

No. 21-8016

In The

Supreme Court of the United States

JOHN EDWARD BURR,

Petitioner,

v.

DENISE JACKSON,

Warden, Central Prison, Raleigh, North Carolina,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

John Burr was convicted of First-Degree Murder and sentenced to Death at a trial for which his attorneys were given less than 3 months to prepare. At that trial, the State withheld the statements of critical witnesses in the case against him, statements that the State concedes contradicted their testimony at trial. When Burr sought this material in post-conviction proceedings, the prosecutors claimed that it did not exist because they had engaged in “open file” discovery. When ordered by the North Carolina Supreme Court to produce their files, the prosecutors produced some of these contradictory statements, while continuing to withhold another statement of more than 100 pages. The prosecutors then incorrectly certified that they had met all of their discovery obligations. It took 15 years, and extensive litigation in the federal courts, before all of the statements that should have been produced before trial were finally provided to Burr’s counsel. In reviewing this record of default, the Fourth Circuit noted a plethora of questions that were raised, as well as a square split among the circuits.

In dismissing Burr’s Petition, and in order to avoid addressing the “plethora” of issues raised by the State’s actions, the Fourth Circuit claimed to have applied *de novo* review to all of the evidence, “old and new,” concluding that the State’s actions did not violate *Brady v. Maryland*, 373 U.S. 83 (1963). But the Fourth Circuit explicitly did not consider new evidence developed in the federal courts during these proceedings, and so did not consider all of the “new” evidence. Moreover, as to the

“old” evidence, the Fourth Circuit deferred to the North Carolina postconviction court’s factual and related findings, foregoing a *de novo* review.

The Respondent’s Opposition does not meaningfully contest these facts. Nor does the Respondent dispute that the Fourth Circuit’s hybrid *de novo* review marks the third different approach by the third appellate court to confront these questions. Rather, the Respondent urges the Court to ignore these questions and this split among the circuits by claiming that the issue presented in this Petition was, somehow, not presented to the Fourth Circuit and, in any event, is not dispositive. The Respondent is incorrect in both arguments. The Petitioner squarely presented the argument that because of the record of default in this case, the Fourth Circuit must employ a different review, and consider all of the evidence newly developed in federal court. And the consideration of this new evidence, along with the application of a true and complete *de novo* review would yield a different result.

ARGUMENT

I. This Question was Plainly Presented to the Fourth Circuit.

The issues raised by this Petition were squarely addressed in all briefs before the Fourth Circuit. In Petitioner’s opening brief, he argued that the full contents of the tape-recorded statement withheld by the State until 2015 demonstrated that Lisa Bridges was the likeliest abuser of her child, was engaged in a cover-up with her family to minimize her child’s condition, and worked with her family to place the blame on Burr. Petitioner-Appellant’s Opening Brief, ECF#10, PageID##30-32, 47-48. Anticipating that the State would object to any consideration of this withheld

statement under *Cullen v. Pinholster*, 563 U.S. 170 (2011), Burr preemptively addressed why this new statement was properly before the court. Petitioner's Opening Brief, ECF#10, PageID#47 at n. 10. Burr further discussed the evidence developed in federal habeas proceedings that revealed as flawed the premise for the opinion by the State's experts that Scott's fall with this child did not cause her closed head injury. Petitioner-Appellant's Opening Brief, ECF#10, PageID#28.

In its Opposition, Respondent well understood that one of the issues before the court was the appropriate standard of review to be applied to the evidence that had not been before the state postconviction court. Respondent thus argued that section 2254's deferential standard of review was still required, and specifically invoked *Pinholster* to argue that "[i]t would be contrary to that purpose [of exhaustion] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." Appellee Brief, ECF#17, PageID#40. The Respondent then explicitly argued that, "pursuant to *Cullen v. Pinholster*, this Court may not consider any new evidence presented, *i.e.*, any new affidavits or any other material not presented to the MAR court." Appellee Brief, ECF#17, PageID#41.

In his Reply, Burr urged the Fourth Circuit to adopt a different standard for examination of this evidence, old and new. In a section of the Reply titled "Application of *Pinholster*," Burr argued that the evidence developed during federal habeas proceedings, in light of the continued withholding of *Brady* material, meant that this was a situation in which "the gloves come off: The federal habeas inquiry

is more penetrating, and – if consistent with statute and the Rules Governing §2254 Cases – [the Court] may hear evidence that would be otherwise immaterial under §2254(d)’s limited review.” Petitioner-Appellant’s Reply Brief, ECF#21, PageID#22 quoting *Valentino v. Clark*, 972 F.3d 560, 576 (4th Cir. 2020). Burr further argued that under the Fourth Circuit’s decision in *Winston v. Pearson (Winston II)*, 683 F.3d 489 (4th Cir. 2012), deference should not be used if the state court decided a claim on a “materially incomplete” record. Petitioner-Appellant’s Reply Brief, ECF#21, PageID#23.

The Fourth Circuit also understood that these issues had been properly presented to it. Indeed, it spent 9 pages of its opinion discussing the “plethora” of unanswered questions and legal issues implicated by the State’s late disclosure of *Brady* material, and its impact on the standard of review. There is no indication by the court that, somehow, this issue was not squarely before it.

II. If a Complete *De Novo* Review is Applied to All of the Evidence, Old and New, Burr is Entitled to Relief.

In arguing that this issue is not dispositive, the Respondent, like the Fourth Circuit, employs a circular logic, one that is particularly inappropriate when analyzing evidence that was never disclosed. Both the Fourth Circuit and the State conclude that the contradictory statements by these witnesses were not “material” based on an analysis of Burr’s trial, and the issues argued there. But in doing so, they both rely on a trial in which defense counsel did not have and was not aware of these statements. At trial, counsel was forced to make strategic elections based on the evidence that the State supplied. Thus, the State grounds its argument - - and

the Fourth Circuit its analysis - - on a record in which counsel did not have significant evidence. But, in evaluating the significance of withheld evidence, the question cannot be how the evidence fits against the trial that occurred, but rather must be *how* the new evidence could have altered that trial and led to different decisions and strategic choices. *See, e.g., Valentino v. Clarke*, 972 F.3d at 583 (“[i]n the context of a credibility competition, *how* new evidence alters the evidentiary picture makes all the difference.”) (emphasis in original).

The Fourth Circuit’s decision grounded its conclusion for lack of materiality on the incomplete record created by the State - - because there was no evidence at trial that the fall was serious or could have caused this child’s death, then evidence that the fall was serious or could have caused death is not material because this was not an issue at trial. This type of analysis rewards the prosecutors who withheld this evidence for, by withholding evidence that the fall was serious, they ensured that no contrary evidence would be available and defense counsel would not be able to secure the medical testimony it needed to confront the State’s witnesses. Indeed, by withholding this evidence, the prosecutors created a vacuum in which defense counsel could have reasonably concluded that no evidence existed to support any contrary argument. At its bottom, the Respondent and the Fourth Circuit ignored the reality that there was no contrary evidence at trial because the State withheld it, not because the State’s narrative was tested in a fair adversarial process and found to be true.

If a full *de novo* analysis is done, and if the central question is how competent defense counsel armed with the suppressed evidence and the evidence developed

during habeas proceedings could have used it, it is difficult to understand how any reasonable person could conclude that the suppressed statements were not material. Considered fairly, the withheld statements impeached the State's claim that the fall was not serious and painted a picture of two witnesses who were not worthy of belief on that very issue. Scott, a child easily led and influenced, whose goal was to say what others had told him and to protect his mother, would have plainly been subject to significant challenge if counsel had been given the suppressed material. In the hands of effective counsel, Scott's desire to please and to elaborate his testimony when encouraged to do so, would have been clear to a jury. Similarly, Bridges, who the prosecutors themselves did not believe, would have been subject to serious attacks on her credibility, and particularly her responsibility for her child's abuse in light of her efforts to have her family lie for her.

If these witnesses are not credible (or far less credible) in this wholly circumstantial case), and if competent trial counsel now armed with these suppressed statements can attack what the Magistrate-Judge found was a "materially different" version of the fall presented at trial — in light of the concessions made by the State's experts in habeas proceedings — a substantial doubt about how Susie died, let alone whether Burr killed her, is created. Instead, the State presented one witness who the prosecutors did not believe was telling the truth, and another who they knew could be easily led and manipulated, all the while withholding the very evidence that would show this. And the State did so while forcing Burr's defense counsel to a trial for which they were not prepared less than 3 months after being appointed.

A full and fair *de novo* evaluation of all of the evidence, “new and old,” would be dispositive and would result in a conclusion that the information suppressed by the State had a material impact on a determination of whether Burr killed this child (or indeed, whether the closed head injury that killed this child was caused by an accidental fall), such that it “undermines confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

CONCLUSION

John Burr was convicted and sentenced to death as the result of a trial that was not a full and fair adversarial testing of the evidence because the State suppressed the statements of these two critical witnesses. The State’s suppression continued for years and into federal habeas proceedings, notwithstanding repeated representations by the prosecutors that this evidence either did not exist or had been fully produced. The issues raised in this Petition dealing with the intersection between *Brady* and *Pinholster* have never been resolved by this Court and have led to a three-way split among the three circuits that have addressed them. Petitioner urges this Court to grant its Writ and answer what the Fourth Circuit conceded was the “plethora” of unanswered questions that remain after *Pinholster*.

Respectfully submitted this 15th day of July, 2022.

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