No. 21-1044

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 Correctional Secure Facility,

Petitioners,

v.

JAMES NATHANIEL BRYANT, III,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Throughout James Bryant's capital trial, seated Juror 342's hearing impairment was apparent. Ultimately, the juror acknowledged she missed testimony at both the guilt and penalty phases. The prosecutor argued for her removal based on her "apparent deafness and inability to follow all the testimony." The trial judge acknowledged that the juror "just flat did not hear" the judge's questions, even when the judge was "raising [her] voice" and "looking directly at" the juror who was attempting to read lips. J.A. 853, 863, 866–67. Bryant's counsel too was fully aware that the juror could not hear the testimony or participate in deliberations due to her impairment. But he unreasonably argued to retain the juror, and she remained on the jury through the death verdict.

In state post-conviction relief (PCR) proceedings, Bryant contended that Juror 342's participation violated his due process right to a fair trial by a competent jury and his right to effective assistance of trial counsel. He supported these claims with proof establishing the extent of Juror 342's hearing impairment, including her husband's testimony that she could not hear even in close quarters and was prone to anger when others noticed her impairment. The state PCR court largely ignored the evidence and denied both claims in a few terse paragraphs of its written order. In federal habeas, the district court hewed tightly and expressly to the deferential approach mandated by this Court's AEDPA cases. Nevertheless, the district court concluded the state court's denial of Bryant's claims both "involved an unreasonable application of[] clearly established Federal law" and "was based on an unreasonable determination of the facts" in light of the state court evidence. 28 U.S.C. § 2254(d)(1) & (d)(2). Following argument en banc, an equally divided Fourth Circuit affirmed the district court's grant of habeas relief.

The question presented is:

> Should certiorari be denied where the sole Question Presented in the Petition fails to encompass all the bases on which the district court granted relief, relies upon material misrepresentations of the record, and merely seeks correction of what the State wrongly perceives to be error?

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INTRODUCTION

The Director of the South Carolina Department of Corrections and the Deputy Warden of the Broad River Secure Facility (collectively "the State") ask this Court to resolve a narrow question that does not encompass all the grounds on which the district court granted habeas relief. The State's question presented asks only whether the district court gave appropriate deference to the "state court fact-findings," seeking review of the district court's determinations under 28 U.S.C. § 2254(d)(2). Because the district court also found the state court unreasonably applied clearly established federal law, it granted relief pursuant to § 2254(d)(1) as well, review of which falls outside the scope of the question presented. Pet. App. 156, 167. Thus, the State asks this Court for an advisory opinion.

Even if the petition were otherwise viable, the district court committed no error. Rather, it correctly acknowledged and applied the "highly deferential standard" prescribed by this Court's § 2254(d) cases. As its meticulous order makes clear, the district court correctly found that the state PCR court relied upon unreasonable determinations of fact and unreasonably applied clearly established federal law, § 2254(d)(1) and (d)(2), in rejecting Bryant's claims.

This Court's review is unwarranted, and certiorari should be denied.

STATEMENT OF THE CASE

I. The state PCR court's perfunctory order failed to address trial and post-conviction evidence demonstrating the extent of Juror 342's hearing impairment.

Following James Bryant's conviction and death sentence imposed by a jury that included a hearing-impaired juror, Bryant sought post-conviction relief, raising—as relevant here—two claims related to the juror: (1) that he was denied his due process right to a fair trial before an impartial and competent jury, Pet. App. 211, and (2) that he was denied effective assistance of counsel when trial counsel failed to seek Juror 342's removal. Pet. App. 213–214.

The trial record and the additional evidence presented at the state PCR hearing included ample proof of the extent of the juror's impairment and its apparent impact on her ability to serve. The state PCR court ignored it all, and instead disposed of Bryant's claims through brief, conclusory findings that largely failed to address the issues raised. Regarding Bryant's fair trial claim, the PCR court's only findings of fact and conclusions of law were:

> This Court finds that Juror [342] was qualified to serve on the jury without objection. Juror [342] testified she heard all testimony during the guilty [sic.] phase and was able to compensate for her hearing deficiencies. The trial court also took specific measures to ensure that Juror [342] was able to hear the testimony. Additionally, South Carolina Courts have held that a person has difficulty hearing is not per se disqualified from serving as a juror. *Safran v. Meyer*, 103 S.C. 356, 364, 88 S.E. 3,4 (1916).
>
> This Court finds there was not a sufficient showing that juror [342] missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material [sic]. Therefore, this due process claim is denied.

Pet. App. 211–12. As to Bryant's ineffective assistance of counsel claim, the PCR court found trial counsel was not deficient during either the guilt or sentencing phases of trial because:

> Counsel's decision not to request Juror [342] excused was a strategic decision. Counsel explained he did not excuse Juror [342] because he did not like the alternate jurors who would replace Juror [342]. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, Applicant failed to show counsel's reasons for keeping Juror [342] was [sic] not a valid strategic reason.

Pet. App. 214. The South Carolina Supreme Court denied Bryant's petition for discretionary review.

II. The district court applied the required deference owed to the state PCR court's factual findings and application of federal law under § 2254(d).

The district court conducted its review of the state PCR court order cognizant of and faithful to this Court's limitations on federal habeas. In doing so, the court recognized the standard for reviewing claims adjudicated on the merits by a state court is "highly deferential" and "difficult to meet." Pet. App. 107 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). "[E]ven affording the trial judge and the PCR court all the appropriate deference," the district court found the PCR court's factual findings were unreasonable in light of the state court record.[1] Pet App. 144. Applying

[1] The district court recognized that, "For a state court's factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous." Pet. App. 108.

> [T]he Court is mindful that it is not at liberty to supplant the factual findings of State tribunals merely because its subjective reading of trial transcripts would lead it to draw different conclusions than the State courts. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("28 U.S.C.

appropriate deference to the state court's application of federal law, the district court found the state PCR court unreasonably applied the "bedrock constitutional right to a competent jury," Pet. App. 156, and the "well-established standard for ineffective assistance of counsel set forth in *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] and its progeny."[2] Pet. App. 167.

III. The district court meticulously analyzed the state court record, identifying substantial evidence of the juror's hearing impairment that caused her to miss testimony.

Before deciding the state PCR court made unreasonable findings of fact and unreasonably applied federal law, the district court analyzed the state trial and PCR record, identifying evidence of Juror 342's hearing impairment that no reasonable court would have ignored. Pet. App. 116–142.

> § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.").

Pet. App. 144.

[2] The district court recognized:

> In order for a federal court to find a state court's application of Supreme Court precedent unreasonable, the state court's decision must have been more than incorrect or erroneous. The state court's application must have been objectively unreasonable." *Wiggins* [*v. Smith*], 539 U.S. [510,] 520–21 [(2003)]; *see also Harrington v. Richter*, 560 U.S. 86, 103 (2011) ("[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

Pet. App. 108–09.

The district court recognized "[t]he concerns with Juror 342's ability to hear began in voir dire," citing to five different exchanges between the trial judge and Juror 342 that "indicate difficulty hearing." Pet. App. 116–19, 120–135. These exchanges included the trial judge's request that Juror 342 "state [her] name for the record," to which Juror 342 responded "Excuse me?" Pet. App. 116.[3] Following voir dire, neither the prosecutor nor trial counsel objected to Juror 342's qualification. Pet. App. 120. The trial judge informed Juror 342 she had been selected to serve on the jury and she needed to return to the courthouse with bags packed for ten days of sequestration. Pet. App. 120. When Juror 342 returned to the courthouse for the start of trial, she had not packed her clothes as instructed, though as the trial judge noted, "every other juror was packed for ten days." Pet. App. 122. As trial began, the trial judge informed all jurors to use a hand signal that meant, "Judge, I cannot hear or I cannot see." Pet. App. 120.

The district court then described the guilt phase of the trial, recognizing that "[a]fter the parties made opening statements and seven of the State's witnesses testified, the trial judge *sua sponte* questioned the jury, and specifically Juror 342, about whether they could hear properly." Pet. App. 120. The district court quoted the following exchange:

The Court: Have you been having difficulty hearing throughout this trial?

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[3] The district court directly quoted portions of the trial record found at J.A. 95, 98, 101–1033, 105, 177, 179–180, 185–87, 192–93, 640–41, and 791–92. The State failed to included J.A. 95, 98, 101–1033, 105, 177, 179–180, 185–87, 192–93, and 640–41 in the Petitioner's Appendix. Any citations to these omitted pages will be to the Joint Appendix.

> [Juror 342]: Long as I'm looking, you know, facing you I can read your lips and understand what you're saying.
> The Court: *All right, so, you really have to read lips to understand?*
> [Juror 342]: *Yes, ma'am*.
> The Court: *Because there's been plenty of times that they have turned away*. Have you heard all of the evidence and testimony in this trial?
> [Juror 342]: I heard.

Pet. App. 121.[4]

At the close of the first day of guilt phase testimony, the trial judge "openly expressed her concerns about Juror 342," stating, "I want you to know that I've got some concerns about the one juror who is lip reading. . . . *I have concerns that it was not brought to light that she really needed to lip read when we were doing individual voir dire*." Pet. App. 122. During the next day's continuation of the guilt phase, "the trial judge again questioned the jurors about their ability to hear." Pet. App. 123. After asking jurors to stand if they could hear the trial judge, the judge questioned Juror 342, "All right, all right, *now, ma'am, you delayed*. Can you hear, are you able to hear?" Pet. App. 124.

The district court then reviewed the trial judge's testing and questioning of Juror 342 during the sentencing phase. For example, after the sentencing phase had already begun, the trial judge performed an exercise where she asked jurors to stand depending on the color of their shirt, and Juror 342 did not immediately stand when the judge called her shirt color. Pet. App. 125. In response to the delay, "[t]he solicitor subsequently moved to have Juror 342 excused from the jury due to his belief that

[4] The district court's order emphasized many portions of the trial court record using italics and bolding. For all quotations to the district court order, the emphasis is in the original.

she was not hearing all the testimony."[5] Pet. App. 125. The solicitor argued: "*I don't think – I think she's following part of the trial testimony. I don't think she's catching all of it*." Pet. App. 125. The trial judge thought it was unclear whether Juror 342 was beginning to stand on her own or only stood when another juror nudged her to stand. Pet. App. 126

The solicitor prompted another hearing test the next day, indicating "*I still continue to be concerned about her apparent deafness and inability to follow all the testimony*." Pet. App. 127. The trial judge responded, "*there have been some things that have brought or cause the Court some concern, times when it looks like maybe she's, she's not watching back and forth and she's not able to hear*." Pet. App. 127.

After administering another hearing test, the trial judge noted the juror's failure of the test for the record,

> [Juror 342] responded to when I asked about the ladies who were wearing skirts or dresses. She got up for that and she responded to that and it looked like without any nudging or coaxing at all. I was watching for that very carefully. *What she didn't respond to was my next question about blue.*

Pet. App. 128. Juror 342 confirmed that she believed her dress to be blue. Pet. App. 131. During a colloquy about the failed hearing test with the parties, the trial judge noted, "*It's kind of hard to know if you've missed something. She's heard what she's heard."* Pet. App. 129. The solicitor concurred, stating "*I don't think there's any way to establish with absolute certainty how much she's hearing*." Pet. App. 129.

[5] In South Carolina, prosecutors are referred to as "solicitors."

The district court then recounted exchanges where the trial judge directly questioned Juror 342 about her hearing:

> THE COURT: . . . Have you had any difficulty in hearing what has happened – let me ask it this way have you turned away and then found yourself just catching the end of some testimony or not hearing all of it?
> [Juror 342]: *Yes, ma'am*.
> THE COURT: You have?
> [Juror 342]: *Yes, ma'am*.
> THE COURT: So, you have missed some of the evidence and testimony?
> [Juror 342]: *No, ma'am, I heard it, but it's more like when I – after I heard the testimony I turned my head, you know, concentrate on it*.
> THE COURT: Okay, now, listen carefully to this question. Have you found yourself maybe turning away and looking and missing part of a question or part of an answer because you didn't, you didn't turn your head fast enough?
> [Juror 342]: *Yes, ma'am*.
>
> . . .
>
> THE COURT: *Okay, have you, in fact, turned away and missed some evidence and testimony at this, at this point?*
> [Juror 342]: *I may have missed a little of it but I didn't miss everything.*
> THE COURT: *Okay, all right, so, so, you did miss some at this phase?*
> [Juror 342]: *Yes, ma'am*.
> THE COURT: Do you believe that you missed any at the guilt phase?
> [Juror 342]: No, ma'am.
> THE COURT: Did you find yourself in that same situation where you had turned away and then you've missed some of the question being asked or some of the answer?
> [Juror 342]: *Yes, ma'am, I may have missed concentrating, you know, just steady, may have missed some of it, yes, ma'am*.
> THE COURT: You may have missed some testimony at the guilt phase? Is that what you're saying?
> [Juror 342]: *Yes, ma'am*.

Pet. App. 130–32. There was "some argument back and forth between trial counsel and the solicitor regarding whether Juror 342 failed to stand during the test because she was confused, or because she did not hear the question." Pet. App. 133. "[T]he trial judge recalled Juror 342 and the following exchange transpired." Pet. App. 133.

> THE COURT: Ma'am, when I was asking the jurors, when I was asking you all to stand up if you had on a green shirt or stand up if you had a dress on and you stood when I asked you if you had – to stand up if you had a dress on. I also asked for everyone who had on blue to stand. *Did you hear that question?*
> [Juror 342]: *Yes, ma'am.*
> THE COURT: *You heard it? Why didn't you stand?*
> [Juror 342]: ***You said – asking me did I hear it? Oh, no ma'am.***
> THE COURT: *You didn't hear when I asked if you have on ---*
> [Juror 342]: ***No, ma'am.***
> THE COURT: *--- blue stand?*
> [Juror 342]: ***No, ma'am.***
> THE COURT: *Okay, and you were looking directly at me and I was talking ---*
> [Juror 342]: ***That's why I was trying, I was trying to read your lips when you was like talking.***

Pet. App. 133–34. As the district court recounted, following this exchange, the trial judge stated on the record:

> THE COURT: Okay, I'm going to note there's no question. *She has indicated she just flat did not hear and I was looking directly at her and talking and even now she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter.*

Pet. App. 134. Nevertheless, following an off-the-record chambers conference, the solicitor withdrew his motion to remove the juror, and after acknowledging that trial counsel wished to retain the juror, the trial court allowed her to continue to serve. Pet. App. 135–36.

The district court then reviewed the postconviction record, describing Juror 342's husband's ("Mr. Jones") PCR testimony that Juror 342 "had been experiencing hearing problems since 1984." Pet. App. 136. Mr. Jones recounted that "when he and his wife go to church she likes to sit in the back, but the preacher tells her that she cannot hear and directs her to the front. . . . And then [the preacher] would ask her

to read and she still couldn't hear what he was saying." Pet. App. 136–37. He provided additional examples, including that Juror 342 could not hear her husband even when standing "just a few feet apart" in their home, and "'[s]he get furious' when she is told she needs a hearing aid" and "she gets mad" because "she don't want to be deaf, she don't want no hearing aid neither." Pet. App. 137–38.

The district court then summarized PCR testimony from the trial attorneys. Bryant's trial counsel "testified that he should have made a motion for mistrial and that 'there's no doubt [Juror 342] did not belong on that jury.'" Pet. App. 140. The solicitor testified that "'everyone knew that she did have the hearing loss,' it was 'hard to get a grasp on how bad it was. . . . It was difficult to determine because she kept insisting she was able to hear and follow the testimony, but then she would admit that she did miss out on certain things.'" Pet. App. 142. The solicitor further indicated that he withdrew his motion to remove the juror because he "was trying to protect the record" and worried removal of the only Black juror "could create . . . a *Batson*-type issue." Pet. App. 141–42.

IV. The district court found that the trial court made unreasonable findings of fact and applications of federal law in denying Bryant's fair trial claim.

1. *Unreasonable findings of fact.*

Based on its thorough review of the state court record, the district court found the PCR court's denial of Bryant's fair trial claim was based on unreasonable determinations of fact. Pet. App. 143–52. Applying § 2254(d)(2), the district court ultimately concluded that:

> [I]t was not just incorrect or erroneous, but unreasonable for the PCR Court (1) to find that Juror 342 was appropriately qualified by the trial court, (2) to credit Juror 342's statements that she 'heard all testimony' during the guilt phase without accounting for her statements to the contrary about both the guilt and penalty phases, and (3) to find that [Bryant] had not made a sufficient showing that Juror 342's hearing impairment was of a degree to materially impair her ability to receive and consider evidence.

Pet. App. 151–52. (internal citation omitted).

In support of that finding, the district court specifically relied on the following:

- "It is perfectly clear from the record that the trial judge had concerns about Juror 342's ability to hear *throughout the trial*." Pet. App. 146.

- "Juror 342 failed to advise . . . that she needed to read lips in order to assist her with understanding testimony. This was material information regarding her capacity as a juror, which was only haphazardly discovered as a result of the trial judge's *sua sponte* questioning, *well after the parties and the trial court deemed her a qualified juror*, and after . . . 'plenty of times' when witnesses on the stand and/or examining counsel turned away from the jury box." Pet. App. 146.

- "[T]here is no indication that Juror 342 ever once availed herself of this hand signal [to indicate difficulty hearing], even though she admitted trouble hearing numerous times in response to *judge-initiated* questioning." Pet. App. 146.

- "The trial judge and solicitor relied upon their own observations . . . of Juror 342. . . . The upshot of this is that her hearing difficulties were *externally evident*. Whatever demeanor and body language [they] observed . . . surely went beyond the typical distraction or temporary lack of focus that every juror suffers from time to time." Pet. App. 147.

- The solicitor's oral motion to remove juror 342, stating he "still continue[d] to be concerned about her apparent deafness and inability to follow all the testimony." Pet. App. 147.

- Juror 342's failure of the second hearing test and the difficulty in knowing what she missed. Pet. App. 148.

- "But the final straw was when Juror 342 admitted to having failed to hear the judge's instruction to stand if wearing blue ***in the middle of the trial judge's second makeshift hearing test.***" Pet. App. 148.

Based on this, the district court opined:

> It is unclear what further indication of Juror 342's hearing incapacity the trial judge was waiting for in order to find her unqualified for continued service on the jury. It is further unclear what more transparent, albeit unwitting, admission of her hearing deficit Juror 342 could have given. If there was any moment when Juror 342 would have been focused on understanding the specific words being spoken in the courtroom, it would be when the trial judge was addressing the jury directly (eliminating the added complexity of bouncing back and forth between examining counsel and the witness stand), and plainly instructing cohorts of Juror 342's peers to stand in succession based on various criteria. Moreover, Juror 342 admitted she was "trying to read [the trial judge's] lips" at that specific moment, demonstrating that the accommodation which was supposed to have been mitigating her hearing deficiency all along *was not reliable*.

Pet. App. 148–49.

The district court found that the PCR evidence further cemented the fact that "Juror 342 was not competent and should have been excused." Pet. App. 150. This evidence includes:

- "Mr. Jones testified Juror 342's hearing problems began in 1984, twenty years prior to [Bryant's] trial, and that she routinely misses things spoken directly to her in various commonplace situations, including when he addresses her from just a few feet away." Pet. App. 150.

- "Mr. Jones' testimony 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." Pet. App. 151.

- "The solicitor's PCR testimony revealed that he withdrew his repeated motion to excuse Juror 342 not because his belief that she was missing trial evidence changed, but because he was concerned with the practical ends of insulating the record against appellate review." Pet. App. 151.

- Trial counsel "invoked the vital, but unanswered, question of how Juror 342 could effectively participate in deliberations if she relied on lip reading with, apparently, limited success." Pet. App. 151.

2. *Unreasonable application of clearly established federal law.*

The district court also found the PCR court unreasonably applied federal law, as mandated by § 2254(d)(1), specifically the "bedrock constitutional right to a competent jury" by:

> glossing over the full import of Juror 342's equivocation regarding her ability to hear, the elucidating PCR testimony that exposed the profundity of her hearing impairment, and the unreliability of her proposed accommodation—lip reading—which was not revealed during voir dire and only haphazardly discovered part way through the guilt-phase evidence.

Pet. App. 156. The district court found that clearly established federal law as announced by this Court entitles every criminal defendant to a competent jury, meaning that jurors "are free from physical infirmities that would interfere with, or prevent, their ability to properly receive and consider evidence." Pet. App. 152. And while the district court "recognize[d] that there is, indeed, no Supreme Court precedent expressly dictating that a juror with substantially the same hearing deficit as Juror 342 is constitutionally disqualified from jury service," courts may still apply a legal principle to a factually similar case. Pet. App. 155–56.

The district court conceded that a defendant's due process rights are not necessarily violated "when a juror misses testimony due to inattention or sleep," but noted key differences in the present case:

> the circumstances invoked by Juror 342's hearing deficit are distinguishable from a sleeping juror scenario because an inattentive juror can be roused to wakefulness, whereas Juror 342's hearing impairment affected her ability to absorb and assess testimony throughout the trial and deliberations. No reasonable fact finder could conclude that Juror 342's hearing deficit was inconsequential when she plainly could not hear questions posed to her that were designed to test

> her hearing, when she admitted to missing testimony in both the guilt and penalty phases, and when her proposed accommodation—lip reading—proved unreliable.

Pet. App. 154–55. Given that Juror 342's impairment prevented her from reliably receiving and considering evidence, the district court determined that the state court unreasonably applied Bryant's constitutional right to a competent jury "composed of individuals free from physical infirmities that would render them substantially incapable of assimilating and evaluating witness testimony." Pet. App. 156.

V. The district court found that the PCR court made unreasonable findings of fact and applications of federal law in denying Bryant's ineffective assistance of counsel claim.

1. *Unreasonable findings of fact.*

The district court found the factual context for the ineffective assistance of counsel claim was "inextricably intertwined with the factual context [it] already analyzed with regard to" the fair trial claim and incorporated that analysis into its review of the ineffective assistance of counsel claim. Pet. App. 162. Also considering the testimony at the PCR hearing, the district court found the PCR court made unreasonable factual findings in determining trial counsel were not deficient in failing to seek the juror's removal. *See* § 2254(d)(2).

The district court found each of the PCR court's justifications for trial counsel's supposed strategic decision to retain Juror 342 unreasonable:

> The PCR Court found that trial counsel made a "strategic decision" not to seek Juror 342's removal because: (1) he did not like the alternate jurors who would replace Juror [342], and (2) he did not approve of the "paper strike" jury selection process. But these putative reasons for trial counsel's course of action 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.

Pet. App. 162 (internal citations omitted). In support of its finding, the district court noted trial counsel testified "there's no doubt that [Juror 342] did not belong on that jury," and contrary to the PCR court's determination, the district court concluded that the weight of the evidence made clear that consideration of the alternate did not influence counsel's decision as he maintained: "I don't think we particularly cared for the alternate, but *I don't think the alternate came into*. . . . It would have to be a mistrial . . . *I should have made a motion . . . for a mistrial, definitely*."[6] Pet. App. 163.

As to the second reason the PCR court identified—trial counsel's disapproval of the "paper strike" jury selection[7]—the district court explained this rationale was also an unreasonable basis for the PCR court's determination:

> If anything, trial counsel's transparent frustration with the jury selection process . . . would have provided an *incentive* to seek a mistrial, because a mistrial was the only viable route to selecting a new jury in a manner that comported with trial counsel's sense of fairness. In any

[6] Based on this testimony, the district court concluded:

> the only reasonable reading of trial counsel's PCR testimony reveals: (1) that trial counsel knows he should have sought a mistrial, because Juror 342 "did not belong on that jury;" and (2) that the prospect of an undesirable alternate replacing Juror 342 "didn't come into" the decision not to seek a mistrial, because the discussion surrounding Juror 342's excusal occurred at a stage of trial when her removal for cause would have required a mistrial.

Pet. App. 163–64.

[7] The "paper strike" method of jury selection used at Bryant's trial required counsel to exercise their peremptory strikes based on a list of juror names on a paper, without being able to see the jurors themselves while exercising peremptory challenges.

> event, it provides zero rationale for trial counsel's failure to seek Juror 342's removal from the panel.

Pet. App. 166. Moreover, the district court found "*there was no valid strategy*" to retain Juror 342 because "trial counsel knew the 'success' of the defense team's representation was dependent upon convincing at least one juror that the death penalty was not warranted," which "necessarily required jurors to assimilate and credit mitigation evidence . . . and to receive any discredit the defense was able to case on" the aggravating evidence. Pet. App. 167.

2. *Unreasonable application of clearly established federal law.*

The district court also determined the PCR court unreasonably applied the *Strickland* standard, Pet. App. 167–68, even applying this Court's heightened deference requirement when reviewing a *Strickland* claim under § 2254(d). Pet. App. 174–75. In the capital context—given that a juror can vote against death simply as an act of mercy—the district court noted that *Strickland* requires an attorney to ensure jurors can receive and consider mitigating evidence. Pet. App. 171. The district court therefore found unreasonable the PCR's legal conclusion that trial counsel made a "strategic decision" in retaining Juror 342:

> The PCR Court conflated a consideration that trial counsel stated "didn't come into it"—disapproval of alternate jurors—and a patently illogical reason *not* to seek a mistrial—disapproval of the jury selection process—with trial counsel's putatively "valid" reasons for retaining Juror 342. In actual fact, the *one* consideration that trial counsel *repeatedly* cited as his motivation for keeping Juror 342 was her race, which would, of course, have no countervailing value as against her hearing incapacity.

Pet. App. 175. The district court consequently concluded that the state court unreasonably applied the *Strickland* performance standard. Pet. App. 175.

The PCR court did not rule on the issue of prejudice, and the district court reviewed the evidence presented in mitigation and determined "the defense possessed significant mitigating evidence" creating "'a reasonable probability' that Juror 342 may have 'struck a different balance,' if she heard and considered the mitigation in its entirety." Pet. App. 174. Accordingly, the district court held that Bryant "satisfied the prejudice prong of the *Strickland* analysis." Pet. App. 174.

VI. Fourth Circuit Procedural History

A divided Fourth Circuit panel reversed the district court's grant of habeas relief. Pet. App. 7–93. However, a majority of the Fourth Circuit vacated the panel's judgment and opinion by granting Bryant's petition for a rehearing en banc. *See* Loc. R. 35(c); Pet. App. 5. Subsequently, an equally divided Fourth Circuit affirmed the district court's grant of relief. Pet. App. 1–2.

REASONS FOR DENYING THE PETITION

I. The State seeks an advisory opinion because all the bases on which the district court granted relief are not included within the scope of the question presented.

To secure review from this Court, all dispositive questions must be fairly included within the scope of the question presented. *See Glover v. United States*, 531 U.S. 198, 205 (2001). "As a general rule," the Court does not "decide issues outside the questions presented by the petition for certiorari." *Id*. Rule 14 states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). The Court disregards this rule "only in the most exceptional cases, where reasons of urgency or economy suggest the need to address

the unpresented question in the case under consideration." *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (internal quotations omitted).

In this case, the State's petition presents only one narrowly framed question:

> 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?

Petition at i. By posing the question as concerning the district court's "mere disagreement with record-supported state court fact-findings," the State frames the issue as one solely concerning the district court's application of § 2254(d)(2), which permits a federal court to grant habeas relief where the state court's merits "decision…was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

But the district court's grant of relief on Bryant's fair trial and IAC claims was not based solely on 2254(d)(2) but also on 2254(d)(1), permitting habeas relief where a state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Indeed, the district court's opinion clearly distinguished between 2254(d)(2) and 2254(d)(1) when granting relief on Bryant's due process claim.[8] *Compare* Pet. App. 144 ("The Court now finds that the PCR Court's factual findings were unreasonable, and that Petitioner has shown as much by clear and convincing evidence.") *with id.* at 156 ("The general standard at issue in Ground One is Petitioner's bedrock constitutional

[8] The question of a juror's competency and impartiality is "one of mixed law and fact." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

right to a competent jury…The Court finds that the PCR Court unreasonably applied this general standard."). The district court also applied the distinct, two-part analysis to the IAC claim.[9] *Compare* App. 167 ("Accordingly, the PCR Court's factual findings on this issue were unreasonable.") *with id.* at 164 ("The Court finds that the PCR Court unreasonably applied the well-established standard for ineffective assistance of counsel set forth in *Strickland* and its progeny."). As a result, even if this Court were inclined to determine that the district court failed to afford appropriate deference pursuant to § 2254(d)(2) (which it did not) and was "based on mere disagreement with record-supported state court fact-findings" (which it was not), the district court's habeas grant under § 2254(d)(1) would still stand.

The State's brief references to § 2254(d)(1) in Section II of its petition do not alter the analysis. This Court has been clear that it will decline to consider arguments, even if extensively briefed, when they fall outside the scope of the question presented. *See, e.g., Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) (refusing to consider an argument that petitioner devoted "much of his merits brief to" because it was outside the scope of the question presented); *see also Visa, Inc. v. Osborn*, 137 S. Ct. 289 (2016) (dismissing certiorari as improvidently granted where the question presented did not cover arguments made in the briefs); *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015) (same). Indeed, even if Section II of the petition "fairly include[s]" a question about § 2254(d)(1), that section only

[9] The inquiry into counsel's performance and prejudice under *Strickland* are "mixed questions of law and fact." *Strickland*, 466 U.S. at 698.

references Bryant's IAC claim. Bryant's fair trial relief granted under § 2254(d)(1) is untouched by the State's petition.

II. The State presents a bald request for error correction based on material misrepresentations of the record below.

The State's petition lacks a compelling reason for this Court to grant certiorari. It asks this Court to correct what the State contends is an error. According to this Court's rules, such requests should rarely be granted. *See* Sup. Ct. R. 10. Here, the Court should be especially cautious about entertaining the request for error correction because it is based on material misrepresentations of the record below.

1. *The State misstates and omits key facts to create the false impression that Juror 342's disability was identified early on and was insignificant.*

Contrary to the State's assertions, the magnitude of the juror's impairment was not immediately identified, and the judge's hearing tests demonstrated she could not hear testimony and the judge's questioning at trial. According to the State, "During voir dire, the State and the trial judge questioned the juror about her hearing." Petition at 4. This is false. While the solicitor very briefly questioned Juror 342 about her hearing, J.A. 108, the trial judge did not ask a single question about her hearing despite multiple red flags, including: the trial judge had to repeat herself when she asked for the juror's name, J.A. 95; the juror did not understand when the judge asked if she was acquainted with any of the witnesses, J.A. 97–98; and the need for substantial back and forth between the judge and the juror for the juror to understand questions related to her ability to follow the law and impose a sentence of death, J.A. 97–104.

As to the trial judge's tests of the juror's hearing, the State claims that, "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.'" Petition at 4. Again, this is false. This inquiry actually occurred at the end of the first day of the trial, after both sides had made their opening arguments and seven witnesses had already testified.[10] *See* Pet. App. 120.

Moreover, while the State repeatedly alludes to the trial court's attempts to determine the extent of Juror 342's disability, it neglects to mention that these attempts revealed that the juror's hearing was substantially impaired and that the trial court's accommodations were ineffective. For example, the State places great weight on the trial judge administering "informal tests throughout the trial to measure whether the jury was able to hear during the proceedings." Petition at 5. What the State fails to acknowledge is that the results of these tests were either inconclusive or plainly demonstrated the juror's inability to hear:

- In the first test on the second day of trial, the judge asked the jurors to raise their hand if they were not having difficulty hearing. J.A. 192–93. Although Juror 342 eventually raised her hand, the trial judge observed that she was slow to respond. J.A. 193. The State makes no mention of this delay.

- The second hearing test did not take place until three days later on the second day of the sentencing phase, when the judge asked jurors to stand if they were wearing a certain color. Although Juror 342 eventually stood when the judge asked anyone

[10] Although the district court only granted relief as to sentencing and left the results of the guilt phase undisturbed, this misrepresentation is nonetheless material because all evidence offered at the guilt phase was specifically incorporated into the penalty phase. J.A. 219.

wearing a blue shirt to rise, the solicitor observed that she might have been nudged by a fellow juror. J.A. 641, 791.[11]

- During the third test, Juror 342 was wearing a navy blue dress but remained seated when the judge asked all women wearing blue to rise. J.A. 856–57. The juror acknowledged that her dress was blue and that she did not hear the judge's question about wearing blue. J.A. 862. During the same colloquy, Juror 342 admitted she had missed some testimony. J.A. 860–64. Following this exchange, the trial judge made a specific note on the record, which the State failed to acknowledge, that the juror "indicated she just flat did not hear and I was looking directly at her and talking and even now she's having difficulty hearing me and I'm raising my voice and there's been a lot quieter voices than mine during the trial of this matter." J.A. 867.

2. *The State emphasizes the measures taken by the trial court to accommodate Juror 342's disability, but it neglects to mention that these measures were ineffective.*

The State alludes to the trial judge instructing the jurors to raise their hand if they could not hear, Petition at 4, but it fails to mention that Juror 342 never once used the signal, despite later admitting she did not hear some testimony. The State also alludes to the trial court's attempt (mid-way through the guilt phase) to accommodate Juror 342 by instructing attorneys and witnesses to face the jury so she could read their lips, *id.*, but the State again neglects the evidence that the accommodation failed. The trial judge noted, and the juror herself acknowledged, that the juror's attention was not always focused on the attorneys or witnesses, which

[11] According to the State's petition, "The trial judge had observed that the juror was beginning to respond when the other 'was nudging,' but agreed to revisit the issue the next day." Petition at 5. In fact, the record indicates that the trial judge noted that "it was really hard to gauge" whether the juror had been nudged. J.A. 791. The judge reiterated these concerns on the following day, when she told counsel, "I could not tell, and so, I'm going to test again because it's most important that all of the jurors are able to hear all of the evidence and testimony presented." J.A. 853.

would have made lip-reading impossible: "there have been some things that have brought or cause the Court some concern, times when it looks like maybe she's, she's not watching back and forth and she's not able to hear." J.A. 853.

Furthermore, there were times when the juror misunderstood straightforward questions even when the judge was speaking directly to her in a loud voice. At one point, the trial judge remarked that Juror 342 "has indicated she just flat did not hear and I was looking directly at her." J.A. 867. There was, as the judge acknowledged, "no question" that the juror was having difficulty hearing, even when the judge was looking directly at her so she could attempt to read the judge's lips. J.A. 867. The overarching problem, as lamented by the judge and solicitor, is that there is no "way to establish with absolute certainty how much" Juror 342 missed and how much she heard. J.A. 859.

3. *The State attempts to bolster the reasonableness of the state PCR court's order with "findings" not included in the state court decision.*

The State extensively quotes from the Fourth Circuit vacated panel opinion, which is a nullity following the order granting *en banc* review, and from the PCR court's oral statements that were not incorporated into the final written order of the PCR court.[12]

The Fourth Circuit panel opinion was explicitly vacated by the court's *en banc* review and references to the panel opinion, which supplemented the state court order

[12] *See, e.g.*, Petition at 9 (citing to the vacated panel opinion at appendix pages 211–212, 214); Petition at 24–25 (extensively quoting from the PCR judge's oral statements that were not included in this final order at joint appendix pages 1183–84).

are inappropriate attempts to bolster the state court reasoning. Pet. App. 2. Similarly, the oral statements by the state PCR court that appear in the transcript but were not incorporated into the state court's written order are not the findings of the state court. Pursuant to South Carolina law, only the PCR court's written findings that constitute "the final judgment of the court." *Ford v. State Ethics Comm'n*, 545 S.E.2d 821, 823 (S.C. 2001). To the extent the State may have been dissatisfied with those findings when they were announced, its remedy was to file a motion to alter or amend under S.C.R.Civ.P. 59(e). Having forgone that option, the State must live with the content of the PCR court's order. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018) (emphasizing that a federal habeas court's reviewing a state court decision must "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims").

Overall, the State's request for error correction is based on misrepresentations or omissions of portions of the state court record and external support for the state PCR court's order. This demonstrates the weakness of the state PCR court's reasoning and renders certiorari inappropriate in this case.

III. The district court appropriately and correctly determined that habeas relief was warranted on Bryant's fair trial and ineffective assistance of counsel claims.

The district court analyzed the record extensively, from voir dire to the PCR hearing. Pet. App. at 116–142. It understood the trial judge was in the best position to analyze the facts, Pet. App. at 144, and that counsel is strongly presumed to have rendered adequate assistance. Pet. App. at 110. It acknowledged the demanding

standards in § 2254(d), Pet. App. at 106–09, and self-consciously recognized that it was not "at liberty to supplant the factual findings of State tribunals merely because its subjective reading of the trial transcripts would lead it to draw different conclusions than the State courts."[13] Pet. App. at 144. Affording all appropriate deference, the district court properly granted habeas relief on Bryant's fair trial and IAC claims under 2254(d)(1) and 2254(d)(2). As the district court correctly recognized, Bryant's case is among the narrow category of cases requiring reversal under AEDPA. Accordingly, certiorari is not warranted to review the district court's determinations in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,
s/Lindsey S. Vann

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[13] In fact, the district court required Bryant meet a higher burden than required by § 2254(d)(2) by also requiring him to demonstrate that the factual findings to the PCR court were incorrect "by clear and convincing evidence." Pet. App. 144 (quoting 28 U.S.C. § 2254(e)(1)); *see also Miller El v. Cockrell*, 537 U.S. 322, 340 (2003).