No. 19-311

In the Supreme Court of the United States

AL CANNON, SHERIFF,
Petitioner,
v.
BRODERICK WILLIAM SEAY, JR.,
Respondent.

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

REPLY BRIEF OF PETITIONER

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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

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

Counsel for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONER

There is a lack of guidance on how to apply deference to state court fact-finding in actions filed pursuant to 28 U.S.C. § 2241. The lack of guidance has led to a published federal court of appeals decision in this Section 2241 case that afforded no deference to carefully made state court fact-finding and defines *de novo* review in a new and troubling way. This Court should grant the petition to bring clarity and order to Section 2241 review of state court fact-finding.

Seay does not dispute the absence of guidance but nevertheless asks this Court to deny the petition to protect his windfall. The gist of Seay's argument on the merits is that there is no error and that the facts support him. In taking this position, Seay fails to appreciate the well-established principle of deference to fact-finding both in prior habeas case law and ordinary appeal process; embraces a legally incorrect definition of *de novo* review; and walks back reliance on new factual assertions offered in the federal action and accepted by the Fourth Circuit's appellate fact-finding. Seay's vehicle argument also falls short as it relies on a rejection of facts of record, not the absence of facts. Seay's position is untenable.

1. Seay argues that in the absence of restrictions such as those in 28 U.S.C. § 2254, federal courts should fall back to pre-1996 standards of review. (BIO at 11). This does not help him. Deference to state court fact-finding is woven throughout pre-1996 habeas precedent. In *Townsend v. Sain*, 372 U.S. 293 (1963), a case Seay cites for support, (BIO at 9-11), this Court

encouraged acceptance of the facts as found in state proceedings and instructed federal judges:

> If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, *he may, and ordinarily should, accept the facts as found in the hearing.* But he need not. In every case he has the power, constrained only by his sound discretion, *to receive evidence* bearing upon the applicant's constitutional claim. There is every reason to be confident that federal district judges, *mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice* or to waste the time of the federal courts in the trial of frivolous claims.

Id., 372 U.S. at 318 (emphasis added).

Careful scrutiny of the record can, and should, co-exist with deference to the fact-finding of the state court unless the state court process was inadequate. *Id.*, at 316. In the delicate balance of federal habeas review of state matters, the deference to state court fact-finding works to "assure the states a meaningful role in the process of constitutional adjudication…." J. Skelly Wright & Abrahma D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895, 919–20 (1966). Such deference is subject to "one caveat," that federal courts "are not to be bound by findings wholly lacking support in the evidence." *Culombe v.*

Connecticut, 367 U.S. 568, 603 (1961). This leads back to the standard of review. Seay unquestionably misapprehends the *de novo* standard.

2. "When used properly, standards of review require appellate judges to exercise self-restraint and in so doing, act to create a more respected and consistent body of appellate law and a more efficient judicial system." Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L. Rev. 233, 235 (2009). The converse, necessarily, leads to unreliable determinations such as the one in this case. To bolster the unrestricted factual review embraced by the Fourth Circuit, Seay offers a legally incorrect, and summary, interpretation of the *de novo* standard. (BIO at 9-11). He opines no deference is due at all. (BIO at 12). Seay, like the Fourth Circuit, misapprehends what that standard commands.

a. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion")." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Rule 52 (a)(6), Fed. Rule Civ. Proc., directs that fact-findings "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Rule 52 applies in all district court matters, including habeas cases. See Rule 81(a)(4), Fed. Rule Civ. Proc. In short, appellate courts are ill-suited to make findings of fact and ordinary appellate review standards limit the ability to do so.

b. The clearly-erroneous standard for review of fact-finding is by design difficult to meet. "The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed.'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). In practice, this Court teaches that if there are two views depending on the weight assigned, the trial court's decision should prevail. *Id.,* at 574. "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* "As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo,* reversing any findings they would have made differently." *Maine v. Taylor*, 477 U.S. 131, 145 (1986).

c. This rule of limitation does not prohibit careful examination of the record, but funnels review to narrow corridors to avoid simple disagreement among judges: "…a 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499 (1984) (quoting *United States v. United States Gypsum Co.* 333 U.S. 364, 395 (1948)). The rule

recognizes and honors the historic deference afforded a trial judge based upon his "opportunity to observe the demeanor of the witnesses…." 466 U.S. at 499-500. The Seventh Circuit has vividly described the restrictive standard: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must … strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 233 (7th Cir. 1988). Seay simply does not address this long-standing principle of deference and merely asserts the review is *de novo*. Review of facts is not *de novo*. The entire system of appellate review is decidedly against Seay's summary position.

3. In the alternative, and again in summary fashion, Seay suggests "the Fourth Circuit correctly reversed the [state court] finding of 'surprise' by reviewing the 'record in its totality' (*i.e.* the entire evidence) before making its finding." (BIO at 12). Thus, the Court of Appeals *could* have been "left with the definite and firm conviction" that the state court erred. (BIO at 12-13). He persists "the prosecution's claim of 'surprise' is disingenuous at best, and the Fourth Circuit would have rightly disregarded it if it were required to review the state court's findings for clear error." (BIO at 13). The point is they did not. And the record does not support that they could. The state trial judge – who heard the assertions, knew the posture of trial, and was familiar with state practice[1]

[1] Though the Fourth Circuit roundly criticized the prosecution for not having all witnesses in the courtroom at the time the jury was sworn, to have witnesses on standby is common practice in South

–found that the prosecution was taken by surprise. Seay did not object to the fact-finding process before the trial court. This is a factual matter entitled to deference.

a. Much of Seay's argument has changed with each presentation,[2] underscoring the danger in disregarding state trial level fact-finding. See *Federal Habeas Corpus Treatment of State Factfinding: A Suggested Approach,* 76 Harv. L. Rev. 1253, 1254 (1963) ("On a purely practical level it is suggested that unrestricted reexamination of facts would burden the federal courts unduly by encouraging frivolous habeas corpus

---

Carolina (as the South Carolina judges recognized), and it is apparently so in other jurisdictions as well. The Fourth Circuit's unsupported conclusion to the contrary has sparked debate as to when and how to take witnesses into custody to avoid being accused of a lack of surprise that occurs later in trial. See https://nccriminallaw.sog.unc.edu/missing-witnesses-mistrials-and-manifest-necessity/ (last visited Nov. 26, 2019).

[2] The petition points out the magistrate rejected Seay's new assertion in the federal petition that 18 witnesses remained in light of the concession to the contrary appearing in the record. (Pet. at 30-31 citing App. 92). That assertion is walked back in Seay's brief to this Court, and is addressed below. Seay continues the pattern with a new assertion in his brief to this Court. He quotes a portion of the prosecutor's opening statement "that '[Grant] would never cooperate with the police'." (BIO at 3). Like his prior witness assertion, the record does not actually support his assertion as cast. The full passage conveys quite the opposite – that Seay and his confederates felt "safe" as "[s]urely Starteasha would never cooperate with the police. And for two years she didn't." (BIO App. 9). Read in context, the remark introduces that the witness was cooperating since that time, as previously set out in detail in the petition. (Pet. at 4-5 and 22-24).

petitions by state prisoners who hope that the federal court, unlike the state court, will believe their stories."). To embrace a system that allows evolving positions (especially on facts previously settled) undermines the policy to limit new fact-finding. At bottom, Seay encourages the Court to deny the petition so that he may benefit from an error – a position this Court has rejected in principle. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993) (defendant could not rely on overruled precedent to establish prejudice in an ineffective assistance claim).

b. Seay also ignores the possibility of remand. Though the record does not support it, if the Fourth Circuit could find Seay showed the state court fact-finding to be "clearly erroneous," he still would not be entitled to appellate level fact-finding. *See Townsend v. Sain*, *supra.* Again, Seay fails to explain why he should be entitled to appellate level fact-finding, other than the fact that the Fourth Circuit majority agreed with him.

4. Seay also implicitly concedes an error in the fact-finding – a finding he induced by the new argument offered in the district court that some 18 witnesses remained to be called. In his brief, he argues "[w]hether the prosecution could have called two additional witnesses or fourteen" there were other witnesses to call. (BIO at 16). As already explained, the district court carefully reviewed the factual record that established without contest that only 3 or 4 remained and those "depended upon" the missing witness. (Pet. at 30-31). The trial judge certainly understood the importance of the witness' testimony, a

fact Seay is constrained to acknowledge once again by reference to the trial judge's inclination to grant a directed verdict in the absence of Grant's testimony. (BIO at 3). Seay's evolving take on the facts, though, undermines his assertion of correctness in the appellate fact-finding. [3]

5. Seay persists that the prosecution was not surprised but ill-prepared; thus, this Court's precedent in *Downum v. United States*, 372 U.S. 734 (1963), and the Ninth Circuit precedent in *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), controls. As already explained there is ample evidence, set out in detail, that the prosecution met with the cooperating witness and even served her with a subpoena. Whatever basis for finding there was "no surprise" is conspicuously absent from any fair reading of the established record. As the dissent listed in detail, the record well-supports that the prosecutor did not have "knowledge and awareness" that there was an issue with the witness at the time the jury was sworn. (See Pet. pp. 22-24).

6. Seay also urges the Court to find that this case is "an inappropriate vehicle" for considering deference

---

[3] Seay also asserts Cannon incorrectly implies the trial court could not grant another continuance. (BIO at 17). His suggestion is wrong. Seay is not responding to any argument. Further, there is no part of the judge's ruling that indicated he could not carry the case over. The great uncertainty in the circumstances simply led him to believe further delay would not be warranted. The ending of the term explains the progression to a second judge, (see Pet. at 7), and is not evidence the trial court misunderstood his authority. Seay's evolving arguments, though occasionally eye-catching, lack substance and are not persuasive.

as to the consideration of alternatives because the record is silent. (BIO at 16). Once again, he is wrong. As already explained, the Fourth Circuit limited its review to the few minutes where the ruling was announced. (Pet. at 29-30). The record shows a continuance and a search *before* the grant of the mistrial. Again, Seay encourages the Court to deny the petition merely so Seay may benefit from the Fourth Circuit error.

7. To the extent Seay suggests this Court should engage in another fact review in hopes of discouraging the Court from granting the petition, a review of precedent shows fact-bound cases are not absent from this Court's grants. *See Vermont v. Brillon,* 556 U.S. 81, 91 (2009) (acknowledging factual balancing in speedy trial cases even "in close cases ordinarily would not prompt this Court's review" but accepting the case where the state supreme court's "fundamental error" warranted reversal). But Seay misses the point. Setting aside for the moment that such assertion is wrong, it does not matter. The position concedes that the State did not receive fair review in the Fourth Circuit. The petition is not premised on a plain request for this Court to reweigh established facts of record; the petition is premised on correcting the Fourth Circuit for affording no deference to fact-finding and making new, unsupported fact-finding on appeal. To teach the lower courts the correct application of the standard of review, it occasionally takes a review of the facts:

> It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can ensure observance of

> Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law.

Cash v. Maxwell, 565 U.S. 1138 (2012) (Scalia, J., dissenting from denial of certiorari) (emphasis in original).

The Court is still declaring the law. It should do so here. "While the broad purpose of habeas corpus may be 'to prevent forfeiture of life or liberty in flagrant defiance of the Constitution,' this purpose cannot be equitably achieved unless a standardized procedure is established." *Federal Habeas Corpus Treatment of State Factfinding: A Suggested Approach,* 76 Harv. L. Rev. 1253, 1272 (1963) (internal citation omitted). Congress has decided that state court factual determinations are to be afforded special deference where reviewed by a federal court after conviction. See 28 U.S.C. § 2254. There is balance in the design which promotes the important principle of federalism. It breaks logic that Section 2241 review loosens all restraint.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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

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

Counsel for Petitioner