No. _____

In the Supreme Court of the United States

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; and LYDELL CHESTNUT, Deputy Warden of Broad River Road Correctional Secure Facility,

Petitioners,

v.

JAMES NATHANIEL BRYANT, III,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General, State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN*
Senior Assistant Deputy Attorney General
**Counsel of Record*

MICHAEL D. ROSS
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

** CAPITAL CASE **
QUESTION PRESENTED

Respondent James Nathaniel Bryant has twice been convicted for the murder of Cpl. Dennis Lyden and twice sentenced to death. At the second trial, one potential juror disclosed a hearing impairment, but was qualified without objection and selected. The trial judge informally tested the juror's ability to hear throughout the proceedings. When the State expressed concern, defense counsel maintained a desire to retain the juror and Bryant personally agreed. In collateral proceedings, Bryant alleged a violation of due process and ineffective assistance. The state court denied relief finding Bryant failed to show that the juror was so impaired as to have "missed material testimony," (App. 10; 211-12), or that counsel made an unreasonable decision to retain the juror. In 28 U.S.C. § 2254 habeas review, the district court disagreed with the state court's fact-finding and ordered resentencing. A split panel of the Fourth Circuit reversed finding mere disagreement was insufficient to show an unreasonable determination. After argument en banc, the Fourth Circuit, lacking a majority, vacated the panel opinion by an evenly divided court.

The question presented is:

In review of a claim fully adjudicated in state court, did the district court violate 28 U.S.C. § 2254's deference mandate and offend the principles of finality and federalism by upsetting a capital sentence based on mere disagreement with record-supported state court fact-findings?

STATEMENT OF RELATED PROCEEDINGS

Bryant v. Stephan, No. 20-4 (United States Court of Appeals for the Fourth Circuit) (order vacating panel decision and affirming district court by equally divided court of appeals en banc filed on November 15, 2021; panel opinion reversing district court's judgment filed on May 24, 2021).

Bryant v. Stirling, No. 1:13-cv-2665-BHH (United Stated District Court for the District of South Carolina)(order denying Rule 59 motion issued on February 12, 2020; order granting resentencing relief entered March 19, 2019; report and recommendation, recommending dismissal without relief issued on July 26, 2018).

Bryant v. State of South Carolina, Case Information No. 2010-181666 (Supreme Court of South Carolina)(order denying petition for writ of certiorari to review the post-conviction relief action order of dismissal filed on October 3, 2012).

Bryant v. State of South Carolina, C/A No. 07-CP-26-5062, Circuit Court of South Carolina, Fifteenth Judicial Circuit, order denying post-conviction relief filed November 16, 2010).

Bryant v. South Carolina, 552 U.S. 899 (2007) (Supreme Court of the United States) (denying petition for writ of certiorari to the Supreme Court of South Carolina filed October 1, 2007)(direct appeal after retrial).

State of South Carolina v. Bryant, 642 S.E.2d 582 (S.C. 2007) (rehearing denied April 4, 2007, opinion issued

February 27, 2007 affirming conviction and sentence) (direct appeal after retrial).

State of South Carolina v. Bryant, 581 S.E.2d 157 (S.C. 2003) (opinion reversing death sentence and murder conviction issued May 12, 2003) (direct appeal).

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PETITION FOR WRIT OF CERTIORARI

The Director of the South Carolina Department of Corrections and the Deputy Warden (collectively, "the State") respectfully petition for a writ of certiorari to review the capital resentencing relief granted by the District Court of South Carolina. The resentencing relief was initially reversed by a split Fourth Circuit panel, then affirmed without a merits opinion by an evenly divided en banc court.

OPINIONS BELOW

The November 15, 2021 en banc decision of the equally divided Fourth Circuit affirming the district court's grant of relief is reported at 17 F.4th 513. (App. 1-2). The May 24, 2021 opinion of the Fourth Circuit reversing the grant of habeas corpus relief is reported at 998 F.3d 128 (4th Cir. 2021). (App. 7-93). The district court's unreported March 19, 2019 Order granting habeas relief is available at 2019 WL 1253235 (D.S.C. Mar. 19, 2019). (App. 103-206). The district court's order denying the State's motion to alter or amend is available at 2020 WL 702748 (D.S.C. Feb. 12, 2020). (App. 94-102). The November 15, 2010 order of the state post-conviction relief court denying relief is not reported but is included in the appendix. (App. 207-223).

JURISDICTIONAL STATEMENT

A panel of the Fourth Circuit filed its opinion reversing the district court's grant of habeas relief on May 24, 2021. (App. 7). On June 30, 2021, the Fourth Circuit granted Bryant's timely petition for rehearing *en banc*. (App. 5). On November 15, 2021, an equally

divided Court vacated the panel decision and affirmed the district court's grant of relief. (App. 1-2). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2254(d) which provides a federal court "shall not" grant habeas relief on a state-adjudicated claim except where the state's disposition:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Further involved is Section 2254(e)(1) which provides:

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

This case also involves the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Statement of Facts.

In June 2000, Horry County Police Officer Cpl. Dennis Lyden was arresting Bryant for driving with a suspended license when Bryant overpowered the officer, took his flashlight, and savagely beat him. Bryant continued the beating over the officer's repeated screams and pleas to stop until the officer was unconscious. (ECF No. 69-4 at 983-84). The head trauma was extensive, and included wounds inflicted with such force that it split the officer's scalp and exposed his skull. Those vicious wounds would have been particularly painful. (ECF No. 69-7 at 38-42). After inflicting the beating, Bryant then shot Cpl. Lyden in the head using the officer's service weapon. (App. 6; *State v. Bryant*, 642 S.E.2d 582, 585 (S.C. 2007)).

B. State Procedural History.

This South Carolina capital case has been in litigation for over two decades. Bryant was indicted in December 2000 for the June 2000 murder and armed robbery. He was initially convicted by a jury in June 2001 and sentenced to death by that same jury. (App. 9). However, the Supreme Court of South Carolina reversed on a procedural issue and returned the matter to the trial court. (App. 9).

1. 2004 Trial and direct appeal.

From September 29 thought October 9, 2004, Bryant was tried by a new jury, convicted on the same charges, and again sentenced to death. (App. 208). In selecting the 2004 jury, one of the potential jurors, Juror 342, reported a "hearing problem with [her] right ear" in her juror information. During voir dire, the State and the trial judge questioned the juror about her hearing. Under questioning by the prosecutor, the juror asserted that though she had some difficulty, she could hear, and confirmed that she could hear him at that time. (J.A. 108). Defense counsel did not ask any questions of the juror and asserted she was qualified. (J.A. 112-13). The trial judge found the juror qualified without objection. (J.A. 113). After the jury was impaneled, the trial judge's general instructions included a direction to signal the judge if a juror could not hear or see at any point during the proceedings. (J.A. 177-78).

Before the first witness was called, the judge inquired whether "every member of the jury [was] able to hear," and, "if so, if they would raise their hands." (App. p. 179). Juror 342 reported difficulty, but also advised if an individual faced her, she could "read … lips and understand…." (J.A. 179). The trial court instructed, "because we do have a juror who reads lips … to look towards the jury as you answer any of the questions." (J.A. 181). At the end of the first day, the trial judge reminded the juror "its very important that you are able to hear and understand all of the testimony," so the juror should advise the court if there was any problem. (J.A. 182-83). After the jury left the

courtroom, the trial judge, noting Juror 342 had not heard to pack her bags for being sequestered, expressed "some concerns about the one juror who is lip reading." (App. 224; J.A. 185). The trial judge underscored to the parties that she was aware of the situation and they should carefully observe and be "mindful" of the situation. (App. 225; J.A. 186). Defense counsel made no indication of concern or objection. (App. 225-26; J.A. 186-87).

In addition to taking precautions to ensure witnesses looked toward the jury, the judge periodically checked with the jurors, the sequestration team, and even gave informal tests throughout the trial to measure whether the jury was able to hear during the proceedings. (See App. 225; J.A. 186). During the sentencing phase, the State questioned if the juror had responded to one of the trial judge's continuing tests, or if she was "nudged" to stand for a correct response. (J.A. 791). The trial judge had observed that the juror was beginning to respond when the other juror "was nudging," but agreed to revisit the issue the next day. (J.A. 791-92).

The trial judge re-tested the next day and questioned the juror individually and directly. (J.A. 855-57). The juror responded to one question, but not the second. (J.A. 857). The trial judge determined it best to ask the juror for medical information on the impairment. (J.A. 857-60). The juror admitted she may have "missed concentrating" and "missed some of" the testimony in the penalty phase, but did not "miss everything." (J.A. 862-63). The State moved to excuse the juror but defense counsel argued against removing

the juror. (J.A. 863-64). Defense counsel argued: "I think that if you brought every juror out they would say at one point in time they've missed something," with co-counsel adding, "[i]f they are honest." (J.A. 864). They questioned whether there was confusion independent of the hearing impairment and the judge questioned the juror again. (J.A. 864-65). The juror was then questioned directly and admitted that she did not hear the direction to stand if she was wearing blue. (J.A. 865-66). The judge then asked the juror for information on the "doctor that deals with [her] hearing problem." (J.A. 866). The juror provided contact information for her ear, nose, and throat doctor who treated the hearing loss in her right ear. (J.A. 866-67). The trial judge attempted to contact the doctor but he was unavailable. (App. 227; J.A. 868).

Ultimately, the trial judge noted that the parties agreed "that all of the jurors can be somewhat distracted at some time and" that there was "no indication that [Juror 342] has not been able to hear the testimony. The indication has been, in fact, that she has been hearing most and has turned away and only missed bits, but she has admitted to missing some." (App. 227-28; J.A. 868-69). The State withdrew its motion, admitting that jurors do not have to be completely free of limitations. (App. 228; J.A. 869). Defense counsel concurred, stating he "agree[d] one hundred percent," and further, that he had reviewed "all of the ramifications one way or the other with" Bryant and that Bryant was "perfectly satisfied that she stays on the jury." (App. 229; J.A 870). Counsel added again that if most jurors were asked "they probably would" indicate having "miss[ed] something

somewhere along the line, too." (App. 229; J.A. 870). Bryant personally confirmed on the record his agreement with retaining the juror. (App. 229-30; J.A. 870-71). The judge brought the juror back again, returned the card with her doctor's information, and cautioned her to inform the trial court if she began to miss something as "we can have it repeated" for the juror. (App. 231-32; J.A. 872).

At the conclusion of the sentencing phase, the jury reported that they found four statutory aggravating circumstances beyond a reasonable doubt:

> (1) the murder was committed while in the commission of robbery while armed with a deadly weapon;
> (2) the murder was committed while in the commission of larceny with use of a deadly weapon;
> (3) the murder was committed while in the commission of physical torture; and,
> (4) the murder was of a local law enforcement officer during or because of the performance of his official duties.

(J.A. 951-52).

The finding of any one of these statutory aggravating circumstances allowed the jury to consider whether to return a death sentence, or life imprisonment. S.C. Code Ann. § 16-3-20 (B). The jury assessed death as the appropriate punishment. (J.A.

951-52).[1] The Supreme Court of South Carolina affirmed his conviction and death sentence on direct appeal. *State v. Bryant*, 642 S.E.2d 582 (S.C. 2007). This Court subsequently denied his Petition for Writ of Certiorari on October 1, 2007. *Bryant v. South Carolina*, 552 U.S. 899 (2007).

2. Initial state post-conviction proceedings.

In August 14, 2007, Bryant filed a post-conviction relief (PCR) application. Appointed counsel, Robert E. Lominack, and Diana Holt, who were statutorily qualified to represent death-sentenced PCR applicants under S.C. Code Ann. § 17-27-160 (B), ultimately assisted him.[2] Bryant claimed, in relevant part, that (1) the retention of Juror 342 violated the due process right to a fair and competent jury; and that (2) trial counsel were ineffective pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), for not requesting the removal of the juror. (App. p. 10).

Bryant was afforded an evidentiary hearing. He called the juror's husband for his opinion on his wife's hearing impairment, (J.A. 1038-43), and produced an

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[1] Bryant received an additional twenty years for the armed robbery conviction. (J.A. 1286).

[2] The Supreme Court of South Carolina strictly enforces the requirements of this section. *See Robertson v. State*, 795 S.E.2d 29, 37 (S.C. 2016) ("we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance *per se*"). The statute requires that "at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Id.,* at 36.

affidavit from a doctor who treated juror's foot in July 2006, almost two years after the October 2004 sentencing. (J.A. 962). In the affidavit, the doctor admitted that he "did not conduct a hearing test using medical equipment designed to measure deafness," and also admitted that she had an ear, nose and throat specialist that she had seen for the condition, but believed "she should never have served on a jury without an appropriate accommodation for her hearing impairment." (J.A. 962). The juror was subpoenaed, and was present in the courthouse during the collateral proceedings hearing, but was not called. (See J.A. 1050).

On July 27, 2010, the PCR judge announced his findings of facts and conclusions of law. (J.A. 1180-87). A first order was issued on August 24, 2010. (J.A. 1191-1255). However, Bryant successfully moved to vacate the order based on the court having adopted the State's proposed order, and, on November 15, 2010, the judge issued another Order of Dismissal. The state court found that the juror was duly qualified to serve, and Bryant had not shown that the juror, at the time of trial, suffered impairment "so severe that she missed material testimony." (App. 10; 211-12). The state court also found counsel made a reasoned, strategic decision to retain the juror. (App. 10; 214). Seeking to appeal the denial of relief, Bryant raised both claims in a petition for writ of certiorari, which the Supreme Court of South Carolina denied on October 3, 2012. (J.A. 11).

C. Federal habeas corpus.

Bryant filed his habeas petition on September 27, 2013, which he amended on November 6, 2017.[3] (J.A. 6 and 10). The State made its return and moved for summary judgment on the state court record. On January 31, 2019, the magistrate judge recommended the State's motion be granted. As relevant here, the magistrate recommended the district court reject Bryant's due process claim and the ineffective assistance claim for not insisting on removal of the juror. The magistrate concluded the findings were not unreasonable, nor was the ruling an unreasonable application of federal law. (App. 115).

By Order issued March 19, 2019, the district court rejected the magistrate's recommendation and found the state court decision was based on unreasonable determinations of fact, and constituted an unreasonable application of clearly established federal law. (App. 115-16). The district court considered Bryant's objection that the testimony from the juror's husband supported the state court's fact-finding was incorrect under a "clear and convincing" standard. (App. 115). The district court reviewed the ample evidence of concern over the impairment in the trial record which "began in voir dire," and continued throughout trial. (App. 115-36). The district court found

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[3] On November 22, 2013, the magistrate judge granted a stay, over the State's objection, so Bryant could attempt to exhaust certain admittedly defaulted claims in state court. (J.A. 7). The federal habeas action remained stayed until the state court dismissed action as improperly successive and untimely. (J.A. 7-9). The District Court lifted the stay on October 13, 2017. (J.A. 9).

that the husband's testimony of impairment and his wife's anger at the suggestion she needed a hearing aid, "both elucidated the profound nature of Juror 342's hearing loss, and offered a coherent explanation for why Juror 342 never once volunteered that she was having trouble hearing during the trial, though her struggles were observable to the trial judge and counsel." (App. 137-38; 150-51).

The district court resolved it was "unreasonable for the PCR Court to find the the juror "was appropriately qualified by the trial court," and unreasonable to "credit" her "statements that she 'heard all the testimony' … during the guilty phase without accounting for her statements to the contrary." (App. 151-52). The district court also found unreasonable the PCR judge's determination that Bryant had not shown the juror's "impairment was of a degree to materially impair her ability to receive and consider evidence." (App. 152). The district court concluded the state court "gloss[ed] over the full import of Juror 342's equivocation," the "elucidating PCR testimony," and the failure of the lip-reading accommodation. (App. 156).

In reviewing the record, the district court noted the hearing difficulty was "*externally evident*" (emphasis in original) at the time of trial, with the juror equivocating at times "saying both 'yes' that she missed some, and 'no' she had not missed any—concerning both the guilt phase and the penalty phase." (App. 147-48). The district court's "final straw," however, was the passage in the trial record where the juror "admitted to having failed to hear the trial judge's instruction to

stand if wearing blue ***in the middle of the trial judge's second makeshift hearing test***." (App. 148) (emphasis in original). The district court concluded "[i]t is … unclear what more transparent, albeit unwitting, admission of her hearing deficit Juror 342 could have given." (App. 148-49). The district court also concluded that the juror "was not competent and should have been excused," and Bryant was prejudiced at sentencing because "[i]t only takes one unconvinced juror to preclude unanimity" and avoid a death sentence. (App. 150). Even though the juror served in both phases, the district court determined that the guilt phase should be left undisturbed because "the State's proof of Petitioner's guilt was ironclad." (App. 145; 150).[4]

The district court considered the magistrate's observation that the parties at trial equated the matter to an inattentive juror, but rejected the comparison because inattentiveness can be cured. (App. 153-54). The district court recognized there is not a case directly on point from this Court, though it also recognized a Tenth Circuit case that approved retention of a deaf juror. (App. 154-55, citing *United States v. Dempsey*, 830 F.2d 1084, 1087–89 (10th Cir. 1987)).

Regarding the ineffective assistance claim, the district court acknowledged some of counsel's collateral action testimony was equivocal on strategy, but found the examples cited by the PCR court other than race

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[4] The dissent from the Fourth Circuit panel opinion similarly agreed that only the death sentence needed to be vacated though the juror served in both phases. (App. 43 n.2).

"were cherry-picked out of trial counsel's PCR testimony, and make no sense as justifications to ignore the presence of an incompetent juror on the panel." (App. 162; 175). The district court found "it was not impermissible for trial counsel to consider the fact that Juror 342 was black when deciding whether or not to seek her removal" but it was not "a valid strategy to retain an incompetent juror." (App. 167). The district court underscored counsel's duty to persuade the jury to accept mitigation, and concluded it was unreasonable to rest on a "hope that she would vote against death simply because the defendant was black like her." (App. 167). The district court granted resentencing relief without any additional proceedings. (App. 104). It also denied the State's motion to alter or amend. (App. 94-102).

The State timely appealed. A split panel of the Fourth Circuit reversed the district court. (App. 7-93). The panel majority found the district court failed to correctly apply the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) as reflected in 28 U.S.C. § 2254. (App. 9). In particular, the majority found the district court erred in making "its own extensive findings of fact" and credibility analysis, and also in discounting evidence supportive of the state court findings. (App. 15). In example, the majority explained that, though the jurors were instructed to advise if there was a problem with hearing the testimony, the district court found that Juror 342 "was either unwilling or incapable of volunteering the undisputed truth." (App. 15). The district court, though, discounted the fact that the record showed that "it was Juror 342 who mentioned her hearing problem

in the first place." (App. 15-16). The majority concluded that the district court simply rejected or gave little weight to those portions of the record where the juror "clearly heard and understood what the judge was saying and responded to it." (App. 16). In support of its conclusion, the majority listed in detail a number of examples from voir dire through trial. (App. 16-26). The majority also noted that defense counsel argued to retain the juror and agreed that missing a few things was not more than mere inattentiveness that all jurors would likely experience. (See App. 23-24; see also 26). The majority noted the record supported the postconviction court's findings that the juror had impairment in her right ear, but could hear; the trial judge pursued and monitored accommodations; and Bryant was aware of these facts at the time trial, along with the responses to the informal testing, but nonetheless argued for retention of the juror. (App. 13-14; 17-26). Further, the majority found a lack of any "any federal decision, much less a Supreme Court decision, where a hearing impairment disqualified a juror from participating in a trial." (App. 14-15).

The majority also acknowledged the collateral action evidence Bryant had presented that included "a few anecdotes of her impairment, like being unable to hear at church or when she was standing just a few feet from her husband at home," but, unlike the district court, also pointed out the failings in Bryant's evidence: "he did not specify whether Juror 342's hearing difficulties had gotten worse over time; how bad they were at the time of trial in 2004; or whether any of the examples he provided to demonstrate Juror 342's hearing difficulties were from around the time of trial,"

and that "Bryant did not call Juror 342's ear, nose, and throat doctor or an audiologist at the postconviction hearing to testify as to the extent of Juror 342's hearing problem." (App. 26). Even so, the majority recognized that the record showing impairment or what may have been "missed was sometimes equivocal." (App. 28). Yet ultimately, there was evidence that supported the state court resolution: "… Juror 342 did show up for trial on time (an instruction that was given in tandem with the [missed] packing instruction); passed at least two hearing tests; and was able to communicate, for the most part, during one-on-one questioning. Moreover, everyone at trial — the judge, the solicitor,[5] the defense team, and the SLED agents — concluded that Juror 342's hearing impairment was not severe." (App. 28-29). The majority afforded deference to the state court findings, noting "the trial judge's superior position in assessing Juror 342's competency" based on the multiple interactions at trial. (App. 28). Consequently, given the specific and fair record support for the state court's findings, the majority concluded the district court was wrong to find those findings unreasonable. (App. 29). Further, in considering application of federal law, the majority noted the "general due process standards that are applicable," and acknowledged the "leeway" that must be afforded the state courts. (App. 32). The majority concluded given the record supported fact-finding, there was no unreasonable application of the general standard. (App. 33).

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[5] In South Carolina, trial prosecutors are solicitors.

In regard to the ineffective assistance claim, the majority focused on counsel's strategic decision. But again found error as the district court rested its conclusion on its own fact-finding. (App. 35). It not only "rejected the multiple reasons given by Bryant's trial counsel" as insufficient when faced with an "incompetent juror," but also inappropriately made the conclusion by virtue of "its own credibility determinations." (App. 35). The majority found "the district court essentially discarded … that while Bryant's defense counsel knew that Juror 342 was having difficulty hearing and had missed 'some' testimony, he nonetheless pushed to keep her on the jury, offering various explanations for this decision" *during the trial*. (App. 35). Further, counsel testified at the postconviction hearing "that Juror 342's ability to pass one of the hearing tests 'was one of the considerations to keep her,' which is consistent with the position he took during trial when he argued that Juror 342 'heard everything' 'in the guilt phase' and that while 'she missed a little something in the penalty phase, ... maybe 11 other jurors missed a little something, too.' " (App. 35-36). He also testified that he did consider the juror's race, was unhappy with the method of the original selection of the jury, and that "the defense team did not "particularly care[ ] for the alternate." (App. 36). The majority reasoned "the record shows that after being made aware of Juror 342's hearing issues and after observing her in person and in real time, Bryant's trial counsel concluded that the benefits of having Juror 342 on the jury outweighed the risk that she had missed some testimony." (App. 36). That decision was not "so beyond the pale that every fairminded jurist would conclude" counsel's strategic

decision was unreasonable. (App. 36). Rather, the record supported that "defense counsel made the on-the-ground decision that his client's chances of avoiding death were better with Juror 342 on the jury than off." (App. 36). The majority resolved: "that the state postconviction court's denial of Bryant's ineffective assistance claim was not unreasonable, either as a matter of fact or as a matter of law," and the district court erred in granting relief. (App. 37).

A majority of the full court granted Bryant's timely petition for rehearing en banc, and ordered additional briefing. (App. 3-6). The Fourth Circuit held an en banc argument on October 26, 2021. (See App. 1). On November 15, 2021, an equally divided Fourth Circuit vacated the panel decision thereby affirming the district court's grant of relief. (App. 1-2).

REASONS FOR GRANTING THE PETITION

AEDPA affords protection of state court convictions that are not in place for claims raised in the first instance or in ordinary appeals. It does "stop[] short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," but restricts relief to matters "where there is no possibility fairminded jurists could disagree." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This is so because, as this Court has repeatedly recognized, a habeas court's review of state criminal matters "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S., at 103 (quoting *Harris v. Reed,*

489 U.S. 255 (1989)(Kennedy, J., dissenting). Misapplication of AEDPA strikes at the heart of our system of respect between the sovereigns.

This matter required a straightforward application of AEDPA, but the district court failed in that task. Rather than passing on the objective reasonableness of the state court's findings in light of the record, the district court instead merely disagreed with the import of the record-based facts which altered the conclusion. AEDPA prohibits this type of review. "[U]nreasonable" is a term of art under the statute, not a license to disagree as if reviewing the matter "in the first instance." *See, e.g., Wood v. Allen,* 558 U.S. 290 (2010). Here, one juror had a hearing impairment that was known and discussed at trial. No objective, dispositive evidence was introduced in collateral proceedings to clearly undermine the facts known at trial. But the district court disagreed with the weight assessed by the state courts, and did not believe counsel had a reasonable strategy to retain such a juror in the first place. In essence, the district court expressed a lack of confidence in the state court's ultimate conclusion – the precise type of error this Court has corrected recently in the Sixth and Ninth Circuits. *See May v. Hines,* 141 S.Ct. 1145 (2021) (*per curiam*); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (*per curiam*). This Court should similarly correct the error here.

I. The district court defied AEDPA's mandated restraint in reversing the state court judgment.

Because Bryant had presented his evidence, made his arguments, and obtained a merits ruling in state

court proceedings, the district court needed only to determine if the state court's disposition of his claims was objectively wrong. The district court did not apply this analysis, however. The district court found some of the evidence more persuasive than other portions of the evidence, and also omitted from consideration the failings of Bryant's evidence which the state court found telling. In short, the district court did not agree with the state court's view of the evidence. That is beside the point. The correct inquiry must be "whether a fairminded jurist could take a different view." *Kayer*, 141 S. Ct. at 525. Further, and equally wrong, was the district court discarding parts of the analysis and record that the state court found persuasive. "[A] federal court must carefully consider *all the reasons and evidence* supporting the state court's decision." *Hines*, 141 S. Ct., at 1149 (emphasis added). In sum, the district court's ruling is flatly against 2254's restrictions and this Court's precedent. The state court sentence should not have been disturbed.

A. Fact-findings made by a state court are particularly protected within AEDPA review and may not be rejected upon mere disagreement.

AEDPA anticipates that reasonable jurists will disagree but commands that a state court's reasonable determination control. *See, e.g., Richter*, *supra.* To that end, AEDPA provides that the "determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). To overturn that determination, a habeas "applicant shall have the burden of rebutting the presumption of correctness by

clear and convincing evidence." *Id.* Thus, a "factual determination is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). The intent is clear. Federal courts in habeas review are not to act as first-impression fact-finders, or "substitute [their] own opinions for the determination made on the scene by the trial judge." *Davis v. Ayala*, 576 U.S. 257, 276 (2015). To be sure, the federal courts must consider whether the critical fact-findings are supported by the record, but that is all.

AEDPA actually provides two avenues for the protection of state court fact-findings, 28 U.S.C. § 2254 (d)(2) and (e)(1). Critically, whether the fact-findings are reviewed through the (d)(2) or the (e)(1) lens, the statute provides that those findings are entitled to special deference.

A factual determination may be found unreasonable under 2254(d) if it stems from an incorrect reading of a record shown by clear and convincing evidence. *Wiggins v. Smith,* 539 U.S. 510, 528-29 (2003). Further, a habeas petitioner may be able to reach the "clear and convincing mark" on evidence produced after the determination that directly conflicts with the finding made by the state court. *See Tharpe*, 138 S. Ct., at 546. But here, Bryant presented no new evidence in federal court. He argued only that the state court was unreasonable. Consequently, the evaluation is limited to state court record, and, in particular, whether there is record support for the findings.

Most telling in regard to the trial record, as the panel majority referenced, is that the trial judge developed the record and after that development, the parties agreed that the juror was qualified to serve. (App. p. 28). Further, in postconviction proceedings, Bryant made indirect attacks on the trial evidence, addressing the juror's hearing impairment with general, anecdotal evidence, but did not present the juror, or her ear, nose, and throat specialist (as known from trial) for any contemporaneous-to-trial information. (See App. 26). Specifically, Bryant called the juror's husband for his opinion on his wife's hearing, and produced an affidavit from a doctor who treated juror's foot approximately two years after trial. (App. 26). This weak evidence demonstrated two things – there was nothing to call into question the information known at trial, and there was not a medical basis for Bryant's assertion the juror was "functionally deaf" during the trial. (See App. 16). The state postconviction court was left with innuendo and speculation offered to undermine the clear and careful record development at trial. Had the district court judge been the trial judge, based on the same evidence presented, the district court may have found the juror not qualified. But the district court was not on the scene, and did not assess the information and credibility from "the trial judge's superior position." (App. 28). In "treat[ing] the unreasonableness question as a test of its confidence in the result," rather than considering whether there could be fair-minded disagreement, the district court patently erred. *Richter*, 562 U.S., at 102. A federal habeas court "may not characterize these state-court factual determinations as unreasonable 'merely because'" it "would

have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (citing *Wood,* 558 U.S., at 301).

Admittedly, this Court has not precisely and directly ruled on the relationship between two provisions regarding factual findings, § 2254 (d)(2) and (e)(1). *Id.,* at 322-23. However, the Court has functionally suggested the two work together, *Wiggins, supra,* and Fourth Circuit precedent also views the two sections as working in tandem, *Winston v. Kelly*, 592 F.3d 535, 555 (4th Cir. 2010) ("Both provisions apply independently to all habeas petitions."). In short, under circuit precedent, a factual determination may be deemed "unreasonable" only if the applicant shows it to be "sufficiently against the weight of the evidence" before the state court.[6] *Id.* The panel majority applied both provisions here. (App. 13). Further, the panel majority reviewed the evidence the district court ignored as "a federal court must carefully consider all the reasons and evidence supporting the state court's decision." *Hines,* 141 S.Ct., at 1149. "After all, there is no way to hold that a decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications." *Id.* (quoting *Richter,* 562 U.S., at 103).

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[6] Section 2254(d)(2) is limited to adjudicated claims. Section 2254 (e)(1) is not so limited and applies in broader review, such as when evidence is submitted in a federal evidentiary hearing. *See Winston*, 592 F.3d, at 555. However, treatment of additional information from federal proceedings is not at issue in this appeal as the district court limited review to the state court record.

The panel majority candidly recognized that "the evidence relating to the severity of Juror 342's hearing impairment and what Juror 342 might have missed was sometimes equivocal." (App. 28). But, as fair AEDPA review necessitates, the majority also recognized that the state court record demonstrates that she "passed at least two hearing tests; and was able to communicate, for the most part, during one-on-one questioning." (App. 28-29). Further, the majority recognized that "everyone at trial – the judge, the solicitor, the defense team, and the SLED agents – concluded that Juror's 342's hearing impairment was not severe." (App. 29). The majority correctly determined that because there is clear record support for the trial judge's findings, and those findings were not undermined by the weak evidence presented in collateral proceedings, AEDPA demands habeas relief be denied. (App. 29). The district court's contrary "approach plainly violated Congress' prohibition on disturbing state-court judgments on federal habeas review absent an error that lies beyond any possibility for fairminded disagreement." *Hines*, 141 S. Ct. at 1146 (internal quotation marks omitted) (quoting *Kayer*, 41 S.Ct. at 520).

Adding even more weight to the no-relief side of the scales, the clearly established law at issue is the "general due process standard[]" affording "more leeway" to the state court making the decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). (App. 32-33). With the record supporting the trial court's findings, and in turn, the postconviction court's findings, and with Bryant failing to present evidence to undermine the careful fact-finding made by the state

court, once again, a correct application of AEDPA required the district court to deny relief.

B. Bryant agreed factually with the trial court and further conceded that a juror who misses part of the evidence is not an unqualified juror.

The record shows that neither Bryant nor his counsel were ignorant of the fact the juror may have missed some portions of the evidence. Bryant made the decision to retain that juror. At trial, he acknowledged the correct principle that a juror does not have to be perfect to be qualified to serve. (J.A. 869-70). In South Carolina, determining whether a juror is qualified is in the discretion of the trial judge. S.C. Code Ann. § 14-7-1010. A juror may not serve if the juror "is incapable by reason of mental or physical infirmities to render efficient jury service…" S.C. Code Ann. § 14-7-810. Of key importance is the phrase "efficient jury service." Bryant's trial judge was very careful to adhere to consideration of this requirement, and keenly observed and repeatedly tested her conclusions concerning the juror throughout the proceedings. Of critical note, both the prosecution and the defense heard the same information before agreeing the juror was, in fact, qualified. (See J.A. 869-70). *See also Safran v. Meyer*, 88 S.E. 3, 4 (S.C. 1916) (a juror "defective in hearing" does not "per se disqualify him").

Bryant's less direct evidence on impairment offered in the postconviction proceeding failed to show the trial decision was unreasonable. The postconviction action judge noted the trial record in making his oral findings:

> … [Juror 342] did have some hearing deficiencies. She had a problem with hearing in the right ear, however, she could hear. Both the State and the Defendant qualified her without objection after having reviewed the returns. There is no question but that she had some problem with hearing, however, she was able to compensate for that by reading the lips of the particular witness She specifically testified at the — during one of the inquiries conducted by the trial judge that she had, indeed, heard all of the testimony thus far in the sentence […] phase.

(J.A. 1183).

In denying relief in his formal written order, the postconviction judge noted the trial judge's vigilance at trial, such as "instruct[ing] all witnesses to look at the jury panel and to speak loudly," and "monitor[ing] the testimony." (J.A. 1184). He noted "[t]here were numerous inquiries" at trial and the juror "specifically said that she could indeed hear." (J.A. 1183). The postconviction judge noted that most of the concern was voiced by the prosecution while "[d]efense counsel … did not want the juror disqualified," however, when "brought to a head … "both Defense counsels and [the prosecution] wanted the juror to remain on the jury." (J.A. 1184). He further noted that counsel had testified in the postconviction hearing that "he would rather have this juror than the alternate" which "was a strategic decision on his part." (J.A. 1184).

There is no "stark and clear" showing that the postconviction court's adoption of the trial judge's

careful fact-finding as supported by the trial record was wrong. The record shows the matter was indeed revisited many times at trial. Defense counsel acknowledged that if the court were to ask any juror, someone was likely to miss something during the long proceeding. (App. 229; J.A. 870).[7] During the postconviction proceedings, defense counsel indicated that the juror should not have been retained, and that he should have moved for a mistrial. (J.A. 1074). However, he also testified this was a hindsight review of his decision. (J.A. 1083).

Further, after years of litigation, Bryant cannot identify a single piece of mitigating evidence that the juror missed. Despite being given an opportunity during the postconviction proceedings to prove the juror missed testimony, Bryant failed to do so.[8] Rather,

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[7] If error occurred in retaining the juror, it was most certainly invited. On rehearing, the Fourth Circuit directed the parties to brief the issue of invited error based on defense counsel's actions at trial, and rightly so. (App. 3-4). Counsel and Bryant both requested the juror remain on the panel. (J.A. 869-71).

[8] South Carolina does not allow evidence regarding actual deliberations, but will allow evidence to show improper influence or actions (such as intimidation or premature deliberations). *See* Rule 606, South Carolina Rules of Evidence; *see also State v. Aldret*, 509 S.E.2d 811, 815 (1999) (alleged premature deliberations); *State v. Hunter,* 463 S.E.2d 314, 316 (1995) (in case alleging intimidation, finding "juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness"). But at no point did anyone suggest asking the juror about her deliberations. The State does not now. The State merely notes that the juror could have been asked questions about contemporaneous-to-trial hearing tests or medical diagnosis (recall that at trial, she gave the trial judge her

his evidence only confirmed what everyone already knew at trial: that the juror had a hearing impairment but was not deaf. The state court not only reasonably, but logically found Bryant failed in his burden of proof. Neither the district court nor Bryant could show precedent finding that any inattentiveness – whatever its cause – automatically makes a due process violation.

This Court expressed in *Richter* that the habeas standard is, by Congressional design, "difficult to meet." 562 U.S., at 102. The required heightened deference "demands that state-court decisions be given the benefit of the doubt…." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) *(per curiam)* (citation and internal quotation marks omitted)). A correct application of AEDPA deference on this developed state court record required the district court to affirm. The district court exceeded its authority in granting any habeas relief.

II. The district court erred in not applying the deference required in a *Strickland* analysis.

In addition to the stand-alone due process claim, Bryant alleged defense counsel was ineffective in retaining the hearing-impaired juror. The district

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doctor's name for contact); she could have been asked questions whether generally people complied when she asked them to speak up or turn toward her while talking; she could have been asked about the record of the proceedings regarding the evidence presented. That is not in any way a report on deliberations, and is not likely to elicit any prohibited information. There is no provision in AEDPA that allows Bryant to presume the prejudice he must presume to be entitled to relief.

"court rejected the multiple reasons given by Bryant's trial counsel for making his strategic decision as 'mak[ing] no sense as justifications to ignore the presence of an incompetent juror." (App. 35; 167). But once again, the district court seized on a single aspect of the testimony, assessed meaning and credibility independent of the state court adjudication and record, and failed to consider the whole of the testimony. While the district court concentrated on counsel's collateral hearing testimony that reflected he wanted to retain the juror because of her race,[9] he also said one of his

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[9] The district court concluded "it was not impermissible for trial counsel to consider the fact that Juror 342 was black," but found that "there was no valid strategy to retain a juror whose hearing was substantially impaired and trust to hope that she would vote against death simply because the defendant was black like her." (App. 156). Yet, the testimony may fairly be read as reflecting a hope for understanding, not nullification. It is arguable that defense counsel could have reasonably believed the juror, who shared the same race as Bryant, may be skeptical of law enforcement generally given her background especially since she had revealed negative interaction with law enforcement by a family member in her voir dire responses; and, further, that she may understand Bryant's position of being angered as he contended he was racially profiled and improperly stopped. (See J.A. 100-101; 1067). In that vein, the record shows testimony that Bryant stated "right before the shooting … something like … 'You'll never do this to me again.'" (ECF No. 69-4 at 218). Testimony was also presented that Bryant had been previously stopped in January 2000, just a few months before the murder, because he was driving without a license. In that incident, Bryant refused to place his hands behind his back to be handcuffed. Bryant had to be wrangled into submission, cuffed and placed in the police car. Bryant asserted to officers that "his rights had been violated and that it was a black thing" but an officer responded, "'No, sir, it was because you violated the law'," even so, Bryant

reasons was the juror had passed a trial test, and acknowledged his concession that most likely any juror would miss a portion of the trial presentation during lengthy proceedings. (App. 35). He added that he did not favor the alternate juror. (App. 36). Thus, counsel made a reasoned decision, on multiple points, and concluded retaining the juror "outweighed the risk that she had missed some testimony." (App. 36). In fact, he said as much: "I just said that [the juror's race] was one consideration" and followed with the opinion he would not "think it outweighs the fact that she was deaf." (App. 166). He also plainly stated that the fact that the juror did respond to the judge's hearing test "was one of the considerations to keep her." (App. 35; J.A. 1081). Again, the majority noted what the district court simply omitted from consideration other testimony and facts that support the reasonableness of the state court's adjudication: "[W]hile Bryant's defense counsel knew that Juror 342 was having difficulty hearing and had missed 'some' testimony, he nonetheless pushed to keep her on the jury, offering *various* explanations for his decision." (App. 35) (emphasis added).

Further, under *Strickland,* "every effort" should "be made to eliminate the distorting effects of hindsight," and assess counsel's performance from the "perspective at the time." 466 U.S., at 669. Counsel testified that he only came to the decision the juror should not have served "in retrospect when [he] read the transcript"

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continued to be uncooperative. (ECF No. 69-6 at 223-27; 69-7 at 6-7). Tying this back to the prior incident, the record shows that Cpl. Lyden even had a handcuff attached to his wrist at some point during the crime. (ECF No. 69-7 at 26 and 35).

after trial. (J.A. 1074; 1083). Here, the after-trial conclusions were elevated over the evidence of on-the-ground decision-making. That, too, is error.

Counsel's considered "strategic choices" are "virtually unchallengeable" unless shown to be "outside the wide range of professionally competent assistance. *Strickland*, 466 U.S., at 690. To show relief is warranted, a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id,* at 689. The task of showing ineffective assistance generally is a demanding one, but AEDPA increases a defendant's burden. *Id.* Under AEDPA review of a state adjudicated claim, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.,* at 104-05. *See also Dunn v. Reeves,* 141 S. Ct. 2405, 2410 (2021) ("In fact, even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen.").

The Fourth Circuit panel majority resolved the matter as AEDPA instructs it should be: "It is apparent from the record that defense counsel's decision to keep Juror 342 on the jury was not so beyond the pale that every fairminded jurist would conclude that it was unsound trial strategy." (App. 36). The district court's analysis was skewed from its unwillingness to accept the fact-findings by the trial court – again, made at the time and with agreement of the parties who also heard and observed the juror. As the panel majority reasoned,

"given the postconviction court's determination that Juror 342's hearing was not so severely impaired that she was incompetent to serve as a juror, that court's conclusion that defense counsel's decision satisfied *Strickland* is well within the bounds of reasonableness, as required under § 2254(d)." Again, on this record, AEDPA required the district court to deny relief.

III. Correction of the district court's defiance of AEDPA in this capital case is important for comity, protection of federalism, and promotion of finality after full and fair state proceedings.

"Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Richter*, 562 U.S. at 103 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (internal quotation marks omitted)). "A proper respect for AEDPA's high bar for habeas relief avoids unnecessarily 'disturb[ing] the State's significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (quoting *Richter,* 562 U.S., at 103, (internal quotation marks omitted)). The above arguments demonstrate that the district court failed to afford that respect. Thus, the federal district court improperly intruded in this state matter. Further, it did so in regard to a capital sentence, again offending one of the principle purposes of AEDPA, to "reduce delays … particularly

in capital cases." *Woodford v. Garceau,* 538 U.S. 202 (2003).

The State appealed to the Fourth Circuit seeking to have the AEDPA provisions properly enforced in order to protect the integrity of its criminal case disposition. A split Fourth Circuit panel reversed the resentencing grant of relief finding the district court had indeed departed from proper AEDPA review. Though a majority agreed to rehear the matter en banc, the en banc court failed to garner a majority opinion on whether there could be find-minded disagreement. Stated differently, seven of the fourteen Court of Appeals judges to hear argument en banc agreed that the district court violated AEDPA restrictions. Where the very issue is whether reasonable jurists may disagree, this particular circumstance weighs in favor of further review. Without this Court's intervention, an egregious misapplication of AEDPA will go unaddressed.

This Court has not hesitated to intervene decisively when the lower federal courts misapply AEDPA. *See, e.g, Hines, supra.* The failure to properly apply AEDPA here warrants this Court's intervention. And, because of the clarity of the error, this Court should summarily reverse and deny habeas relief pursuant to *Hines* and *Kayer*.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition.

Respectfully Submitted,

ALAN WILSON
Attorney General, State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN*
Senior Assistant Deputy Attorney General
**Counsel of Record*

MICHAEL D. ROSS
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners