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 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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In his brief in opposition, Bryant attempts to change the question presented, repurpose the record, and suggests that misapplication of AEDPA is nothing more than ordinary fact-based error. His response shows Bryant has little to offer in real defense of the district court's error. As this Court has recently underscored: "When Congress supplies a constitutionally valid rule of decision, federal courts must follow it." *Brown v. Davenport*, No. 20-826, Slip Op. at 6 (Apr. 21, 2022). AEDPA is "such a rule." *Id.* The district court failed to properly apply AEDPA, the Fourth Circuit failed to correct it, and the State seeks redress.

Bryant does not, indeed, cannot dispute: 1) there is a fully developed state court record that demonstrates the question of whether the hearing-impaired juror should have served on the jury was addressed in detail, repeatedly, at trial and challenged again in collateral proceedings; 2) at trial, his counsel and he himself personally acknowledged the impairment but requested the juror stay on the jury; 3) and, that he presented only collateral-to-the-impairment evidence in his post-conviction proceedings, failing to offer testimony from the juror or any audiology medical evidence as to the limitations demonstrated at trial. Further, Bryant cannot, and does not try, to overcome the long-standing principle that counsel's post-trial reflections on possible different strategies do not undermine the time-of-trial informed decisions. He simply asks this Court to approve the district court's reviewing the settled facts of record and drawing its own conclusions. But that *is*

the error. "'[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 293 (2010)).

The record here shows the district court abandoned AEDPA restraint, discarded facts important to the state trial judge and collateral action judge, and made its own determination as to the extent of hearing impairment, and reasonableness in retaining the juror. (Pet. at 18-30). Repeatedly, the district court impermissibly used "a set of debatable inferences to set aside the state court's conclusion." *Rice v. Collins*, 546 U.S. 333, 333 (2006).

While Bryant complains that he is entitled to the conclusions drawn from those facts by the district court, he is not. He shows no error in the state courts' critical fact-findings; consequently, the district court's review of those same facts that resulted in an opposite conclusion violates core AEDPA restrictions. Facts are involved, true, yet this Court has not allow such plain and obviously error to escape review because it involves the facts of record. *See Mays v. Hines*, 592 U.S. ___, ___, 141 S. Ct. 1145 (2021) (*per curiam*) and *Shinn v. Kayer,* 592 U.S. ___, ___, 141 S. Ct. 517 (2020) (*per curiam*). (Pet. at 31-32).

In sum, Bryant's brief offers little to dissuade this Court from granting review either procedurally, substantively or factually. The State has already set out the district court's improper treatment of the state courts' record-supported fact-finding in the petition and

will not do so again here, but will address the major points from the brief in opposition in this reply.

I. The question presented is sufficient to address the error of improperly discarding the state court fact-findings and granting relief on mere disagreement in outcome.

Bryant attempts to convince the Court that the question presented fails to incorporate all "dispositive questions." (BIO at 17). This is not only wrong, it is also telling. Bryant does not meet head on the argument that the district court erred by making its own determination of facts and credibility. (*See* Pet. at 19-23; 25-30).[1] This Court has set Bryant's hurdle high as he must show more than "the federal habeas court would have reached a different conclusion in the first instance." *Wood,* 558 U.S. at 301. In his response, Bryant offers a procedural argument to avoid the hurdle all together. Bryant alleges that there is no separate issue of a misapplication of clearly established federal law before the Court, therefore, the question presented is insufficient and could only result in an "advisory opinion." (BIO at 17-18). The argument lacks merit legally and factually.

a. Bryant is primarily wrong because he fails to consider 28 U.S.C. § 2254(d)(2)'s provision that relief may be granted when the state court decision is "*based* on an unreasonable determination of the facts" presented. (emphasis added). Essentially, Congress

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[1] Bryant is constrained to admit that Section 2254(d) is referenced in the petition, he simply argues that it is not referenced enough throughout the petition. (*See* BIO at 19).

has identified only those facts which form the basis for the ruling, *i.e.,* are essential to the state court adjudication, matter in habeas. In short, federal courts are concerned only with the foundational facts of the state adjudication. Without a reasonable factual foundation, the ruling falls.

In recognition of the importance of the factual foundation, this Court has instructed that "federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact" in the AEDPA analysis. *Williams v. Taylor*, 529 U.S. 362, 386 (2000). In *Brumfield v. Cain,* 576 U.S. 305 (2015) this Court "did not question the propriety of the legal standard," but trained its "examination of the record" to the "critical factual determinations" which it found "unreasonable." *Id.* at 314. The Court held, because the factual findings were "unreasonable," Brumfield ha[d] satisfied the requirements of § 2254(d)." *Id.* at 324. *See also Wiggins v. Smith,* 539 U.S. 510, 528 (2003) (applying *de novo* review where state adjudication rested in part on "an erroneous factual finding"). Bryant's argument runs counter to this Court's precedent.

As *Brumfield* demonstrates, if the habeas petitioner shows an unreasaonble determination of the "critical" facts, AEDPA deference restrictions are lifted and the court reviews the issue *de novo. Id.* at 307 and 314. *See also Jones v. Walker*, 540 F.3d 1277, 1288 n. 5 (11th Cir. 2008) (a federal court "is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them"); *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008) (*de novo* review applied "[b]ecause

the trial court based its decision on an unreasonable factual determination"). As the lower courts have set out, this "makes sense" since the foundational facts drive the decision. *Maxwell v. Roe,* 628 F.3d 486, 506 (9th Cir. 2010) (*de novo* review "makes sense" where there is no decision based on reasonable fact-finding); *Conner v. McBride,* 375 F.3d 643, 655 n. 5 (7th Cir. 2004) (federal court review *de novo* where fact-finding is found unreasonable given "there would be no state court analysis to apply AEDPA standards to").

Bryant also asserts that the district court set out the standard and distinguished the two subparts. (BIO at 18). That matters not. It is the ruling that matters. This Court routinely reverses lower courts that cite the standard. *See, e.g., Hines v. Mays*, 814 F. App'x 898, 904–05 (6th Cir. 2020) (quoting 28 U.S.C. § 2254 (d)(1) and (2)), *cert. granted, judgment rev'd*, 141 S. Ct. 1145 (2021), *reh'g denied*, 141 S. Ct. 2693 (2021); *Kayer v. Ryan,* 923 F.3d 692, 700 (9th Cir. 2019) (quoting 28 U.S.C. § 2254(d)(1), (2)), *cert. granted, judgment vacated sub nom. Shinn v. Kayer*, 141 S. Ct. 517 (2020).[2]

b. At any rate, if Bryant's hopeful procedural argument is construed at its most favorable, the argument still fails factually. The petition relies expressly on the full text of 28 U.S.C. § 2254(d), (*see* Pet. at 2), and argues that the district court's error

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[2] Further, there is no case from this Court directly on point in law and fact regarding retention of a hearing-impaired juror at trial. Even the district court admitted as much, (App. at 155), as did the Fourth Circuit panel majority, (App. at 32-33).

"altered the conclusion" and "AEDPA prohibits this type of review." (Pet. at 18; *see also* 27). The question is sufficient, especially considering even "[q]uestions not explicitly mentioned but 'essential to the analysis' … have been treated as 'subsidiary issues "fairly comprised" by the question presented.'" E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 457 (9th ed. 2007) (citations omitted). Bryant's argument fails.

II. Bryant fails to show any "material misstatement of fact" supporting the state court adjudication in light of the state court record.

It should be of little surprise that the State and Bryant disagree on the meaning of the state court record. Such disagreement is not a "material misrepresentation" as Bryant alleges. Further, not all misstatements or errors are "material misrepresentations." The Circuit Courts of Appeal routinely acknowledge the difference between an unreasonable determination of a non-critical fact and an unreasonable determination of a critical fact in the state court adjudication. *See, e.g., Collier v. Norris*, 485 F.3d 415, 423 (8th Cir. 2007) (even when the parties agree on a fact error, "it does not necessarily follow that the state court adjudication was based on an unreasonable determination of facts"); *Juan H. v. Allen*, 408 F.3d 1262, 1270 n. 8 (9th Cir. 2005) ("a federal court may also grant a writ of habeas corpus if a material factual finding of the state court reflects 'an unreasonable determination…'") (citations omitted). The text of AEDPA restricts the material facts to those

on which the state court "based" its adjudication. 28 U.S.C. § 2254(d)(2). Bryant does not demonstrate any material misrepresentation of facts underpinning the adjudication. None.

Initially, Bryant offers characterizations of review in place of a demonstration of factual error. He compares what he characterizes as the "brief, conclusory findings" of the state court with what he terms the district court's "meticulously analys[is]." (*See* BIO at 2-10). That is shortsighted to the statutory restriction at issue, but even more, it underscores the error – the district court revisited the same facts and reached a different conclusion. Other limitations are evident in Bryant's argument.

a. First, the number of words written does not equate with reasonableness of the adjudication. Recall that the state collateral court actually issued two orders. At Bryant's insistence the court issued the second shorter order having already 1) read the record; 2) heard the post-conviction evidence; 3) considered the post-conviction arguments; and 4) having twice before made his conclusions of law. (*See* Pet. at 8-9). In contrast, the "detailed" review by the district court was on the cold, parsed record.[3]

b. Second, Bryant has inadvertently proven another facet of the error in this case: "This Court has

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[3] The district court had referred the matter first to a magistrate judge for a report and recommendation. The magistrate concluded that Bryant "failed to demonstrate by clear and convincing evidence that the PCR court's factual findings were unreasonable in light of the record." (J.A. 1451).

long stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Davenport,* Slip. Op. at 20-21. Federal courts sitting in habeas do not look to reverse and "flyspeck" the state court's order. *Meders v. Warden, Georgia Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019) (habeas review "does not mean we are to flyspeck the state court order or grade it"). Bryant's opposition actually goes far to prove the error the State brings to this Court: "[I]t is not apparent how the [district court's] analysis would have been any different without AEDPA." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). And, though Bryant claims "material facts" are misrepresented, the state court record firmly rebuffs his assertion. Bryant's allegations as to the assertions in the petition do not go to "material misrepresentation" in the ruling, and, at any rate, may be resolved by reference to the record.

c. Bryant challenges the State's assertion in the petition that both the trial judge and the State questioned the juror in voir dire about her ability to hear. According to Bryant, the statement "is false." (BIO at 20). His perception of a misstatement is incorrect. The trial court record shows that the trial judge several times during voir dire repeated her questions to the juror, trying to be understood and to understand the juror. For instance, in one exchange, the trial court, after receiving a non-responsive answer to her question, stated:

> Listen to my question very carefully. I will instruct you as to the law… you'd indicated that you would listen to the law and you would apply

> that law. You've said you would do that … the first time I asked…

(J.A. 99). The trial judge continued to question the juror. While many answers were responsive, others were not. At another point, the trial judge cautioned again for the juror to "listen carefully." (J.A. 101). (*See also* J.A. 1431, federal magistrate noted that "both Judge Thomas and Solicitor Bailey questioned Juror 342 about her ability to serve as a member of Petitioner's jury."). The State submits this shows careful questioning on whether the juror was hearing and/or understanding the judge. Further, the prosecutor noted the juror put her hand up to ear when the trial judge was questioning her. (J.A. 108). Further still, the juror had revealed her hearing impairment prior to that on her juror questionnaire. (*See* J.A. 108). Bryant is simply wrong.

d. Bryant also questions the petition assertion that before the first witness was called the trial judge questioned the jury about hearing, and again cries "false." (BIO at 21). He then concedes the very point intended, "*the inquiry actually occurred*," though later. (BIO at 21) (emphasis added). It is impossible for him to support his assertion that material facts to the adjudication were misrepresented. Even so, the referenced petition passage, indeed, should have a qualifier to set out that the inquiry and instruction "to look toward the jury" was given immediately after the juror had advised the judge she was both hearing and "reading lips" *during the trial*, and the instruction was given *before another witness testified*. (J.A. 179-81). However, Bryant's counter-assertion is misleading. He

does not concede that the instruction was made immediately after the juror first related the information and before the first witness thereafter. Bryant, though, inadvertently bolsters the State's argument on the well-developed record regarding the juror and the trial judge's careful actions. At bottom, the record shows the trial judge was cognizant of the juror's impairment throughout the trial and pursued accommodations. Bryant simply cannot undermine the record evidence of the trial judge's careful attention to the issue.

e. Bryant then goes forward to present his position on how the facts should be viewed. (*See* BIO at 21-23). In so doing, he asks this Court to set aside AEDPA as the district court did. But avoidance of AEDPA is error. Moreover, again claiming "misrepresentation," Bryant suggests that the State "neglects to mention that" the trial court's "attempts to determine the extent of Juror 342's disability" demonstrated "substantial impairment" and insufficient "accommodations." (BIO at 21). Perhaps because that is not true, at least according the trial judge, the prosecutor, the defense attorneys, the state collateral action judge, and the federal magistrate. Further, this Court has confirmed the error in such an argument: "[I]f a petitioner alleges the state court's decision 'was based on an unreasonable determination of the facts' under § 2254(d)(2), it is not enough to show that 'reasonable minds reviewing the record might disagree about the finding in question.'" *Davenport,* Slip. Op. at 15 (quoting *Brumfield*, 576 U.S. at 314).

III. Bryant incorrectly asserts a majority of the Fourth Circuit vacated the panel opinion when the Order plainly reflects the opinion was vacated by an evenly divided court.

Turning to the misstatements in Bryant's brief, he asserts the Fourth Circuit vacated the panel opinion by granting the petition for rehearing by the full court. (BIO at 17). However, the order vacating was issued after rehearing, not with the grant of rehearing, and by an equally divided court. (*See* App. at 2). Presumably the Fourth Circuit meant what it said. Also, in reference to the panel opinion, Bryant complains of its inclusion in the discussion. (BIO at 23). He points to no reason why other than the procedural action to vacate. There is no finding of legal or factual error in the panel opinion, the Fourth Circuit en banc simply could not agree –splitting evenly seven to seven – on whether the district court properly applied AEDPA restraint. (App. 2). Bryant cannot erase history or the logic expressed in the panel opinion. *See, e.g., Alice Corp. Pty. v. CLS Bank Int'l,* 573 U.S. 208, 214–15 (2014) (related holding of divided panel later vacated in en banc review).

IV. Bryant unreasonably asserts an impropriety in considering the full of the state collateral proceedings as the history of the case.

Bryant oddly argues that if "the State may have been dissatisfied with those findings [in the collateral court's final order], its remedy was to file a motion to alter or amend." (BIO at 24). Bryant overlooks that the State *agreed* with the findings. Indeed, the record

supports those findings. The argument Bryant offers does not fit his position. At any rate, the state court record is clearly not limited to just the pages in the final order and gives context to the proceedings. Reference to same is not error. It certainly offers no basis to deny the petition.

V. Bryant's suggestion that misapplication of AEDPA is nothing more than "mere error correction" is contrary to this Court's precedent.

This point in Bryant's brief hardly requires reply. The district court egregiously misapplied AEDPA and improperly intruded in this state matter. This Court does not hesitate to take federal courts to task for failing to properly apply AEDPA. *Hines, supra, Kayer, supra.*

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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