No. 99-6615

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, WARDEN,
Respondent.

BRIEF OF RESPONDENT

Filed January 31, 2000

QUESTIONS PRESENTED

1. When it enacted 28 U.S.C. § 2254(e)(2) as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), did Congress intend a state prisoner's "due diligence" in pursuing a claim in state court to be the threshold inquiry for determining whether the statute even applies, or does the plain wording and structure of the statute evince Congress' intent that a federal habeas corpus court "shall not hold an evidentiary hearing . . . unless" the prisoner demonstrates both his "due diligence" in state court ***and*** "clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"?

2. Did the Court of Appeals correctly conclude that the claims never raised by petitioner in state court are barred by his procedural default and that a federal evidentiary hearing on such claims is barred under § 2254(e)(2)?

3. Does this Court's granting of certiorari to determine the proper interpretation of § 2254(e)(2) implicate the Court of Appeals' judgment that the Virginia Supreme Court reasonably concluded that petitioner's "secret plea agreement" claim had "no merit" and that federal collateral relief is barred under § 2254(d)?

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STATEMENT OF THE CASE

A. Facts

Michael Williams was a quadruple murderer before he ever met Jeffrey Cruse. On Christmas Eve in 1992, using a .357 handgun belonging to one of his victims, Williams premeditatedly shot four men in the head inside a house in Prince Edward County, Virginia. He then set fire to the house and fled with the handgun. Two months later, Williams and Cruse, whom petitioner first met in January of 1993 (JA 222), murdered Mr. and Mrs. Morris Keller in adjacent Cumberland County.

On February 27, 1993, Williams and Cruse decided to commit a robbery at the Bear Creek Market, armed with the same .357 revolver Williams had stolen in Prince Edward. When they found the market closed, however, Williams suggested that they rob the Kellers who lived nearby.[1] The two then walked to the Keller residence where, after forcibly gaining entry, they stripped and bound the victims, searched their home for valuables and took possession of Mr. Keller's .38 pistol, raped Mrs. Keller, ordered both victims to shower and dress, and then marched the couple at gunpoint into the woods behind their home. (JA 80-99).

It is undisputed that at this point Williams was armed with the .38 pistol and Cruse with the .357 revolver. Cruse testified that Williams shot Mr. Keller in the head and then, at Williams' urging, Cruse shot Mrs. Keller in the head. Mr. Keller tried to stand and Williams shot him again. Then, after

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[1] Cruse recently had moved to Cumberland from Northern Virginia and did not know the Kellers. (JA 73-75, 78). Williams, on the other hand, was a life-long resident of Cumberland and "grew up . . . [r]ight down the road" from the victims. (JA 222, 226). While Cruse had no prior felony record (JA 139), Williams had two prior felony convictions (JA 237, 300-01) and only recently had been paroled. (Presentence report at 4B).

stating that he wanted to insure that the Kellers were dead, Williams fired multiple shots at both victims.[2] (JA 101-07).

Williams and Cruse gathered the victims' property, set the house afire, and fled in the victims' jeep. They later sold some of the stolen goods in Fredericksburg, where they burned the jeep and threw the .357 revolver into a river. They then returned to Cumberland, but Williams later fled to Florida. (JA 110-21).

Acting on a tip, the police contacted Cruse who denied any involvement and was released. But, after the victims' bodies were found behind their burned home, Cruse consulted counsel and negotiated a written agreement that would have spared him the death penalty in return for his truthful cooperation. (JA 133, 158, 162-63). Cruse told the authorities about the murders, but did not reveal that Mrs. Keller had been raped. When the rape later was discovered, the prosecutor revoked the agreement. (JA 151, 159). Cruse nevertheless cooperated with the police and helped them recover the victims' property and the .357 revolver. (JA 133). When Cruse testified against Williams, all the circumstances surrounding the breach of his agreement were disclosed to the jury. (JA 158-59).

Williams was the only defense witness. He admitted that he suggested the original robbery plan and that it was his idea to set fire to the Kellers' home. (JA 223-24, 234). However, he denied that he raped Mrs. Keller,[3] and claimed that the

[2] Mrs. Keller was shot once in the head with the .357 revolver and twice in the head with the .38 pistol. Mr. Keller was shot three times in the head and twice in the right leg, all with the .38 pistol. (JA 166-80).

[3] Williams said that he told Cruse that raping Mrs. Keller was "not a very good idea [because] DNA [testing] will pick it up." (JA 229).

only shot he fired was the first shot into Mr. Keller's head.[4] (JA 229-30, 232-33).

Seminal fluid found on the vaginal swab obtained from Mrs. Keller's body contained a particular subtype of enzyme that, of the relevant parties, only Williams possessed.[5] A DNA test of the spermatozoa found on the vaginal swab was consistent with the conclusion that both Williams and Cruse had raped Mrs. Keller. (JA 202-06).

B. Trial Proceedings

On January 6, 1994, a jury convicted Williams of burglary, rape, arson, two counts of robbery, two counts of abduction, and multiple counts of capital murder. The jury fixed Williams' punishment at 20 years for the burglary, life

[4] Williams admitted that, when he and Cruse marched the Kellers into the woods behind their home, he was armed with the .38 pistol and Cruse was armed with the .357 Black Hawk revolver. (JA 232, 245). Williams also admitted that he fired the first shot into Mr. Keller's head with the .38 and that Cruse then shot Mrs. Keller in the head with the .357 Black Hawk. (JA 232-33, 245). Given those undisputed facts, Williams was able to place the .38 pistol in Cruse's hand thereafter only by the implausible explanation that, immediately after Cruse shot Mrs. Keller, Williams turned to Cruse and said, "Let me get my gun back." (JA 245). According to Williams, as soon as Cruse "pulled" the .38 pistol from Williams' hand, Cruse began firing the .38 at the Kellers. (JA 233). But, when Williams was arrested on March 4, 1993, his statement to the police was ***not*** that Cruse had fired a first shot with the .357 revolver and then fired all the remaining shots with the .38 pistol. To the contrary, when informed that the .357 handgun had been recovered and that Cruse had told the police "the whole story," Williams stated, "I can prove that [Cruse] had that goddamn Black Hawk." (JA 215-19). In other words, while Williams correctly placed responsibility on Cruse for shooting Mrs. Keller with the .357 revolver, he gave no indication that Cruse ever had fired the .38 pistol.

[5] The forensic analysis detected the presence of "PGM subtype 2-" on Mrs. Keller's vaginal swab. (JA 195). Of Williams, Cruse and Mr. and Mrs. Keller, only petitioner possessed the "PGM subtype 2-" enzyme. (JA 193-96). Thus, Williams' assertion that the forensic evidence was "inconclusive" is simply false. (Pet. Br. 6 n.6).

imprisonment for the rape, 50 years for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. The jury sentenced Williams to death for the capital murders of Mr. and Mrs. Keller, finding in both instances that Williams represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.4. On February 22, 1994, the trial court imposed both death sentences.

C. Direct Appeal

Williams' convictions and sentences were affirmed by the Supreme Court of Virginia on November 4, 1994. With respect to Williams' death sentences, the state court expressly relied on the four Prince Edward murders which Williams had committed prior to the capital murders.[6] *Williams v. Commonwealth*, 450 S.E.2d 365, 377, 379 (Va. 1994). This Court denied certiorari on June 26, 1995. *Williams v. Virginia*, 515 U.S. 1161 (1995).

D. State Habeas Corpus

On August 10, 1995, the trial court appointed an attorney to represent Williams in his state habeas proceedings. On January 29, 1996, Williams filed an amended habeas petition. Of his present claims, only one was raised in any form – his allegation that the prosecution failed to disclose that, at the time of trial, Cruse supposedly still had an agreement with the prosecution that he would not receive a death sentence. (JA

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[6] Williams admitted the Prince Edward murders to both the judge and his trial counsel. (JA 336-39, 434). He subsequently pleaded guilty to capital murder and three counts of first-degree murder and was sentenced to four terms of life imprisonment plus fourteen years. He murdered Jeffrey Villalobos by inflicting a "contact" gunshot wound to the back of the head. (JA 320-21). Williams shot William Cutter and George Atkinson, Sr., once each in the face. (JA 322, 326). He executed George Atkinson, Jr. with two close-range shots to the face. (JA 328-29).

384-88). Prior to filing his amended petition, Williams had filed conclusory motions for the appointment of an investigator and for discovery. (JA 355-60, 371-72). The respondent opposed Williams' motions (JA 364-68, 373-75), and answered the "secret agreement" claim ***with affidavits from both the trial prosecutor and Cruse's trial attorney, unequivocally stating that Cruse had testified truthfully at trial that he had no agreement with the prosecution***. (JA 440-42).

The Virginia Supreme Court dismissed Williams' petition on March 18, 1996, expressly finding that the "secret agreement" claim had "no merit." (JA 444-45). The state court also denied Williams' motions for an investigator and discovery. (JA 444). Certiorari again was denied by this Court. *Williams v. Netherland*, 519 U.S. 877 (1996).

E. Federal Habeas Corpus

Williams filed his federal petition on November 21, 1996, approximately seven months after the effective date of AEDPA. (JA 458-82). He raised not only his claim regarding Cruse's supposedly undisclosed agreement (JA 470-74), but also for the first time two claims related to Juror Bonnie Stinnett's allegedly untruthful responses during voir dire (JA 459-65, 475-77) and a claim that the prosecution failed to disclose a psychiatric report concerning Cruse. (JA 474-75). On December 20, 1996, the Warden moved to dismiss, asserting among other things that AEDPA applied to Williams' case and that an evidentiary hearing was barred under 28 U.S.C. § 2254(e)(2).

Williams filed no discovery request until April 29, 1997, when he asked the district court to issue subpoenas for documents pertaining to Cruse from a wide variety of sources, including Cruse's trial attorneys. (JA 505-13). On July 16, 1997, the district court denied Williams' request, specifically finding that he had failed to establish "good cause" as required by Rule 6(a), Rules Governing Section 2254 Cases. (JA 520). On April 13, 1998, the district court dismissed all of Williams' claims except those involving Juror Stinnett and Cruse's allegedly undisclosed agreement. (JA 529). The court

found that the claim involving Cruse's psychiatric report was defaulted and did not warrant a hearing. (JA 559-61).

On April 20, 1998, the Warden filed a motion for summary judgment, reasserting that an evidentiary hearing was barred under § 2254(e)(2). On May 15, 1998, the district court declined to rule on the Warden's motion and scheduled an evidentiary hearing. (JA 633-34). The Warden then asked the United States Court of Appeals for the Fourth Circuit to require the lower court to determine whether an evidentiary hearing on Williams' particular claims was permissible under § 2254(e)(2). On May 27, 1998, the Fourth Circuit stayed the district court's order awarding an evidentiary hearing and directed the lower court to apply § 2254(e)(2) to Williams' claims. (JA 635-37). On remand, the district court applied § 2254(e)(2), determined that a hearing was prohibited and dismissed the petition in its entirety. *Williams v. Netherland*, 6 F. Supp. 2d 545 (E.D. Va. 1998). (JA 638-46).

On August 2, 1999, the Fourth Circuit affirmed the district court's denial of relief. *Williams v. Taylor*, 189 F.3d 421 (4th Cir. 1999). (JA 651-71). The Court of Appeals applied § 2254(e)(2) to Williams' claims that never had been raised in state court, but also determined that he was not entitled to an evidentiary hearing even under pre-AEDPA law. (JA 656-63). The Fourth Circuit did ***not*** apply § 2254(e)(2) to Williams' claim regarding Cruse's alleged "secret agreement," but determined that he was not entitled to an evidentiary hearing under pre-AEDPA law. (JA 664-66). On October 28, 1999, this Court granted certiorari, limited to petitioner's challenge to the applicability of § 2254(e)(2) to his claims. *Williams v. Taylor*, 120 S.Ct. 395 (1999).

SUMMARY OF ARGUMENT

This is a case, not about another judicial fine-tuning of a federal habeas court's equitable discretion, but about interpreting an act of Congress expressing its judgment as to how the interests of comity, finality and federalism are to be accommodated within a specific aspect of federal collateral review. Of all the aspects of such review that adversely affect

those interests, the most intrusive and damaging ***by far*** is an evidentiary hearing, presided over by a lone federal judge with virtually unbounded authority to redetermine the facts that will govern a state prisoner's attack upon his criminal conviction that already has survived direct appeal and state collateral review.

It would be difficult to imagine an act that exerts more strain on our federal system than a United States judge purporting to redetermine the facts that were before the state court when it rejected a prisoner's claim or passing judgment upon facts that never were presented to the state court. Indeed, the evidentiary hearing Williams is seeking would require not only the testimony of one of the jurors who decided his case, but also the testimony of the prosecutor, ***who is now a sitting Virginia judge*** and who already has stated unequivocally in an affidavit that Williams' allegations are baseless. (JA 440-41, 629-30). The spectacle of a federal judge deciding whether a state judge is telling the truth only would exacerbate the strain.

Section 2254(e)(2) is an integral part of AEDPA's federal habeas reform. It mandates that a federal court "shall not" conduct an evidentiary hearing "unless" the applicant demonstrates two things: that the failure to develop the facts in state court is not attributable to him, *see* § 2254(e)(2)(A)(i) and (ii); ***and*** that there is "clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* § 2254(e)(2)(B). (Resp. App. 4-5). The governing standard thus has evolved from "deliberate bypass," *see Townsend v. Sain*, 372 U.S. 293 (1963), to "cause and prejudice, or actual innocence," *see Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) – both of which were established by this Court as limits upon a district court's ***discretion*** – to a legislatively-imposed standard of "due diligence and actual innocence," couched in terms which clearly limit a district court's ***power*** to conduct a hearing. Because it is Congress, not this Court, that determines the jurisdiction of the lower federal courts, this Court must follow Congress' unequivocal command.

Williams' argument – that his alleged "due diligence" in state court renders § 2254(e)(2) entirely inapplicable – has no merit. The statute's internal structure necessarily contemplates that evidentiary hearings will be prohibited even where it is undisputed that the prisoner used "due diligence" in state court. Thus, the statute's introductory phrase – "If the applicant has failed to develop the factual basis of a claim in State court proceedings . . . " – must be given its logical meaning. In this context, the concept of "failure" simply has nothing to do with "due diligence" or fault. It merely describes the posture of the prisoner's case at the conclusion of the state court proceedings: regardless of whether he attempted to develop the facts, he nevertheless failed to do so.

Section 2254(e)(2) applies to defaulted claims that never were raised in state court. *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). The Fourth Circuit thus properly applied § 2254(e)(2) to Williams' claims involving Juror Stinnett and Cruse's psychiatric report, none of which ever was raised in state court. The Court of Appeals also correctly concluded that there is no "cause" for Williams' defaults. The factual predicate for the juror claims has been a matter of public record since well before the time of trial. And, the factual predicate for the claim involving the psychiatric report certainly was available at the time of Williams' state collateral proceedings. Thus, as the Fourth Circuit found, Williams was not entitled to a hearing on these claims even under the pre-AEDPA, "cause and prejudice" standard.

The Fourth Circuit did not apply § 2254(e)(2) to Williams' claim concerning Cruse's alleged "secret agreement." This Court's ultimate interpretation of the statute, therefore, will not implicate the validity of the Court of Appeals' judgment. Nonetheless, § 2254(e)(2) clearly is applicable to the claim and, in conjunction with §§ 2254(d) and 2254(e)(1), precludes an evidentiary hearing to expand the factual record beyond what was before the state court when it reasonably rejected the claim on the basis of, among other things, Cruse's sworn trial testimony and the unrebutted affidavits of both the prosecutor and Cruse's trial attorney. Neither in state nor

federal court has Williams proffered ***any*** evidence that supports his claim. He merely wants an evidentiary hearing so that a single federal judge can redetermine the credibility or weight of the evidence upon which the state supreme court relied when it rejected his claim, or so that he somehow might discover facts which he hopes will support his claim. Neither post nor pre-AEDPA law entitles a state prisoner to an evidentiary hearing under these circumstances.

ARGUMENT

Under the plain language of § 2254(e)(2), "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the [district] court ***shall not*** hold an evidentiary hearing on the claim ***unless*** the applicant shows" two things. (Emphasis added). First, he must show that his claim relies either upon "a new rule of constitutional law" that this Court already has declared "retroactive to cases on collateral review" or upon "a factual predicate that could not have been previously discovered through the exercise of due diligence." *See* § 2254(e)(2)(A)(i) and (ii).[7] Second, even if the applicant satisfies one of the two foregoing requirements, he also must demonstrate that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* § 2254(e)(2)(B). (Resp. App. 4-5).

Williams expressly admits that, if the statute is applicable to his claims, an evidentiary hearing is barred ***because he cannot satisfy the "clear and convincing evidence" requirement of § 2254(e)(2)(B)***. (Pet. Br. 25). Indeed, both the district court (JA 644-45) and the Fourth Circuit readily concluded that, in view of Williams' testimony admitting that he shot Mr. Keller in the head during the robbery and after Mrs. Keller had been raped, it would be impossible to conclude that the facts underlying Williams' claims "establish by

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[7] The "new rule" aspect of § 2254(e)(2) is not implicated by any of Williams' claims.

clear and convincing evidence that . . . no reasonable fact-finder would have found [him] guilty of [capital murder]."[8] (JA 660-61).

Thus, the threshold issue is whether § 2254(e)(2) is applicable to Williams' claims. If it is, an evidentiary hearing is barred and the case is over. If it is not, this Court then must review the Fourth Circuit's conclusion that Williams is not entitled to an evidentiary hearing even under pre-AEDPA law.

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[8] Williams admitted that he was a full participant in the armed robbery, an accomplice to the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. (JA 225-32, 243-45; Pet. Br. 42 n.27). Contrary to Williams' assertion, the medical examiner did ***not*** testify that the first gunshot wound inflicted upon Mr. Keller "was not likely fatal in and of itself." (Pet. Br. 6). The unrefuted medical evidence proved that all three of the gunshot wounds to Mr. Keller's head contributed to his death. (JA 178-81, 185-86). Indeed, the district court expressly found that, "[a]ccording to the medical evidence . . . , any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal ***and all three definitely contributed to his death***." (JA 645, emphasis added). Thus, Williams' admission that he fired the first bullet into Mr. Keller's head clearly satisfied the requirements of Virginia law regarding proof that the defendant "was an active and immediate participant in the acts or acts that caused the victim's death." *See Strickler v. Greene*, 119 S.Ct. 1936, 1953 n.39 (1999). When this admission is combined with the concession that the killings occurred during the course of the armed robbery and subsequent to the rape, any notion of "clear and convincing evidence" that Williams is not guilty of the capital murder of Mr. Keller becomes a legal impossibility. *See Briley v. Commonwealth*, 273 S.E.2d 57, 63 (Va. 1980) ("It is only necessary to prove that the defendant was the triggerman in the murder and an accomplice in the robbery or rape to convict him of capital murder"). ***Indeed, as Williams acknowledged in state court, when he testified he "essentially had to admit to capital murder by inflicting a potentially lethal wound in the commission of robbery."*** (CA4 JA 1027). Williams' reliance on *Cheng v. Commonwealth*, 393 S.E.2d 599 (Va. 1990), is misplaced. (Pet. Br. 41). In *Cheng*, the victim was shot four times, all with the same weapon, and the issue was whether the defendant was the person who fired those shots. *See Cheng*, 393 S.E.2d at 602, 607-08. Here, the jury was instructed correctly that Williams could be convicted of capital murder pursuant to Virginia's "joint participation" rule. (JA 260, 293).

As will be demonstrated, however, the threshold question must be answered in the affirmative.

I. BY ENACTING § 2254(e)(2), CONGRESS LIMITED A FEDERAL HABEAS COURT'S JURISDICTION TO CONDUCT AN EVIDENTIARY HEARING TO THE RARE CASE WHERE THE PETITIONER'S CLAIM SATISFIES TWO STRINGENT REQUIREMENTS.

Congress enacted § 2254(e)(2) as an integral part of AEDPA's comprehensive federal habeas reform. No one could argue seriously that the intent of AEDPA was to expand the scope or availability of the writ. *See* House Conf. Report No. 104-518 (Apr. 15, 1996) at p. 111: *Joint Explanatory Statement of the Committee of Conference* ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases"); *see also Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., joined by Rehnquist, C.J., O'Connor and Thomas, JJ., dissenting) ("The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal system, produced by various aspects of this Court's habeas corpus jurisprudence"). And, Congress' specific intent in enacting § 2254(e)(2) is evident, not only from the plain language it employed, but also from the statute's place in the evolution of modern federal habeas law. Over the last four decades, that law has progressed from a liberal "deliberate by-pass" standard, to a more moderate "cause and prejudice" standard, and now to a legislatively-imposed "due diligence and innocence" standard. This new standard not only sharply limits the availability of evidentiary hearings, but for the first time expressly conditions a district court's authority to hold such hearings upon a determination that the particular claim at issue satisfies both of two very demanding requirements.

A. Townsend v. Sain

In 1963, this Court ruled: "Where the facts are in dispute, the federal court in habeas corpus ***must*** hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court. . . . In other words a federal evidentiary hearing ***is required*** unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. at 312-13 (emphasis added). The Court then set forth six particular circumstances when a federal habeas court "must grant an evidentiary hearing," the fifth of which was when "the material facts were not adequately developed at the state-court hearing." *Id.* at 313.

Borrowing from *Fay v. Noia*, 372 U.S. 391 (1963), *Townsend* explained that the prisoner could be disentitled to a hearing based upon a failure to develop the material facts only if he "deliberately by-passed" an opportunity to present the facts in state court. *See Townsend*, 372 U.S. at 317. Even then, the Court made clear that a federal court retained the authority to conduct a hearing and that the prisoner's "deliberate by-pass" merely took his case from the realm where a hearing was required to where it was discretionary. *Id.* at 318.

In other words, if the district court ***denied*** a hearing, the prisoner might be able to challenge that ruling successfully on appeal but, if the court ***granted*** a hearing, there was absolutely nothing the State could do. It should not be surprising that a system so weighted in favor of prisoners and against the States could not survive if the interests of comity, finality and federalism were ever given their due. Fortunately, over the next several decades, those interests gradually moved to the forefront.

B. The 1966 Amendments

In 1966, Congress enacted 28 U.S.C. § 2254(d), which created a presumption of correctness regarding state court findings of fact, subject to eight enumerated exceptions, many of which were borrowed directly from *Townsend*. Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1105. This Court has been of two minds as to whether the 1966 amendments "codified"

Townsend or even addressed the issue of whether a hearing is required. *Compare Thompson v. Keohane*, 516 U.S. 99, 109 (1995) (characterizing § 2254(d) as "an almost verbatim codification of the standards delineated in *Townsend* . . . for determining when a district court must hold an evidentiary hearing") *with Tamayo-Reyes*, 504 U.S. at 10 n.5 (while § 2254(d) "list[ed] exceptions to the normal presumption of correctness of state-court findings and deal[t] with the burden of proof where hearings are held," it did "not codify *Townsend*'s specifications of when a hearing is required," or "purport to govern the question of when hearings are required").

The Court clearly has held, however, that the 1966 amendments "elevated" *Townsend*'s "exhortation" that a federal court "ordinarily should . . . accept the facts as found" by the state courts, *see Townsend*, 372 U.S. at 318, "into a mandatory presumption of correctness." *Miller v. Fenton*, 474 U.S. 104, 111 (1985). The Court also has concluded that the amendments "were intended by Congress as limitations on the exercise of . . . jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). And, most significantly, the Court has acknowledged that "[f]ederal habeas has been a source of friction between state and federal courts, . . . [that] Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966. . . . [and that] ***some content must be given to the provisions of the subsection if the will of Congress be not frustrated***." *Id.* at 550 (emphasis added).

C. Keeney v. Tamayo-Reyes

This Court did not revisit the availability of evidentiary hearings for nearly thirty years after *Townsend*. By that time, however, the Court already had restricted substantially the scope of habeas review in terms of whether the prisoner's ***claim*** was properly before the court. For example, claims defaulted in state court pursuant to an adequate and independent state procedural ground were barred from federal review, absent a finding of both "cause and prejudice," *see Wainwright v. Sykes*, 433 U.S. 72 (1977), or a showing of "actual innocence." *See Murray v. Carrier*, 477 U.S. 478 (1986). This

procedural default doctrine applied regardless of whether the claim was defaulted at trial, on direct appeal, or on state collateral review. *See Coleman v. Thompson*, 501 U.S. 722 (1991). Similarly, claims that could have been raised in a prior federal petition were barred, subject to the same "cause and prejudice or actual innocence" standard. *See McCleskey v. Zant*, 499 U.S. 467 (1991). And, claims which sought either to announce or apply a "new rule" of constitutional law were barred, subject to two very narrow exceptions. *See Teague v. Lane*, 489 U.S. 288 (1989).

All of these limits on the availability of the writ were animated by the interests of comity, finality and federalism, and a recognition of the substantial costs exacted by federal collateral review. *See Coleman*, 501 U.S. at 745-51; *McCleskey*, 499 U.S. at 489-93; *Teague*, 489 U.S. at 308-10. In 1992, this Court determined that these same interests required a similar restriction on the availability of hearings to develop facts that were not developed in state court. *Tamayo-Reyes*, 504 U.S. at 5-8. The Court then expressly overruled *Fay* and *Townsend*'s "deliberate by-pass" standard, and established for defaulted facts the very same "cause and prejudice or actual innocence" standard that applies to defaulted claims. *Id.* at 8.

None of this Court's limits on the scope of the writ, however, purported to revoke or lessen a federal court's ***power*** to grant relief or to conduct an evidentiary hearing. Instead, the Court merely defined particular circumstances where "considerations of comity and concerns for the orderly administration of criminal justice . . . require a federal court to forego the exercise of its . . . power." *See Tamayo-Reyes*, 501 U.S. at 6; *see also Carrier*, 477 U.S. at 514 n.21. The Court's solicitude for a district court's raw power was a recognition of the fundamental fact that it is Congress, not this Court, that defines the lower federal courts' jurisdiction. *See* U.S. Const. Art. III; *Keene Corporation v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . . and, once the lines are drawn, 'limits upon federal jurisdiction . . . must be neither disregarded nor evaded' ")

(citation omitted). In 1996, however, Congress dramatically altered the jurisdictional calculus.[9]

D. AEDPA's § 2254(e)(2)

When Congress enacted AEDPA, it not only expressly addressed for the first time the availability of evidentiary hearings for state prisoners, but repealed the former § 2254(d) which had been enacted in response to *Townsend*, replaced it with a more stringent presumption of correctness,[10] ***and expressly forbade district courts from conducting such hearings unless the prisoner satisfies two demanding requirements***. "[I]t is the duty of this [Court] to see to it that the jurisdiction of the [district courts], which is defined and limited by statute, is not exceeded." *Mata*, 449 U.S. at 547 n.2 (citation omitted); *see also Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) (tax statute stating that "[t]he district courts shall not enjoin . . . " is "first and

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[9] Despite *Tamayo-Reyes*'s limits on the discretion to conduct evidentiary hearings, the result nevertheless was unsatisfactory to the States because, if a district court erroneously concluded that the "cause and prejudice" standard had been satisfied and conducted an evidentiary hearing, there remained nothing the States could do. And, once the facts were heard and determined by the district judge, States were faced on appeal with the futile task of attempting to "unring the bell," arguing that the court of appeals should ignore any adverse facts found by the district court because the court should not have conducted a hearing in the first place.

[10] AEDPA replaced § 2254(d) with § 2254(e)(1) which mandates that state court factual determinations "shall be presumed to be correct" and that the prisoner "shall have the burden of rebutting the presumption by clear and convincing evidence." (Resp. App. 4). ***The eight former exceptions to the presumption of correctness were deleted.*** Thus, regardless of whether the 1966 amendments were intended to codify or modify *Townsend*, or the extent to which *Townsend* survived *Tamayo-Reyes*, AEDPA's §§ 2254(e)(1) and (e)(2), in combination, clearly intended to eliminate any vestige of *Townsend* regarding the availability of evidentiary hearings.

foremost a vehicle to limit drastically federal district court jurisdiction . . . ").[11]

Williams contends, however, that § 2254(e)(2) does not even apply unless "the applicant has failed to develop the factual basis of a claim in State court proceedings." According to petitioner, an applicant cannot be deemed to have "failed to develop" his claim if he demonstrates his "due diligence" in pursuing the claim in state court. (Pet. Br. 21-23). This argument, however, ignores the plain wording and intent of the statute.[12] *See generally Holloway v. United States*, 119 S.Ct. 966, 969 (1999) ("the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent' ").

[11] As will be demonstrated (see Argument II), § 2254(e)(2) clearly applies to a claim that is not even properly before the federal court because it never was raised in state court. But, as to claims which were rejected on the merits in state court, AEDPA erected parallel general prohibitions against the granting of relief and the conducting of a hearing to expand the factual basis for the claim beyond what the prisoner presented to the state court. (See Argument III). In both instances, Congress declared that a federal court "shall not" take a specified action "unless" certain stringent requirements are satisfied. *See* § 2254(d) ("An application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . "); § 2254(e)(2) ("the court shall not hold an evidentiary hearing on the claim unless . . . "). (Resp. App. 3-4). AEDPA also erected a similar general prohibition against granting relief upon claims raised in a second federal petition. *See* § 2244(b)(2) ("A claim . . . that was not presented in a prior application shall be dismissed unless . . . "). And, in this context, as in the context of evidentiary hearings, "due diligence" must be linked to "clear and convincing evidence" of innocence before the general prohibition can be surmounted. *See* § 2244(b)(2)(B)(i)-(ii). (Resp. App. 1). This internally consistent structure clearly evidences Congress' intent to make both the granting of relief and the holding of a hearing the rare exception rather than the norm.

[12] The President also expressed the mistaken view that the statute "is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement Accompanying Signing of Pub. L. 104-132, 32 Weekly Comp. Pres. Doc. 719 (Apr. 24, 1996). Such a "signing statement" should not be afforded any deference in determining Congress' intent. *See generally* Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 Ind. L. J. 699, 700 (1991) ("judicial reliance on presidential signing statements has almost nothing to recommend it. . . . the President is not a legislator and . . . signing statements . . . are often politically manipulative attempts to undermine statutory structure or achieve results too controversial to be adopted in the text").

Congress clearly did not intend for the prisoner's alleged "due diligence" in state court to be the trump card Williams envisions. As written, the statute obviously contemplates that there will be claims as to which the prisoner will satisfy § 2254(e)(2)(A)(ii)'s "due diligence" requirement, ***but which nevertheless cannot be the subject of a hearing because, as here, the prisoner cannot satisfy the "innocence" requirement of § 2254(e)(2)(B)***.[13] *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (noting "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited ***in the absence of a strong showing of actual innocence***") (emphasis added). Williams, however, would have this Court reach the nonsensical conclusion that, even though the statute expressly requires a showing of both "due diligence" ***and*** "clear and convincing evidence" of innocence, Congress nevertheless intended that a showing of "due diligence" by itself is sufficient to render the statute's general ban on hearings entirely inapplicable.[14]

[13] In this Court's post-*Sykes* jurisprudence, "due diligence" as "cause" never has been sufficient to excuse a prisoner's default; a petitioner had to demonstrate both "cause" ***and*** "prejudice" or "actual innocence." By enacting § 2254(e)(2), Congress exercised its prerogative and narrowed the scope of the writ even further by requiring a showing of both "cause" in the form of "due diligence" ***and*** "clear and convincing evidence" of innocence. Congress certainly did not intend, as Williams suggests, to retreat by authorizing hearings merely upon a showing of "cause."

[14] The ACLU's amicus brief acknowledges that Williams' use of the term "diligence" to describe the threshold inquiry under the statute is "confusing." (ACLU Br. 11). The ACLU, however, then adopts the very same confusing interpretation by contending that subsection (A)(ii)'s "due

The conjunctive nature of § 2254(e)(2)'s requirements compels the conclusion that the statute's introductory phrase, "If the applicant has failed to develop . . . ," must mean something different from the "due diligence" requirement embodied in § 2254(e)(2)(A)(ii). *See Hohn*, 524 U.S. at 249 ("We are reluctant to adopt a construction making another statutory provision superfluous"). Williams contends, in effect, that a habeas petitioner cannot "fail to develop" his claim in state court if he made any attempt – no matter how perfunctory – to do so. According to Williams, the mere fact that he asked for an evidentiary hearing and filed requests for discovery and investigative assistance – ***actions now taken as a matter of course by virtually every capital habeas petitioner*** – precludes a finding that he failed to develop the factual basis for his claim in state court. (Pet. Br. 29-33). This argument, if accepted, would render the statute a practical nullity.[15]

Section 2254(e)(2)'s prefatory "failed to develop" language has nothing to do with the prisoner's "due diligence,"

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diligence" requirement "come[s] into play only if a federal court first determines that it was the prisoner's fault . . . that the facts were not developed earlier." (ACLU Br. 11 n.14). The ACLU does not even attempt to explain how Congress logically could have intended to establish "due diligence" as one of two requirements that a state prisoner must satisfy if, as amicus contends, a federal court necessarily will have determined that the prisoner is at fault, *i.e.*, that he was not "diligent," before those requirements even come into play.

[15] As the Fourth Circuit noted, Congress certainly did not intend for state prisoners to be able "to avoid the strictures of section 2254(e)(2) simply by churning out unsupported, boilerplate requests for state court discovery, hearings, and investigative and expert assistance." (JA 659). ***This Court should have no doubt that accepting Williams' interpretation of the statute would insure that such boilerplate motions would be filed in every capital case, thus rendering the statute a dead letter in that context.*** Indeed, the amicus brief filed by the ACLU admits as much. (ACLU Br. 11 n.14). If, in order to avoid the statute entirely, all a prisoner must do is ask the state court for a hearing, discovery or investigative assistance, the statute is truly worthless.

or lack thereof, in pursuing the claim in state court. In common parlance, one certainly may attempt to accomplish a task but nevertheless "fail" to do so. *See* Webster's Third New International Dictionary 814 (1993) (def. 2b: defining the verb "fail" as "to miss success in some effort: become forced to leave incomplete an attempt or enterprise"); *id.* at 815 (def. 2: defining "failure" as "want of success"). Given the internal structure of § 2254(e)(2), Congress' use of the phrase, "failed to develop," must be given its logical, neutral meaning: the prisoner either developed the predicate facts for his claim in state court or he "failed" to do so and the statute applies; and, if the statute applies, there can be no hearing unless the prisoner satisfies both of the statute's twin requirements, ***one of which specifically takes into account whether the petitioner is at fault for the failure to develop the facts in state court.***[16]

Williams relies upon a number of court of appeals decisions which have rejected the Warden's interpretation of § 2254(e)(2) because such an interpretation allegedly allows state courts to "manipulate" the system and "insulate" their criminal judgments from federal hearings merely by refusing to grant state prisoners' requests for hearings, discovery and investigative assistance. (Pet. Br. 26-27 n.19).[17] Such a

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[16] Both Williams and the ACLU characterize the Warden's position as one that places "strict liability" upon habeas petitioners. (Pet. Br. 35; ACLU Br. 14-15). It would be a strange species of "strict" liability, however, that expressly allows for an exception if the petitioner makes the required showing of "due diligence" and "innocence." Williams' real complaint is that his claims do not fit within the narrow exception created by Congress. Indeed, the unspoken formula of Williams' brief is to work backwards from the acknowledged fact that he cannot show clear and convincing evidence of his innocence to a conclusion that Congress could not have intended to establish such a showing of innocence as a prerequisite for a hearing.

[17] *See, e.g., Burris v. Parke*, 116 F.3d 256, 269 (7th Cir.), *cert. denied*, 522 U.S. 990 (1997). Neither *Burris* nor any other case petitioner relies upon comes to grips with the inherent illogic of making the prisoner's "due diligence" a threshold inquiry which may render the statute wholly

hostile view of the States, however, is fundamentally at odds with this Court's expressed view. *See Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993) ("state courts are fully qualified to identify constitutional error . . . , and . . . often occupy a superior vantage point"); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) ("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). More importantly, there is no evidence that when it enacted AEDPA Congress viewed the state judiciaries with such a jaundiced eye. *See* 141 Cong. Rec. S 7846 (Sen. Hatch expressing view that state courts are just as capable as federal courts). Like all federal courts, state courts undoubtedly are imperfect on occasion, but there is no basis for a conclusion that, if this Court were to interpret § 2254(e)(2) in the manner Congress intended and the Warden advocates, the state courts would seize upon that interpretation as an opportunity to act in bad faith. Our system of federalism simply cannot survive such unfounded suppositions. *See Withrow v. Williams*, 504 U.S. 680, 723 (1993) (Scalia, J., concurring and dissenting) ("It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not)").[18]

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inapplicable when Congress clearly has stated that such "due diligence" has force only when linked with a compelling showing of innocence.

[18] The Virginia College of Criminal Defense Attorneys (VCCDA) complains that, since 1995 when the Virginia Supreme Court was given exclusive jurisdiction over habeas petitions filed by death row prisoners, it has not granted any requests for an evidentiary hearing or any motion for discovery or investigative assistance. The complaint is meaningless. Compared to many States, Virginia has relatively few capital cases, presently only 25, and the VCCDA's argument is based on a sample of only 31 cases. (VCCDA Br. 5). The amicus, moreover, cannot point to even a single post-1995 case where the state court denied a request for an evidentiary hearing but a federal court subsequently conducted a hearing on the same claim, let alone demonstrate that the state court's denial of a hearing was objectively unreasonable given the nature of the request upon which it acted. The same is true of the amicus' assertion regarding state court denials of requests for discovery and investigative assistance. Unless specific examples of motions that the state court supposedly should have granted are brought to this Court's attention, the complaint is about as cogent as a gripe that this Court never has granted an original jurisdiction habeas petition filed by a death row prisoner. Absent a persuasive demonstration to the contrary, this Court must conclude only that the Virginia Supreme Court has denied requested relief because it determined in good faith that the requests had no merit.

II. SECTION 2254(e)(2) CLEARLY BARS AN EVIDENTIARY HEARING ON THE DEFAULTED CLAIMS THAT WILLIAMS NEVER RAISED IN STATE COURT.

It is beyond question that, if a prisoner failed to raise a claim in state court, he necessarily "failed to develop the factual basis of [the] claim in state court proceedings" within the meaning of § 2254(e)(2). If the claim itself is not properly before the federal court, the facts underlying such a claim cannot be the subject of a hearing. *See Tamayo-Reyes*, 504 U.S. at 8 n.3 (noting the dissent's agreement that "the cause-and-prejudice standard is . . . an acceptable precondition to reaching the merits of a habeas petitioner's [defaulted] claim"); *id.* at 14 (O'Connor, J., dissenting) ("To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court").

That is not to say, however, that § 2254(e)(2) has no application to defaulted claims never raised in state court. Indeed, this Court already has made clear that, while the statute's role in this context is secondary, it is nevertheless both significant and preclusive.

Two years after AEDPA became effective, this Court held in *Breard v. Greene*:

> It is the rule in this country that assertions of error in criminal proceedings must first be raised in state

> court in order to form the basis for relief in [federal] habeas. . . . Claims not so raised are considered defaulted.

523 U.S. at 375 (citations omitted). The Court then went on to explain that AEDPA's § 2254(e)(2) applied to Breard's claim that never had been raised in state court, and effectively precluded him from being able to demonstrate the required "prejudice":

> [I]n 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner . . . will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. §§ 2254(a), (e)(2) (Supp. 1998). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be. ***This rule prevents Breard from establishing that the violation*** of his Vienna Convention rights ***prejudiced him. Without a hearing, Breard cannot establish*** how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him.

Id. at 376 (emphasis added).

Williams' claims involving Juror Stinnett and Cruse's psychiatric report are defaulted because they never were raised in state court and could not be raised there now. *See* Va. Code §§ 8.01-654(B)(2); 8.01-654.1. The issue of a hearing is a moot point unless or until he demonstrates the "cause and prejudice" required to place the merits of his claims properly before the federal courts. And, even if Williams could meet those requirements, the district court would be prohibited from conducting a hearing unless he satisfies both

the "due diligence" and "innocence" requirements of § 2254(e)(2)(A)(ii) and (B).

It is undisputed that Williams cannot satisfy the "innocence" requirement of § 2254(e)(2)(B). (Pet. Br. 25). This failure, by itself, is sufficient to preclude a hearing. For the reasons that follow, however, it is equally clear that Williams also cannot demonstrate "cause" for his defaults, the "due diligence" required by § 2254(e)(2)(A)(ii), or the "prejudice" required for the granting of relief:

A. Juror Stinnett

One of Williams' defaulted claims is that Juror Stinnett was untruthful during voir dire. (JA 459-65). Another is that the prosecutor knew the juror was untruthful and failed to disclose that fact. (JA 475-77). Neither of these defaulted claims is capable of supporting collateral relief.

1. Facts

The judge asked a group of jurors including Stinnett whether anyone was "related" to any of the prospective witnesses, including Deputy Sheriff Claude Meinhard. Stinnett did not respond affirmatively. (JA 39-40). The judge also asked whether anyone had "ever been represented" by any of the attorneys in the case. Again, Stinnett did not respond affirmatively. (JA 33).

The divorce between Stinnett and Meinhard has been a matter of public record since their divorce decree was entered in 1979. (JA 483-85). They had married in 1962 and had four children, the youngest being born in 1972. At the time of petitioner's trial, then, the youngest child was 21. (JA 484, 627). Stinnett and Meinhard separated in 1977, and their divorce was uncontested. (JA 484, 628). The divorce decree shows that Stinnett was the complainant and Meinhard the

defendant. "Robert G. Woodson, Jr." is referenced as the complainant's counsel.[19] (JA 485).

When Williams raised his claims in federal court, the juror provided an affidavit in which she averred that, since their divorce in 1979, she and Meinhard have had very infrequent contact, having occasion to speak to each other only one or two times per year. (JA 627). She ***never*** has spoken to Meinhard about Williams' case and the fact that Meinhard was a witness at trial "made no difference to [her] one way or the other, and certainly didn't cause [her] to favor the Commonwealth or the defendant." (JA 627). Because the divorce was uncontested, she did not consider Woodson to have "represented" her. (JA 628). Because she and Meinhard had been divorced in 1979, she did not consider Meinhard to be "related" to her at the time of trial. (JA 627).

At the time of trial, Woodson was the Commonwealth's Attorney in Cumberland County. He now is a Virginia trial judge. (JA 629). Like the juror, Judge Woodson also provided the district court with an affidavit in response to Williams' claims. (JA 629-30). While he was aware that Stinnett had been married to Meinhard years ago, because of their divorce Woodson did not consider them to be "related" at the time of trial. He has no recollection of the specifics of Stinnett's voir dire but, if he had heard her being asked if she was "related" to any witness, he would not have expected her to say that she was "related" to Meinhard. (JA 629). Even today, Judge Woodson has no recollection of having been involved in Stinnett's divorce proceedings. (JA 629-30). "Whatever [his] involvement was in the 1979 divorce, by the time of trial in 1994, [he] had completely forgotten about it." (JA 630).

Meinhard was a prosecution witness (JA 66-72) but, in terms of establishing petitioner's guilt, his trial testimony was so insignificant that the defense elected not even to cross-

[19] The decree was signed by Williams' trial judge, John R. Snoddy, Jr. (JA 459; CA4 JA 844). Williams never has alleged that the judge should have remembered signing the divorce decree.

examine him. (JA 72). Although Meinhard was one of two officers who initially interviewed him, Cruse told the police nothing of value when Meinhard was present and Meinhard was not present when Cruse later admitted his role in the murders. (JA 69, 72).

2. No "Cause" or "Due Diligence"[20]

As the Fourth Circuit correctly found, "[t]he documents supporting Williams' . . . claims [about the juror] have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." (JA 659). Although Williams suggests that his state habeas counsel reasonably relied on the truthfulness of Stinnett's answers on voir dire (Pet. Br. 29, 35), he cannot contend seriously that state habeas counsel subjectively had no reason to investigate the jurors. The record shows that Williams' state habeas petition raised a claim regarding Juror Blanton. (JA 388-91). He also filed a request for a court-appointed investigator to interview the jurors alleging, in conclusory fashion, that there were "irregularities, improprieties and omissions . . . with regard to the impaneling of the jury." (JA 358). Thus, it is quite obvious that state habeas counsel did ***not*** rely upon the truthfulness of the jurors' responses on voir dire.

Williams also contends that this Court should find "cause" for his failure to raise his claims regarding Stinnett in state court based upon the fact that the Virginia Supreme Court denied his request for an investigator. According to petitioner, he discovered the factual predicate for his claim only because his federal habeas counsel was willing and able

[20] While a petitioner's "due diligence" or lack thereof does not determine whether he "failed to develop" the factual basis for his claims in state court, even if this Court were to conclude that it does, Williams' lack of "due diligence" is clear.

to pay an investigator. (Pet. Br. 32, 35). This contention, however, will not withstand scrutiny.

A review of the affidavit of Williams' investigator shows that the factual predicate for the claims was easily discovered: she merely interviewed a total of five jurors, two of whom told her that Stinnett was the ex-wife of Meinhard. (JA 493-94). That information then was readily confirmed by resort to local court records. (JA 483-85).

Williams' state habeas attorney was appointed in August of 1995. (JA 625). The amended state petition was not filed until late January of 1996. (JA 376-92). Given that Williams apparently believed there was reason to investigate the jurors (JA 358), there is no reason that his state habeas counsel could not have interviewed ***all*** the jurors (let alone merely the ones later interviewed by the investigator) during the five months between his appointment and the filing of Williams' amended petition. Conducting such interviews is hardly the type of task that can be conducted only by an "investigator."[21] Because the state court appointed Williams an attorney who clearly could have discovered the basis for the claims with the exercise of due diligence, a finding of "cause" or "due diligence" cannot be premised upon the state court's denial of Williams' conclusory request for an investigator. The errors or omissions of state habeas counsel clearly cannot constitute "cause."[22] *See Coleman*, 501 U.S. at 754; *see also* § 2254(i). (Resp. App. 5).

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[21] Williams' investigator had no more "personal ties" to the Cumberland area than did petitioner's state habeas attorney. (Pet. Br. 32). Williams describes his discovery of the information about Juror Stinnett as "serendipitous" and "fortuitous." (Pet. Br. 13 n.11). The fact remains, however, that state habeas counsel apparently believed there was reason to interview the jurors. (JA 358). If he had done so, there is no reason to believe that he would not have discovered the same information learned by the investigator.

[22] The district court's conclusion that there was "cause" for Williams' default (JA 558) is inexplicable given the court's conclusion that he had not established "cause" for the default of his claim regarding Cruse's

Williams, moreover, misapprehends the concept of "cause." While "cause" may be premised upon a showing of an "external impediment" which either "prevented" the prisoner from raising the claim or made the raising of the claim "impracticable," *see Carrier*, 477 U.S. at 488, 492, it cannot be based merely upon a state judicial ruling denying the prisoner's request for assistance. Otherwise, what heretofore has been a prohibition against a State preventing or making impracticable the prisoner's raising of a claim would be transformed into a requirement that the State not oppose his requests for assistance and affirmatively help the prisoner upon request. This Court certainly never has authorized such a mutation of the "cause" requirement.[23]

Finally, as the Fourth Circuit concluded, Williams' request for an investigator was patently "deficient" and "in no way alerted the state habeas court to any specific claim." (JA 659). He offered no support for his vague allegation of "irregularities, improprieties and omissions" with respect to the jury and no explanation as to why habeas counsel could not interview jurors without the assistance of an investigator. (JA 358, 367-68). In short, he asserted nothing in state court that could not be asserted by ***any*** prisoner in ***any*** case. The Court of Appeals, therefore, clearly did not err in concluding that "[t]he failure to develop the . . . claims [relating to Stinnett] was thus attributable to petitioner, not to the Supreme Court

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psychiatric report. (JA 560-61). (See below at 32). In both instances, the factual predicate for the claim was equally available upon the exercise of due diligence. In any event, the district court's conclusion that the claims involving Juror Stinnett were "not reasonably available to defense counsel" (JA 558) is, for the reasons stated in the text, clearly erroneous.

[23] "Impracticable," as used by this Court in the context of "cause," does not mean the same as "impractical." *See* Webster's at 1136. Moreover, it would be completely illogical, as well as inimical to the interests of comity and federalism, to base a finding of "cause" upon the state court's denial of a request for an investigator in Williams' case ***because the district court denied a similar request***. (JA 448-53).

of Virginia's rejection of a fishing expedition request." (JA 659-60).

3. No "Prejudice"

Even if Williams somehow could demonstrate "cause" for his default, he could not demonstrate the required "prejudice." As the Fourth Circuit found:

> Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror towards the Commonwealth's case.

(JA 662-63).

Under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), Williams cannot possibly prevail unless he shows that Stinnett "failed to answer honestly a material question on voir dire" ***and*** "that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 555-56.[24] Given the length of time that Stinnett had been

[24] *McDonough* was a direct appeal federal civil case. The burden a § 2254 petitioner must carry is at least as demanding as the test established in *McDonough*. Contrary to Williams' assertion (Pet. Br. 47 n.33), the facts of this case do not present the "extreme situation" where bias may be "implied" because a juror was "a close relative of one of the participants in the trial." *See Smith v. Phillips*, 445 U.S. 209, 222 (1982) (O'Connor, J., concurring).

divorced from Meinhard, it would be impermissible for a federal habeas court to decide years after the fact that the juror's answers were in any sense "dishonest." *See McDonough*, 464 U.S. at 555 (emphasizing that average juror "may be uncertain as to meaning of terms which are relatively easily understood by lawyers and judges"). Here, as in *McDonough*, "[t]o invalidate the result of a [lengthy] trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* Moreover, even if the juror's answers somehow could be deemed "dishonest," disclosure of the fact that she once had been married to Meinhard, or that the prosecutor assisted her in the 1979 uncontested divorce proceedings, would not have been a valid basis for a challenge for cause under Virginia law. *See Lilly v. Commonwealth*, 499 S.E.2d 522, 531 (Va. 1998) (juror related to officer/witness not excludable for cause), *vacated on other grounds*, 119 S.Ct. 1887 (1999); *Roach v. Commonwealth*, 468 S.E.2d 98, 109 (Va.) (juror who is former client of prosecutor not excludable for cause), *cert. denied*, 519 U.S. 951 (1996). The fact that Williams may have found such information useful in exercising his peremptory strikes (Pet. Br. 47) is constitutionally irrelevant. *See McDonough*, 464 U.S. at 555 (drawing distinction between exclusions for cause and peremptory challenges); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("peremptory challenges are not of constitutional dimension").

B. Cruse's Psychiatric Report

Another claim that Williams raised for the first time in his federal petition was an allegation that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the report of Cruse's psychiatric evaluation. (JA

474-75). The district court did ***not*** grant Williams an evidentiary hearing on this claim, concluding that it was defaulted by virtue of his failure to raise it in his state petition. (JA 559-61). On appeal, the Fourth Circuit affirmed the district court's ruling that the claim was defaulted under a pre-AEDPA, "cause and prejudice" analysis. (JA 661-62). The Court of Appeals also concluded that an evidentiary hearing on the claim was barred under § 2254(e)(2). (JA 660).

1. Facts

In September of 1993, ***not*** in connection with his prosecution, Jeffrey Cruse was evaluated by a prison psychiatrist in response to Cruse's complaint, "I can't stop having nightmares and crying." (JA 495-99). The relevant portions of the report are as follows:

> This is a 25 year old white male, currently an inmate at the Powhatan Correctional Center, following an event in which he participated in capital murder of a couple nearby. ***The patient has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time.*** He reports having done LSD two months prior in large amounts, "up to 12 hits at a time," and had been doing so for the past 10 months prior to that. ***Patient reports he was with another individual who had a record of having murdered people. The patient felt unable to say "no" to his partner's request to rob the couple and subsequently kill them. The patient has recurrent nightmares and visualizes the face of the woman that he killed. When attempting to describe this nightmare, he breaks openly into tears and his face reddens.***
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> * * *
>
> The patient. . . . continues to feel worthless as a person, placated [sic] by the guards for what he's done, bringing him into helplessness, tears and anger. He has no hope for his future and has been thinking of suicide constantly.
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> * * *
>
> Examination revealed a white male who appeared to have flat affect, low monotone speech, and was wearing prison clothing and shackles. He did not display impulsivity. He cried often and reddened his eye features during the interview, especially during topics in which he discussed the nightmares, as well as current treatment while in jail. This apparently is brought on by embarrassment. ***He stated he felt he might be killed if he did not follow through his partner in crime's instructions to kill the couple.*** . . . He described neurovegetative symptoms of major depression and post-traumatic nightmares, recurrent in nature, of the event.
>
> * * *
>
> Cognitively, he was able to recall recent and remote events well, except for black-outs when he is drinking excessively or doing LSD, in the past two years.

(JA 495-96, 498, emphasis added).

When Williams raised the "*Brady*" claim in his federal petition, he included the report as an exhibit (JA 474-75, 483), but he offered no explanation as to how he had obtained it. ***Seventeen months later, after the district court ruled that the claim was barred by Williams' failure to raise the claim in state court*** (JA 559-61), Williams filed a motion to reconsider, asserting for the first time that the report had been found by his federal habeas counsel's investigator ***in Cruse's court file in Cumberland Circuit Court.*** (JA 621). Williams also asserted that his state habeas counsel had reviewed this same file while preparing the state petition but that "the psychiatric report . . . was not there." (JA 621). The affidavit from state habeas counsel which Williams submitted, however, was not so unequivocal: "I have no recollection of seeing this report in Mr. Cruse's court file when I examined

the file."[25] (JA 625). One of the exhibits that Williams submitted with his state petition, moreover, was a transcript of Cruse's sentencing proceeding on April 26, 1994, wherein Cruse's counsel made several references to reports concerning his client's mental health (JA 416-17, 423-24), including the following:

> ***The psychiatric report*** goes on to point out that he is significantly depressed. He suffered from post traumatic stress. His symptoms include nightmares, sleeplessness, sobbing, reddening of the face, severe depression, flash backs, nightmares, in particular. . . . Seeing the pictures, he says he sees the pictures coming at him time and time again.

(JA 424, emphasis added).

2. No "Cause" or "Due Diligence"

The district court correctly concluded that Williams had failed to demonstrate "cause" for failing to raise his claim in state court:

> Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings.

(JA 560-61). The Fourth Circuit also correctly rejected Williams' assertion of "due diligence":

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[25] State habeas counsel did ***not***, as Williams asserts on brief, "recollect[ ] that the psychiatric report was not in Cruse's court file when counsel reviewed it." (Pet. Br. 48).

> In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did not act diligently.

(JA 660).

Williams contends that his admitted failure to raise the claim in his state petition should be excused because his motions for discovery and for the appointment of an investigator were denied by the Virginia Supreme Court. This is nonsense. Leaving aside the perfunctory nature of both motions, as well as the fact that the district court also denied similar motions, neither discovery nor an investigator was necessary to find the report: ***his state habeas attorney, who was appointed by the trial court at state expense, merely went to the courthouse and examined Cruse's file which was accessible to any member of the public***. The mere fact that state habeas counsel either did not see or recognize the supposed significance of the report does not alter the fact that the court file and report plainly were available without the assistance of court-ordered discovery or the appointment of an investigator.

Williams' state habeas counsel also was on notice of the existence of the report by virtue of the transcript of Cruse's sentencing proceeding which Williams submitted as an exhibit with his state petition. (JA 415-28). In that transcript, Cruse's attorney made reference to several reports regarding Cruse's mental health, including a "psychiatric report" which closely mirrored the report upon which Williams now relies. (JA 416-17, 423-24). Given Williams' undeniable awareness of the existence of such reports, he cannot possibly demonstrate either "cause" for his default or that the factual predicate for his claim "could not have been previously discovered

through the exercise of due diligence." *See* § 2254(e)(2)(A)(ii). And, given the fact that Williams' state habeas counsel was investigating possible *Brady* claims regarding Cruse, and knew from Cruse's sentencing transcript about the existence of a psychiatric evaluation of Cruse, diligent counsel obviously would have pursued the matter further even if, as Williams alleges, counsel did not find such a report in Cruse's court file.

Williams again attempts to distort the concept of "cause" by relying upon the fact that the Warden's counsel did not agree to his informal discovery request[26] and that the Virginia Supreme Court denied his subsequent motions for discovery and for the appointment of an investigator. (Pet. Br. 30). This Court never has suggested that, unless the State affirmatively assists a prisoner upon request, there is "cause" for the

[26] The Warden's counsel informed Williams' counsel that any discovery requests should be directed to the Virginia Supreme Court in a motion pursuant to the applicable state court rule. (JA 352-54). Williams suggests that the denial of his request for informal discovery violated a continuing duty under *Brady* to disclose exculpatory evidence. (Pet. Br. 30-31). *Brady's* due process guarantee, however, applies only "[a]t trial" and, "after a conviction the prosecutor is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt on the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). Under no stretch of the imagination did *Brady* require the Warden to agree to informal discovery in Williams' civil, habeas proceeding. The *ad hominem* amicus brief filed by a group of law professors is misguided for at least two reasons. First, its thrust is that a federal habeas court should enforce alleged violations of a prosecutor's ***ethical*** duties, as opposed to duties imposed by the Constitution. This Court does not have the authority to create such a rule even if it were inclined to do so and, even if it had the authority, it could not do so here without violating the "new rule" doctrine. Second, the alleged ethical violation attributed to the Warden's counsel is based upon a false premise, *i.e.*, that counsel knew of the existence of Cruse's psychiatric report during the state habeas proceedings, yet failed to disclose it. ***The Warden's counsel was unaware of the report until Williams filed it as an exhibit attached to his federal habeas petition.***

prisoner's failure to raise a claim during state court proceedings.

Finally, even if such flyspecking of state collateral proceedings by a federal habeas court were warranted, the motions that Williams filed in the Virginia Supreme Court were entirely perfunctory and unsupported by any specific allegation of fact that conceivably could justify a conclusion that the state court's denial of such motions supports a finding of "cause." Williams' discovery motion broadly requested "all documentation relating [to] the incarceration of Mr. Cruse from his date of his first incarceration in connection with [the] capital murder charges." (JA 371). The motion contained no support for such a request other than a purely conclusory assertion that Williams' counsel "must talk to Mr. Cruse and obtain records relating to his incarceration."[27] (JA

[27] The ACLU simply is wrong when it asserts that Williams filed a discovery motion with the Virginia Supreme Court asking "for any *Brady* materials in the state's possession" and specifically "for psychological reports that might have been used at trial to undermine the credibility of Cruse." (ACLU Br. 1). The only discovery motion Williams filed in the Virginia Supreme Court was the limited one described in the text. (JA 371-72). Petitioner's ***informal***, letter request for discovery was a lengthy, omnibus-style *Brady* request, including a general request for "psychiatric reports." (JA 344-51). When the Warden's counsel declined informal discovery (JA 352-54), Williams chose not to file such an omnibus request with the Virginia Supreme Court. Contrary to Williams' assertion (Pet. Br. 31), this Court's decision in *Strickler* has no application here. ***In view of the fact that Williams' state habeas counsel clearly thought there was reason to investigate and, indeed, raised Brady claims involving Cruse*** (JA 379-88), counsel obviously did not rely on anything the prosecution did at the time of trial. *See Strickler*, 119 S.Ct. at 1952 ("cause" based, in part, upon state habeas counsel's reliance upon prosecutor's "open file" policy at trial). And, the Warden's response to Williams' request for informal discovery was the precise ***opposite*** of the representation during the state habeas proceedings in *Strickler* which this Court construed as an assurance that all *Brady* material already had been disclosed at the time of trial. *Id.* at 1951. Indeed, the letter to Williams' state habeas counsel made absolutely no such assurances, and stated that the Warden's counsel would

372). Williams' request for an investigator was equally lacking. The opening paragraph stated that Williams was requesting "an investigator to examine issues relating to the testimony and status of . . . Jeffrey Cruse" (JA 355), but the body of the motion made no attempt to justify the appointment of such an investigator. The only discussion of Cruse in the motion was in the context of a request for the appointment of an "expert attorney" to pursue ineffective counsel claims related to trial counsel's handling of Cruse's trial testimony. (JA 357-58). Moreover, even if the discussion of Cruse in the motion could be construed as relating to a request for an "investigator," the fact is that, by the time the Virginia Supreme Court denied Williams' motion (JA 444-45), the prosecutor and Cruse's trial attorney both had submitted affidavits unequivocally refuting Williams' unsupported allegation that Cruse had an undisclosed agreement with the prosecution. (JA 440-42). No court could be faulted for denying Williams' motions under these circumstances. Indeed, ***the federal district court also denied Williams' request for an investigator (JA 448-53, 621) and repeatedly found that he had not demonstrated the "good cause" required for discovery.*** (JA 520, 633). A state court simply cannot be faulted or penalized for denying a motion that subsequently is denied by a federal court.

3. No "Prejudice"

The Fourth Circuit concluded that, even if Williams could show "cause" for his default, he still would be unable to show the required "prejudice" because, in view of his own

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not review the State's files to determine if all *Brady* material had been disclosed at the time of trial and that any discovery must be in the context of a formal motion. (JA 352-54). The Warden's counsel certainly did not, as Williams suggests, "represent[ ]that any such items would have been disclosed pretrial." (Pet. Br. 38). ***The fact that Williams raised Brady claims regarding Cruse in his state petition establishes beyond dispute that he did not rely on any such purported representation.***

highly inculpatory testimony, there is no likelihood "the outcome of the case . . . would have been different" if trial counsel had been aware of Cruse's psychiatric report.[28] (JA 662). A review of the report in its entirety confirms the Fourth Circuit's conclusion.

Trial counsel, of course, could have attempted to impeach Cruse on the basis of his reported statement that he had "little recollection of the [capital murder], other than vague memories, as he was intoxicated with alcohol and marijuana at the time."[29] (JA 495). But, whatever good this may have done

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[28] Even though Williams obtained affidavits from his trial counsel regarding other matters (JA 395-400), he never has proffered any evidence that his trial attorneys were unaware of the report or that they did not determine, for the reasons set forth in the text, that bringing the report to the jury's attention would have done more harm than good. Nor has Williams ever proffered any reason to believe that any agency of the Commonwealth other than the Department of Corrections was aware of the report at the time of Williams' trial. *See United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("imposition of an unlimited duty . . . to inquire of other offices not working with the prosecutor's office on the case . . . would [create] a state of paralysis"); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir.) (prosecutor has no duty "to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"), *cert. denied*, 519 U.S. 868 (1996). ***Indeed, given the reference to the report in the transcript of Cruse's sentencing proceeding (JA 424), there is no reason to believe that the prosecution or any investigative arm of the Commonwealth was aware of the report until it was gathered in connection with Cruse's presentence investigation that was ordered at the conclusion of his guilty plea proceeding.*** (JA 416-17; CA4 JA 445-46). Williams' attorneys had access to the contents of Cruse's presentence investigation. *See* Va. Code § 19.2-299(A) ("Any report so filed . . . shall be made available to counsel for any person who has been indicted jointly for the same felony . . . "). Williams' suggestion that the psychiatric report was "confidential" (Pet. Br. 12) is unfounded.

[29] It is dubious, at best, that defense counsel would have attempted to impeach Cruse on the basis of his alcohol and marijuana use, even if they had known about the report. Cruse had admitted drinking alcohol prior to the crimes (JA 75-76) and other prosecution witnesses already had testified that Cruse and Williams had been "drinking heavily." (Tr. 1-4-94 at 45, 52;

would have been more than offset by the remainder of the report. *See generally Clere v. Commonwealth*, 184 S.E.2d 820, 821 (Va. 1971) (after witness' testimony attacked with prior inconsistent statement, proper for prosecution to introduce prior consistent statement and for court to admit both statements for jury's consideration). The report reflected that Cruse had stated that, because he knew that Williams "had a record of having murdered people," he "felt unable to say 'no' to [Williams'] request to rob the couple and subsequently kill them" (JA 495) and that "he might be killed if he did not follow [Williams'] instructions to kill the couple." (JA 498). This not only would have revealed to the jury that Williams already was a murderer before he committed the capital crimes, but would have bolstered the prosecution's effort to portray Cruse as a more sympathetic character than Williams (JA 269, 283-84), by repeatedly detailing the mental anguish Cruse had experienced as a result of the crimes, including "recurrent nightmares and visualiz[ations] of the face ***of the woman he killed***." (JA 495, emphasis added). Thus, even if it could be concluded that disclosure of the report would have created a ***possibility*** of a different outcome at the guilt stage of trial, given the entirety of the report and Williams' own

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CA4 JA 76). Williams, moreover, had told his trial counsel that, as he would later testify, he and Cruse had drunk "a lot of beer" and smoked marijuana. (JA 223, 433). Knowing all this, trial counsel wisely made no attempt to cross-examine Cruse about his alcohol and drug consumption. (JA 140-56). The reason for this tactic is clear. As trial counsel's affidavit demonstrates, Williams had decided that he was going to testify at the guilt stage and was insistent "that he wanted to tell the jury what had occurred." (JA 438). Because there was no evidence that Cruse was any more intoxicated than Williams and, because Williams purported to remember the relevant events "in great detail" and was going to relate those details to the jury (JA 433), any attempt to impeach Cruse's memory of the events on the basis of his drug and alcohol use would have had a similar impact on the credibility of Williams' testimony which was, after all, the ***sole*** focus of his guilt-stage defense.

inculpatory testimony (see above at 10 n.8),[30] there is no ***probability*** of a different result. *See Strickler*, 119 S.Ct. at 1953 (emphasizing that petitioner's burden is to show "reasonable probability," not merely "reasonable possibility").[31]

III. SECTION 2254(e)(2) APPLIES TO WILLIAMS' CLAIM ALLEGING AN UNDISCLOSED AGREEMENT BETWEEN HIS CO-DEFENDANT AND THE PROSECUTION, AND THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THE STATE COURT REASONABLY REJECTED THE CLAIM ON THE BASIS OF THE UNCONTRADICTED EVIDENCE PRESENTED DURING STATE COLLATERAL PROCEEDINGS.

It is important to understand that, with respect to this particular claim, Williams is demanding an evidentiary hearing, ***not*** to prove the truth of any fact or the credibility of any evidence that he actually has proffered to the federal courts, but merely to serve as a fishing expedition to uncover facts

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[30] Williams suggests that the Warden somehow has admitted that credibility was the key to whether he could be convicted of capital murder (Pet. Br. 10-11, 40 n.26), but the Warden's statement he relies upon clearly indicated that, if the jury believed Williams, "Cruse fired all . . . but one of the shots that killed Mr. Keller" (JA 366-67), *i.e.*, that Williams admitted firing one of the shots that killed Mr. Keller and, therefore, was guilty of capital murder.

[31] Prior to his merits brief in this Court, Williams never claimed that there is a reasonable probability that the result of the ***penalty*** stage would have been different if the psychiatric report had been disclosed. This belated argument (Pet. Br. 43) should not be considered because it was not raised in the court below or even in Williams' certiorari petition. In any event, the argument is frivolous. Petitioner was so lacking in remorse that, when he was arrested approximately a week after the murders, he still was wearing Mr. Keller's leather jacket as a trophy. (JA 220, 247). And, once the jury learned ***that Williams had murdered four other men just two months prior to the Keller murders***, his death sentence was, if not absolutely assured, at least extremely probable.

which he hopes might support his claim, and as a vehicle for a federal judge to redetermine the credibility or weight of the evidence that was before the state court when it rejected his claim. AEDPA certainly does not permit an evidentiary hearing under such circumstances.

It likewise is important to understand the inter-relationship of the various provisions of AEDPA when dealing with a claim that was presented in state court and rejected on the merits. As the Fourth Circuit correctly concluded, § 2254(d) provides the primary standard for assessing such claims. (JA 663-64). Under that provision, the writ "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless" the prisoner shows that the state court decision either "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]" or "was based on an unreasonable determination of the facts ***in light of the evidence presented in the State court proceeding***." *See* § 2254(d)(1)-(2) (emphasis added). (Resp. App. 3-4). If the prisoner's claim does not fall within one of § 2254(d)'s two exceptions, Congress' general prohibition applies and the claim ***must*** be rejected. Sections 2254(e)(1) and (e)(2) thus come into play only if the prisoner is able to escape the strictures of § 2254(d).

Assuming that relief is not barred under § 2254(d), however, a federal court still would be required to presume the correctness of any state court factual determinations, unless the prisoner carries "the burden of rebutting the presumption . . . by clear and convincing evidence." *See* § 2254(e)(1). (Resp. App. 4). And, in any event, the federal court would be prohibited from conducting a hearing unless the prisoner shows that the lack of factual development is not attributable to him, *see* § 2254(e)(2)(A)(i)-(ii), ***and*** demonstrates "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* § 2254(e)(2)(B).

The Fourth Circuit correctly analyzed Williams' claim within this framework and determined that it must be rejected, whether pursuant to § 2254(d) or de novo:

> Williams . . . claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of *Brady*. ***The Supreme Court of Virginia was correct, however, to reject Williams' claim***. In state court the Commonwealth supplied two affidavits – one from [prosecutor] Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. ***Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."***
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> ***Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth."***[32] The district court

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[32] This second affidavit from Mr. Blessing was submitted after Williams' federal habeas counsel had asked Blessing to sign an affidavit which inaccurately stated that Cruse "did have an understanding with the Commonwealth that if he cooperated . . . and testified against Williams, his cooperation and testimony might help him. . . . " (JA 501, 504). Blessing refused to sign the affidavit presented to him by Williams' counsel because it was "not true." (JA 501). In the subsequent affidavit that Blessing executed, he averred not only that there was no such agreement or understanding between Cruse and the prosecution, but also that he never

> thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence.

(JA 664-65, emphasis added). Because the Fourth Circuit did not apply § 2254(e)(2) to this claim, the Court of Appeals' judgment will remain unaffected by this Court's interpretation of the statute. Indeed, given that this Court granted certiorari only to resolve Williams' question concerning the proper interpretation of § 2254(e)(2) and, in view of the Fourth Circuit's rejection of Williams' "secret agreement" claim under § 2254(d), the claim is not properly before the Court. Nevertheless, as will be demonstrated, § 2254(e)(2) clearly precludes a hearing on this claim.

A. No "Due Diligence"

The total facts which Williams says entitle him to an evidentiary hearing are as follows: Cruse had a written agreement with the prosecution that was revoked prior to trial (JA 151-52, 162-63); despite the revocation of the agreement, Cruse continued to cooperate with the prosecution and agreed to testify against Williams (JA 397); no trial date was scheduled for Cruse until after he testified against Williams (JA 384); Cruse admitted in his testimony against Williams that he was guilty of the capital murder of Mrs. Keller (JA 103-04); the prosecutor's redirect examination of Cruse and his jury argument supposedly indicated that Cruse still had an

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had stated or implied to Williams' counsel, or anyone else, that there was such an agreement or understanding. (JA 501-02). Any assertion by petitioner that Blessing "indicated [to federal habeas counsel] there was an understanding" between Cruse and the prosecution (Cert. Ptn. Reply 13 n.10) not only is false, but also is contrary to Williams' own (again, unsupported) assertion in the district court that during "discussions . . . with Cruse's counsel about additional affidavits, Cruse's counsel ***has not completely refuted the possibility*** that some inducement from the Commonwealth existed." (JA 502 at ¶ 4, emphasis added).

agreement with the prosecution whereby he would be spared a death sentence (JA 159, 284);[33] and two months after Williams' trial, Cruse pleaded guilty and subsequently was sentenced, upon the prosecutor's recommendation, to multiple terms of life imprisonment. (JA 401-28).[34]

Williams' trial attorney cross-examined Cruse about the revoked agreement and about whether he was, in fact, testifying without the benefit of an agreement with the prosecution. (JA 149-52). ***The prior written agreement was disclosed fully to the jury and, in fact, was made an exhibit by the prosecution.*** (JA 151, 157-58, 162-63, 431-32). Cruse's two trial attorneys, moreover, were present in the courtroom when he testified (JA 159, 431, 442), but Williams made no effort to

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[33] In his state habeas petition, Williams did not rely at all upon the prosecutor's redirect examination of Cruse and mentioned the prosecutor's jury argument only in connection with a related ineffective counsel claim. (JA 378 at ¶ 142). Williams' federal petition, however, asserted that, based upon the prosecutor's redirect examination of Cruse, "[t]he conclusion is inescapable that the Commonwealth and Cruse had an understanding regarding a sentencing recommendation" and that "[t]he only reasonable inference from [the prosecutor's jury argument] is that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder." (JA 472-73).

[34] Cruse received three consecutive life sentences, plus 90 years. (JA 427-28). Williams simply is wrong when he says that a charge against Cruse for the killing of Mr. Keller was reduced from capital murder to first-degree murder. (Pet. Br. 15 n.14). As the district court noted (JA 578) and the record shows (JA 404), the only change in the charge regarding Mr. Keller was to amend a first-degree murder charge to note Cruse's participation as a principal in the second-degree. Contrary to Williams' allegation (Pet. Br. 43 n.29), this amendment was not premised upon Cruse's testimony that he had not fired any "fatal" shots at Mr. Keller, but rather upon the fact that he had not fired ***any shots at all*** at Mr. Keller. Petitioner also is wrong in asserting that the district court found that "a reasonable reading of the record as a whole suggests the existence of a deal." (Pet. Br. 36). The district court did no such thing; it merely listed the circumstances which "Williams argues . . . strongly suggests that some sort of . . . agreement existed." (JA 578).

call them as witnesses to examine them about the possible existence of a continuing agreement. ***Indeed, Williams separately alleged that his trial attorneys were ineffective in failing to call the prosecutors or Cruse's attorneys as witnesses to develop the record.*** (JA 358, 377; CA4 JA 772). And, although Williams later claimed in his federal petition that "the only reasonable inference" from the prosecutor's argument to the jury was that there was, in fact, such a continuing agreement, Williams made no effort at trial to develop the record on this point once he heard the prosecutor's allegedly telling remarks.[35]

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[35] The prosecutor argued to the jury that Cruse was a credible witness because "his back is against the wall; if he lies, he dies." (JA 284). Obviously, if, as Williams told the district court (JA 473), "the only reasonable inference" from such an argument is that Cruse still had an agreement with the prosecution, Williams could have pointed out to the trial judge the alleged discrepancy between Cruse's testimony and the prosecutor's argument and demanded a hearing at which the prosecutors and Cruse's attorneys could have been called as witnesses. The same is true, of course, to the extent Williams relies upon the fact that the prosecutor asked Cruse on redirect examination if it was his understanding that he remained charged with capital murder and that "the judge is going to decide whether you live or die." (JA 159). Any claim that these matters of record proved that the prosecution had failed to disclose a continuing agreement with Cruse obviously could have been raised and developed at trial and litigated on direct appeal. The Virginia Supreme Court did not rule Williams' "secret agreement" claim defaulted because, as previously noted, Williams did not rely upon either of the prosecutor's remarks in his state habeas petition, except in relation to an ineffective counsel claim. (JA 378). The state court, however, did rule that two other aspects of Williams' *Brady* claim were defaulted because they could have been raised at trial and on appeal. (JA 444, applying rule of "*Slayton v. Parrigan*" to claims "IV(A), IV(B)"; see also JA 379-84). In any event, the prosecutor's "if he lies, he dies" argument was nothing more than a recognition of the fact that the one thing Cruse could do to maximize his chances of being sentenced to death would be to lie under oath about his involvement. As for the prosecutor's question, and Cruse's acknowledgement, that "the judge" would decide his fate, this represented merely a realistic assessment that, having confessed both to the police and under oath in court that he had raped Mrs. Keller and shot her in the head, Cruse had little or no prospect of mercy from a jury and that, under Virginia law, it is the trial judge who ultimately decides whether a death sentence will be imposed. *See* Va. Code § 19.2-264.5.

In his state habeas petition, Williams suggested that Cruse's written agreement with the prosecution never had been revoked (JA 386) and asserted, in conclusory fashion, that cross-examining Cruse at an evidentiary hearing "would certainly lead to substantial evidence of a continuing plea agreement." (JA 386-87). The Warden presented the affidavits from the lead prosecutor and Cruse's trial attorney which established that no agreement existed.[36] (JA 440-42). Neither before nor after the Warden submitted those affidavits, however, did Williams offer any support for his claim. He submitted no affidavits from his trial counsel on this point, even though he had obtained affidavits from both trial attorneys on other points. (JA 395-400). Nor did he submit affidavits from either of Cruse's two trial attorneys, even though one had provided an affidavit on a related matter. (JA 394-95). Williams thus made no proffer to the state habeas court that he

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[36] Cruse had testified unequivocally under oath at trial that he was testifying without the benefit of any agreement with the prosecution, that he remained charged with capital murder and subject to a possible death sentence. (JA 135, 152, 159). Williams notes that the Warden produced no affidavit from Cruse during the state collateral proceedings in response to Williams' claim. (Pet. Br. 12 n.10). But, given Cruse's unequivocal trial testimony and, given Williams' failure to proffer any evidence in support of his naked claim, the Warden certainly had no duty to have Cruse reiterate his sworn, cross-examined testimony in affidavit form. Nor did the Warden have any duty, as Williams suggests, to obtain an affidavit from the assistant prosecutor from another jurisdiction who helped Mr. Woodson prosecute Williams' case. As the elected Commonwealth's Attorney in Cumberland County, Woodson was the person who had signed a written plea agreement with Cruse and later revoked it. (JA 163, 264). There is no reason to believe that the assistant prosecutor knew anything about Cruse's lack of an agreement other than what Woodson told him.

had interviewed his own trial attorneys, or either of Cruse's two trial attorneys, in an attempt to develop his claim.[37]

Williams did ask the Virginia Supreme Court to order the Commonwealth to make Cruse available to his habeas counsel[38] and to "produce all documentation" relating to Cruse's incarceration. (JA 371-72). As previously detailed (see Argument II at 35-36), those requests were entirely conclusory and unsupported by any specific allegations of fact. The Virginia Supreme Court denied Williams' motions at the same time it entered an order dismissing his habeas petition and expressly finding that his "secret agreement" claim had "no merit." (JA 444-45). By that time, however, the Warden had filed the affidavits from the Commonwealth's Attorney (who by then

[37] It is significant that prior to trial Williams' attorneys discussed Cruse's expected testimony with Cruse's trial attorneys. (JA 431). Williams made no proffer to the state habeas court that he had contacted Cruse's trial attorneys to discuss the claim or even asked them to contact Cruse to see if he was amenable to an interview.

[38] The Warden's counsel had informed Williams' counsel that Cruse is incarcerated in an out-of-state location and that his location would not be disclosed to Williams. (JA 363). When Williams subsequently asked the Virginia Supreme Court to compel the Warden to make Cruse available, the Warden opposed the motion and represented that Cruse was being held at an out-of-state location in order to protect him from Williams. (JA 373-75). The Warden noted the conclusory nature of Williams' motion and that he had failed to proffer that he had attempted to pursue his claim by any means short of interviewing Cruse, such as interviewing his own trial counsel or either of Cruse's two trial attorneys. (JA 374-75). The Warden also pointed out that Williams had failed to proffer any reason to believe that Cruse was amenable to an interview. (JA 375). Indeed, the record shows that in 1997 an investigator working on Williams' behalf and employed by a state-funded agency wrote a letter to Cruse in care of the Virginia Department of Corrections and that the letter was forwarded to Cruse at his out-of-state location. (JA 521-23). Cruse obviously was not obligated to respond to the letter and apparently chose not to do so.

was a Virginia judge) and from Cruse's trial attorney, both unequivocally stating that there had been no "secret agreement" with Cruse. (JA 440-42).

To the extent Williams produced ***any*** evidence in state court relevant to the claim, it undermined rather than supported his allegation. The transcript of Cruse's guilty plea proceeding two months after Williams' trial clearly shows that, upon inquiry by the trial judge, Cruse confirmed that no one had made "any promises" and that he still was subject to a possible death sentence. (JA 409-10). Likewise, in the transcript of Cruse's sentencing proceeding, Cruse's attorney unequivocally informed the trial judge that Cruse had cooperated "without any promise of anything in exchange for his testimony." (JA 421).

When discussing the concept of a petitioner's "due diligence" in state court, one must assess whether new facts or evidence which the petitioner wants to present to a federal court could have been discovered and presented during the state court proceedings. In Williams' case, however, there are no such new facts. ***He presented no evidence to support his claim in either state or federal court.*** He merely wants an evidentiary hearing to discover facts which he hopes might support his claim or to have a federal judge redetermine the credibility of the unequivocal and uncontradicted evidence upon which the Virginia Supreme Court relied when it rejected his claim. Such an abuse of an evidentiary hearing never has been warranted in our federal system and certainly is not permitted under AEDPA. *See generally* Rule 2(c), Rules Governing Section 2254 Cases (requiring petitioner to "set forth in summary form the facts supporting each of the grounds [for relief]"); *McFarland v. Scott*, 512 U.S. 849, 860 (1994) ("the habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims").

It would be both illogical and inappropriate to conclude that Williams used "due diligence" to develop his claim in state court simply because his motions for discovery and an investigator were denied by the Virginia Supreme Court.

Williams also asked the federal district court for the appointment of an investigator, in part to investigate whether Cruse had a secret agreement. (JA 450-52). The request was denied. (JA 8, 621). Likewise, he repeatedly asked the federal district court for various forms of discovery related to his claim that Cruse had a "secret agreement." (JA 505-19, 524-28, 614-18). ***The district court, however, on two separate occasions, in findings independently made by two different federal judges, concluded that Williams had failed to show the "good cause" required for discovery under Rule 6(a).*** (JA 520, 633).

Thus, at bottom, Williams' argument is that he is entitled to an evidentiary hearing to develop as yet unknown facts and that he used "due diligence" to develop those as yet unknown facts in state court, even though the federal district court, like the Virginia Supreme Court, denied his request for an investigator and found that there was no "good cause" for discovery. Merely to state such an argument is to demonstrate that a ruling in Williams' favor would make a mockery of both AEDPA generally and the concepts of "due diligence" and federalism specifically.[39]

B. No Merit

Williams cannot obtain relief unless he demonstrates that the undisclosed information was "material," *i.e.*, that there is

[39] It would be difficult to overstate the adverse impact of federal evidentiary hearings upon the interests of comity, finality and federalism. Although "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), that is precisely what such hearings in capital cases have become. *See* Price-Waterhouse-Coopers, "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999) at III-23 ("Many experienced federal capital habeas counsel described the preparation required for an evidentiary hearing ***as similar to that required for an entire capital trial***") (emphasis added). Federal hearings reportedly are granted in 83% of California capital cases and 40% of capital cases elsewhere. (*Id.* at V-79, VIII-119).

a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). And, there is a distinct and important difference between a "reasonable probability" and a mere "reasonable possibility" of a different result. *See Strickler*, 119 S.Ct. at 1953.

Here, the Fourth Circuit correctly concluded that, "even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality" and that "[g]iven Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head,[40] we are confident there is no 'reasonable probability [that the outcome of Williams' trial] would have been different.' " (JA 665-66).

In other words, even if it were assumed for the sake of argument that Cruse still had an agreement with the prosecution by which he knew he would be spared a death sentence and, even if it were assumed that disclosure of that fact would have caused the jury to discredit Cruse's testimony and accept Williams' testimony in their respective entireties (an assumption far beyond anything to which Williams reasonably could be entitled),[41] there is no reasonable probability the jury would not have convicted Williams of capital murder, ***solely on the basis of his own testimony***. As even the district court concluded, "Williams' own testimony established that he shot Mr. Keller during the commission of robbery and subsequent to the rape of Mrs. Keller and that, therefore, he is guilty of capital murder." (JA 584, 645).

[40] Williams admitted not merely that he was an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, but also that he was a full participant in (indeed the instigator of) the robbery of the Kellers as well as the burning of their home. *See Williams*, 450 S.E.2d at 370. (JA 225-34).

[41] According to trial counsel, Williams "did not do well as a witness" because "his demeanor on the witness stand appeared very cold." (JA 438).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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