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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-1223, Bell versus Kelly.

Mr. Bress.

ORAL ARGUMENT OF RICHARD P. BRESS

ON BEHALF OF THE PETITIONER

MR. BRESS: Thank you, Mr. Chief Justice, and may it please the Court:

The problem at the heart of this case is construing subsections (d) and (e) of 28 U.S.C. 2254 together in a way that makes sense. The last time that this Court construed those two provisions together was in Michael Williams. Michael Williams presented a different issue.

But we believe that looking at how Michael Williams would play out with a small change in the facts will help frame the issue that's before the court today.

Now, as the Court recalls, in Michael Williams the Virginia Supreme Court denied Williams the investigative assistance he needed in order to help develop a claim based on his suspicions of jury misconduct. He, therefore, didn't make the claim in State court.

On -- in Federal court he got investigative

1 assistance; and, in speaking with the investigator, two
2 of the jurors referred to the foreperson, Bonnie
3 Stinette, as Bonnie Minehart.

4 JUSTICE ALITO: Mr. Bress, before we get
5 into that, could I just ask you a threshold question?
6 We took this case to decide a question, and one of the
7 factual predicates of the question is that the State
8 court refused to consider certain evidence. And I'm
9 puzzled about that.

10 What was the evidence that the State court
11 -- do you say that the State court refused to consider
12 evidence that was proffered to it?

13 MR. BRESS: No, Your Honor. The State court
14 did not refuse to consider evidence proffered to it.
15 The State court refused to permit the full development
16 of the evidence. And if we it misled the Court we
17 certainly apologize.

18 JUSTICE GINSBURG: I didn't hear the -- the
19 last part.

20 MR. BRESS: The State court refused to
21 permit the evidence to be fully developed, Your Honor.
22 They didn't refuse to consider evidence.

23 JUSTICE SOUTER: What do you mean by that?
24 What specifically did they --

25 MR. BRESS: Specifically, Your Honor, the

1 State provided 120 days to develop the State habeas
2 petition. The Petitioners during that time developed 14
3 different claims, including the claim that's at issue
4 here today.

5 In the course of that they interviewed, I
6 think, 11 different witnesses. For the ineffective-
7 assistance-of-counsel claim they got affidavits. They
8 also interviewed all 12 jurors for five different claims
9 of juror misconduct. They interviewed five different
10 witnesses for Brady claims, et cetera.

11 They ran out of time, Your Honor, and they
12 asked the court for more time on repeated occasions.
13 They asked the court to investigate --

14 JUSTICE ALITO: But that really does not
15 present the question that you asked the Court to decide.

16 MR. BRESS: Well, Your Honor, if you read it
17 that way, it would not, but I don't read the question
18 presented that way. I read the question presented to
19 present the question of when the district court properly
20 hears evidence after a finding of diligence by the
21 prisoner and holds that the State court didn't provide a
22 full and fair opportunity to that prisoner to develop
23 the facts in State court, that where the evidence is
24 important the -- the district court may consider that
25 evidence, rather than giving deference to the State

1 court.

2 And giving deference to the State court is
3 not even on the table any longer in this case. It was
4 -- what the Fourth Circuit did -- the Fourth Circuit took
5 the new evidence into account and deferred to the State
6 court nonetheless.

7 JUSTICE SCALIA: Why wouldn't he have
8 brought that new evidence to the attention of the State
9 court first? Why wasn't he obliged to bring it to the
10 attention of the State court?

11 MR. BRESS: He didn't have the new evidence,
12 Your Honor.

13 JUSTICE SCALIA: Well, he could have a post
14 -- you know, a post-conviction proceeding in the State
15 court.

16 MR. BRESS: Actually, no, he couldn't, Your
17 Honor.

18 JUSTICE SCALIA: A State habeas.

19 MR. BRESS: I'm sorry. The -- as the
20 Virginia Commonwealth attorneys point out in their
21 amicus brief, there is a rule in the Virginia State
22 court that any facts not set out in the habeas petition
23 at the State level can't be brought in later. He wasn't
24 able to bring the facts in afterwards.

25 CHIEF JUSTICE ROBERTS: Well, weren't the

1 facts merely cumulative evidence of his claim that was
2 before the State court?

3 MR. BRESS: No, they weren't, Your Honor.
4 There were three categories of new facts or new evidence
5 that came in on Federal habeas.

6 And if I may, the first -- the first of them
7 had to do with facts that undermined the State's claim
8 of aggravation. The State relied on solely one
9 aggravating factor: that was future dangerousness. And
10 in the course of that, in developing it, their number
11 one emphasis was on one adjudicated -- unadjudicated bad
12 act, and this was a story told by Billy Jo Swartz about
13 an alleged horrific assault on her and of Tracy
14 Nicholson, who was a girlfriend of the Petitioner.

15 What the jury didn't know at the time was
16 that both Tracy and her mother, who were there, said
17 that the incident did not occur, that there was no
18 assault there, and Billy Jo Swartz was a liar.

19 Now, on State habeas, Joanne did submit an
20 affidavit and, in that affidavit, said that Billy Jo
21 Swartz had lied. That created a dispute of fact at the
22 State level, but unfortunately rather than hear the
23 witnesses to determine the credibility and -- the
24 Virginia Supreme Court instead decided against
25 Petitioner.

1 CHIEF JUSTICE ROBERTS: Well, but I think
2 that supports my suggestion, which is that the evidence
3 was cumulative. There was a dispute on that issue.
4 There was evidence on both sides. And now you say, hey,
5 we've got more evidence.

6 MR. BRESS: Well, it's not more evidence,
7 Your Honor; it's just that a dispute over the facts
8 where credibility is at issue shouldn't be decided on
9 the papers.

10 JUSTICE GINSBURG: But the Virginia Supreme
11 Court, on habeas, said we are going to accept as true
12 all the facts as the Petitioner alleged them. They said
13 specifically "all facts alleged in the petition will be
14 taken as true."

15 MR. BRESS: And if they had done that, Your
16 Honor, I think that we'd be in a different position.

17 JUSTICE GINSBURG: But they said that they
18 did.

19 MR. BRESS: They said, on the one hand, they
20 did, and yet, on the other hand, when they were looking,
21 for example, at Joanne Nicholson's testimony, they said
22 she could have been effectively impeached by other
23 statements that she had made, that in their household,
24 she had never seen Bell be physically abusive to her
25 daughter. Now, Joanne Nicholson and Tracy Nicholson

1 have said throughout that he was never physically
2 abusive to Tracy. The supposed impeachment would have
3 come from police court records that have never been
4 introduced in this case. So the Virginia Supreme Court,
5 without a hearing, just said, on the one hand, we accept
6 these facts as true and, on the other hand, even though
7 Joanne Nicholson would testify that this event never
8 occurred that way, she would have been impeached so the
9 jury wouldn't have believed it.

10 JUSTICE ALITO: Well, your argument is
11 dependent on the proposition that the claim that was
12 advanced in the Federal habeas proceeding is a different
13 claim from a claim that was adjudicated on the merits in
14 the State court?

15 MR. BRESS: That's right, Your Honor.

16 JUSTICE ALITO: And if that's the case, I
17 don't understand why your adversary is not correct that
18 it will always be possible in capital cases for an
19 ineffective assistance of counsel claim that has been
20 adjudicated on the merits in the State court to be
21 advanced and get de novo review in Federal habeas, where
22 every aspect of the defendant's life that is potentially
23 favorable can be advanced as a basis for mitigation.
24 You know, when your firm with all of its expertise and
25 resources comes into the case at the Federal habeas

1 level, will it not always be the case that you will be
2 able to find some additional mitigation evidence and
3 then, under your theory, that will be a new claim and it
4 well be -- it will get de novo review?

5 MR. BRESS: I'd like to answer that
6 question, Justice Alito, in two ways: One very
7 practical, which is that the Ninth and Tenth Circuits
8 have adopted the rule that we advocated for years. The
9 Sixth Circuit and the Fourth Circuit have adopted that
10 rule for Brady claims, and we haven't seen the flood
11 that supposedly is going to come through the gates.

12 Secondly, on a more theoretical level, for
13 someone to be able to introduce this new evidence on
14 Federal habeas, they have to first be able to
15 demonstrate that they were diligent in attempting
16 formulate it in the State court. Second, they've got to
17 be able to demonstrate that it's important and
18 importantly changes the overall factual mix. Now --

19 JUSTICE GINSBURG: I don't get the diligence
20 part because the whole ineffective assistance of counsel
21 is the client isn't expected to do any of this; it's
22 counsel that's ineffective.

23 MR. BRESS: Your Honor, I'm referring to
24 Michael Williams, which talks about diligence by the
25 State habeas counsel.

1 JUSTICE GINSBURG: So, it doesn't translate
2 into ineffective assistance of counsel because the
3 client is not the one -- the lawyer has been -- has not
4 been diligent, but there is nothing that the client
5 could do. I just don't see how --

6 MR. BRESS: Well --

7 JUSTICE GINSBURG: -- how you could talk
8 about the diligent -- the diligent client bringing up
9 the ineffectiveness of his lawyer.

10 MR. BRESS: Your Honor, we understand and
11 appreciate the diligence of habeas counsel is not any
12 kind of excuse and can't be -- statutorily it can't be,
13 actually under 2554, but what we are talking about is
14 whether the prisoner and his counsel were diligent in
15 seeking to develop the facts for their claim when they
16 were on State habeas. That's what Michael Williams had
17 to do with it. Michael Williams equated diligence with
18 reasonable efforts and said that the contrary would be
19 negligence.

20 In this case we've got a finding by the
21 district court that Bell and his lawyers were diligent
22 in seeking to develop their ineffective assistance of
23 counsel claim at State habeas. And that's what allows
24 them under (e), that's what says that they didn't fail
25 to develop the evidence under (e)(2) and allows them to

1 go through the gate of (e).

2 Now, in order to get here, you have to
3 demonstrate that diligence. You also have to
4 demonstrate that you're able to develop new facts that
5 matter, that are important, that are significant.

6 JUSTICE GINSBURG: But your use the -- to say
7 that it's a new claim, because that's what it has to be,
8 right, but it's such an extraordinary use of "claim." I
9 mean, we have exhibit cases, the notion is a claim, is a
10 tort claim or a contract claim, but not additional
11 evidence in support of the basic claim. The basic claim
12 is ineffective assistance of counsel.

13 MR. BRESS: Your Honor, I appreciate that
14 it's not "claim" as it's used ordinarily in the Rules of
15 Civil Procedure or when you're talking about making
16 claims in that sort of a complaint. However, this
17 Court, including an opinion -- *Banks v. Dretke*, for
18 example, talked about the two different Brady claims in
19 that case as separate claims, even though they were
20 withholdings by the same prosecutor. More closely even,
21 in *Michael Williams*, there were two separate
22 withholdings of evidence to impeach the same witness.

23 JUSTICE BREYER: All right. So I'm trying
24 to figure out how the statute works.

25 MR. BRESS: Yes.

1 JUSTICE BREYER: And it seems to me that the
2 way it's supposed to work -- have you read, by the way,
3 the facts of the case for December in Bell v. Cohen?
4 No? Okay. Forget that. I was going to shorthand that
5 because it's similar to the hypothetical I'm thinking
6 of.

7 What happens is that the -- the State court
8 now says, okay, I assume all the facts in your favor and
9 you don't prevail. All right. Now, he goes into
10 Federal court and he has some new facts. Now, either
11 they are such that they transform the claim and it's a
12 new claim. I mean, in that case there is an argument
13 for that, maybe not in yours, but --or they aren't. Now,
14 if they aren't, then what he is supposed to do, the
15 judge, is go look and decide on the basis of what they
16 presented to the State. That's the end of it.

17 Now, if they are, he is supposed to exhaust.
18 You go back, you exhaust this new claim like any other
19 new claim, and if the State bars it, then you go and see
20 if there was cause and prejudice. And that's how it's
21 supposed to work. And if there was cause and prejudice,
22 then you have the hearing. Okay? That's how it's
23 supposed to work factually.

24 I have no idea if that's what went on here,
25 but if it -- if it did -- it didn't seem to me -- there

1 was some confusion about whether the procedures are
2 adequate in the State. Then there is some other thing
3 that this might be the same claim. I mean, I don't see
4 how we get to the question we took this case to decide,
5 frankly, without knowing what the basis was and whether
6 it was correct for the district court to give him any
7 hearing at all.

8 MR. BRESS: Okay, Your Honor. I'd like to
9 address that. I think that that's essentially how this
10 worked in this case. What the district -- what the
11 district court did here is it first made a finding of
12 was there diligence? Because it has to do that under
13 Michael Williams to even take the next step. Did the
14 Petitioner --

15 JUSTICE BREYER: That's the first step. The
16 first step, I'd go and see -- but at any rate, you go
17 ahead.

18 MR. BRESS: Right. But it had to take that
19 step. And it had to take that step, by the way, of
20 course, with (d) in mind as well, because this Court in
21 Schriro said there is no reason to have hearing if it is
22 separately precluded by another predicate. In Schriro,
23 obviously, it was the refusal to -- to allow mitigating
24 evidence. So it does that. Then it determines
25 separately under Townsend, was there a problem in State

1 court that -- did you have a full and fair hearing, and
2 if you can prove the facts that you state, would you
3 win, and so those allowed the court the discretion to
4 hold a hearing.

5 JUSTICE BREYER: I don't see -- well, why
6 wouldn't you say right off the bat, new claim, go
7 present it to the State court, exhaust it?

8 MR. BRESS: Well, this couldn't have been
9 presented in the State court.

10 JUSTICE BREYER: Why not?

11 MR. BRESS: Well, as the State argued below,
12 it would have been procedurally default --

13 JUSTICE BREYER: No, no, no. Suppose we
14 have -- that's what I want, not these facts, but I want
15 the facts where really, he couldn't have discovered
16 this, because the first time that the district attorney
17 opened his files for the Brady claim was 140 days after.
18 So we now have some totally new, which he couldn't have
19 gotten; no one disputes it. Were it that kind of
20 thing -- I think he would have to present it to the
21 State court, wouldn't he?

22 MR. BRESS: Well, Your Honor, according to
23 the warden at least, in this case if you took let's say
24 the facts of Banks v Dretke, which this Court decided,
25 where when you were in front of the State court, what

1 you knew was that the girlfriend of the prisoner had
2 said that one of the witnesses was particularly close to
3 law enforcement, and on that basis they made a claim -- a
4 Brady claim in State court. It was denied because it
5 wasn't factually developed enough, all right?

6 So they went to Federal court and in Federal
7 court they got a lot more evidence that supported that
8 claim. They actually found out that in fact this person
9 was a Government informant, and on that basis this Court
10 found cause and prejudice and addressed that that
11 claim --

12 JUSTICE BREYER: Well, you must have been
13 assuming then that the State would not give that person
14 a -- a new opportunity to consider the new evidence.

15 MR. BRESS: And that's absolutely true here
16 as well, Your Honor. The State statute --

17 JUSTICE BREYER: Suppose it were really new.

18 MR. BRESS: The State statute is
19 unequivocal, as the State --

20 JUSTICE BREYER: Yes, but so is it in
21 Tennessee, and in Tennessee there is an exception where
22 you could bring the thing up because you couldn't
23 possibly have gotten over it.

24 MR. BRESS: Your Honor, there is no
25 exception here in Virginia that would allow you to do

1 that.

2 JUSTICE BREYER: So in Virginia a person
3 discovers for the first time, 140 days later looks at
4 the D.A.'s files, and discovers something that shows the
5 whole trial was a farce -- I mean, something
6 unbelievable, and there is no way for the person under
7 Virginia law to bring that up in a State court?

8 MR. BRESS: Not in this sort of a claim.
9 No, Your Honor, there isn't.

10 CHIEF JUSTICE ROBERTS: Well, Mr. Bress,
11 your -- your argument that this can't be brought up
12 assumes that it is a new claim rather than the same claim,
13 right? Because if it were just the same claim then the
14 question would be it is simply cumulative rather than
15 new?

16 MR. BRESS: If it's the same claim for
17 2254(d) purposes, yes, Your Honor.

18 CHIEF JUSTICE ROBERTS: Right. And I guess
19 it gets back to Justice Ginsburg's question. We usually
20 don't consider claims different if there is just new
21 evidence, but here didn't the Fourth Circuit necessarily
22 determine that this was the same claim in deciding to
23 defer to the State court findings?

24 MR. BRESS: Yes, it did, Your Honor. The
25 Fourth Circuit viewed this as the same claim and that's

1 the root of some of our disagreement with them.

2 CHIEF JUSTICE ROBERTS: And if fact you got
3 more than you were entitled to, because it did look at
4 the new evidence, albeit through the guise of deference,
5 but it shouldn't have even looked at that at all.

6 MR. BRESS: Your Honor. We would agree that
7 that -- that interim solution is not a plausible
8 solution, so we would agree with that, on the new
9 evidence --

10 CHIEF JUSTICE ROBERTS: So if we think that
11 they were right -- and again, I think we are getting
12 away from the question presented -- if we agree that
13 they are right, that this is the same claim and it's
14 just additional evidence, then you lose.

15 MR. BRESS: No, not necessarily, Your Honor.
16 We also argued on separate grounds that where the
17 State's procedure is inadequate, then the -- the State's
18 application of -- of Federal law would have been
19 unreasonable.

20 JUSTICE SOUTER: Mr. Bress, may I ask you a
21 question --

22 MR. BRESS: And if that's true --

23 JUSTICE SOUTER: May I ask you a question
24 which sort of goes to the utility of raising that issue
25 here, and it's a preliminary, not a doctrinal question.

1 But --

2 MR. BRESS: Sure.

3 JUSTICE SOUTER: -- my understanding is that
4 in the United States District Court on the Federal habe
5 -- the district court made a -- drew a conclusion based
6 on the evidence before it, no deference to the State
7 court, that in fact your client did not demonstrate
8 prejudice. And my understanding is that that --
9 although the Fourth Circuit did not rely upon that, my
10 understanding is that that -- that finding remains
11 undisturbed. Is that correct?

12 MR. BRESS: Your Honor, what the district
13 court found, as the Fourth Circuit saw it and as we see
14 it, was that the State court's finding of prejudice was
15 not unreasonable. Now, I acknowledge that when you read
16 the district court's oral ruling you won't see a
17 reference to 2254(d).

18 JUSTICE SOUTER: No.

19 MR. BRESS: However, when you look at what
20 the State court wrote in its written ruling, what it
21 says is there is a colorable claim that the State court
22 was unreasonable, on -- in both application of law to the
23 facts and development of the facts, and then it said
24 that they will -- that the court would not decide this
25 issue yet, until it has a hearing; and so the Fourth

1 Circuit looked at what the district court wrote and
2 presumed that consistent with what it had written, it
3 then confronted this issue, the issue of reasonability,
4 orally; and it didn't require that when a judge is
5 saying something orally, as opposed to putting it in a
6 written opinion, that it dot every i and cross every t.
7 It assumed that it meant what it had said earlier. If
8 this Court has any doubt about that, however, it could
9 certainly remand with instructions.

10 JUSTICE GINSBURG: I that what it was saying
11 is that we are dealing -- this is a Strickland question.
12 Strickland has two parts. Part A is were counsel
13 inadequate; and Part B is did it make any difference?
14 It seemed to me the district court was just making a
15 straight out Strickland determination and not deferring
16 to anything else. It was just saying no, I've looked at
17 all the evidence, and yes -- they certainly were -- they
18 were not effective. On the other hand, there is no
19 prejudice because using the strict Strickland test,
20 there was no reasonable likelihood that a jury would
21 have come out differently.

22 MR. BRESS: Your Honor, consistent with the
23 Fourth Circuit, we don't read him to say that. But even
24 if he meant that, the Fourth Circuit certainly on --
25 looked at this from a reasonableness standpoint, and not

1 from a de novo standpoint. So even had the district
2 court meant a de novo review and engaged in it, we still
3 didn't get the correct standard or review on appeal.

4 JUSTICE SOUTER: Oh, that may be. I didn't
5 mean to imply you didn't have a Fourth Circuit question.
6 I -- I guess I was raising a question as to whether it
7 is wise to make this the case to decide the Fourth
8 Circuit issue.

9 JUSTICE SCALIA: Mr. Bress, this case
10 involves Section 2254(d), right? Does that appear
11 somewhere in the briefs? It would be nice to have it in
12 front of me.

13 MR. BRESS: Yes, Your Honor.

14 JUSTICE SCALIA: I mean, it's a central
15 thing the case is about. I cannot find it in any of the
16 briefs. Appendix to the petition for cert; I got -- I
17 got to go back to that. Don't you think it's important
18 enough to be in your brief?

19 MR. BRESS: If I may return to the Chief
20 Judge's -- Chief Justice's question from earlier, there
21 are other new claims, new facts here that are equally
22 important in deciding whether this is a new claim. For
23 example, physical child abuse first came into this case,
24 and really was first discovered --

25 CHIEF JUSTICE ROBERTS: I know, but they're

1 -- your underlying theory is that if you get a lot of
2 new evidence, that somehow changes the claim. And
3 again, I think Justice Ginsburg -- I'm having trouble
4 getting my arms around that, and particularly since it's
5 problematic in this area where there is always new
6 evidence.

7 You're looking at someone's childhood. You
8 can always find a new anecdote, a new concern going
9 either way, that you know, this was unusual because he
10 was a good child, or this is excused because he had such
11 a bad upbringing.

12 MR. BRESS: Mr. Chief Justice, two responses
13 to this. Number one -- and you know, as I've said
14 before, this Court has used claim I think in similar
15 ways. It may have been colloquial but it at least
16 demonstrates that it can use it.

17 I'm not saying it's the most normal, or the
18 ordinary course definition, but I am saying that it's
19 the definition that's necessary to read (d) and (e)
20 together in a way that makes sense; and if I can just
21 explain why I think that's true.

22 If you look at (e), (e) says that you can
23 get a hearing even if you weren't diligent in State
24 court, if the facts that you want -- need to develop
25 were not reasonably available in State court and if

1 they would prove by clear and convincing evidence that
2 you are innocent.

3 CHIEF JUSTICE ROBERTS: All right, well
4 just -- we've got two but just to stop you on one. The
5 fact that they excuse your failure to raise and present
6 the evidence in State court doesn't mean that when you
7 get the evidence you have a new claim. It just means
8 that they are going to let you raise a claim you could
9 have raised before.

10 MR. BRESS: Well, if what they are talking
11 about is -- if that includes the ability when you are in
12 State court -- assume, for instance, House versus Bell,
13 just if can take that as an example.

14 I'm sorry, Your Honor.

15 CHIEF JUSTICE ROBERTS: I've gotten over it.

16 MR. BRESS: I don't know, but if we can --
17 if we can just look at the facts of that case briefly:
18 Assume that in State court, despite diligent a effort,
19 they were able to come up with some of the evidence but
20 not all of the evidence that they later came up with in
21 terms of the blood spattering, the DNA, and such.

22 Their claim is denied on the -- on the
23 merits because they weren't able to get much of the
24 evidence in and denied in State courts. They couldn't
25 go to Federal courts where they were able to bring in

1 all of that evidence, and let's say even more, enough to
2 prove by clear and convincing evidence that they were
3 innocent.

4 Under the warden's view, you'd still go back
5 to the State court opinion and decide whether it was
6 intrinsically reasonable. And so long as it is, you
7 wouldn't -- the State court gets affirmed, and none of
8 that new evidence of innocence comes in.

9 Now, I guess it's a possible solution, but
10 the question is: Is that what Congress really intended
11 here?

12 JUSTICE BREYER: I might say the new claim
13 -- okay, so it's a new claim. I don't know if yours is,
14 by the way, but suppose it's a new claim. Then what you
15 ought to do is go back to the State court and exhaust.
16 So now what you show is that that's futile.

17 Now we get to your question before us.
18 Okay. So it's an imaginary case. It's less imaginary
19 in December than here. But, anyway, the -- the -- you
20 get back to the State court. Now, what is supposed to
21 happen?

22 At that point I guess the statute leaves the
23 judge free to develop the facts. It doesn't say you
24 can't. Okay. So then you do it.

25 Now we have the question, which when we took

1 this we thought we could reach, but I don't know if we
2 can -- now we have the question: When the judge makes
3 the decision on the basis of those facts, if they have
4 never developed any of this in State court, fine. Then
5 have -- then just do it as if it were a regular case; don't
6 defer it.

7 But suppose some of the things have been in
8 State court related to this but not others. Now what do
9 we do?

10 MR. BRESS: Well, Your Honor --

11 JUSTICE BREYER: I mean that's not an
12 obvious answer to that one.

13 MR. BRESS: I -- I think that in -- in that
14 case, by the way, you still have to defer to the State
15 factfinding. I think you always have to when the State
16 determines particular facts.

17 JUSTICE BREYER: What it's going to do is
18 it's going to be finding facts on the basis of certain
19 evidence. And what you will have gotten your new claim
20 granted on is the fact that you found some new evidence
21 that's very significant, and you couldn't possibly have
22 found it before.

23 Now what do we do? Do we defer in part; do
24 we defer -- I mean now what does the district judge do?

25 MR. BRESS: Well, I think that, again, you

1 have to defer under (e)(1) presumably to particular fact
2 findings and find that by clear and convincing evidence
3 you've disproved those facts. But, otherwise, I don't
4 think you defer on the application of law to fact. I
5 don't think you can under Holland, et cetera.

6 Now, you know, just to make this a little
7 bit clearer, hopefully, in -- in Keeney, upon which this
8 Court drew in Michael Williams, the Court looked -- the
9 Court did -- looked at a potential distinction between
10 the failure properly to make a claim in State court and
11 the failure properly to develop the facts for that
12 claim.

13 Now, the Court looked at that distinction in
14 the context of seeing whether cause and prejudice, which
15 applied to certainly the major claim in the State court,
16 should apply to the failure to fully develop it. And
17 what it said is that distinguishing between those two
18 circumstances is irrational.

19 Now, I would submit that it's similarly
20 irrational to attribute to Congress the intent to
21 distinguish between the circumstances, or because of
22 these limitations you had in State court, despite your
23 effort, you weren't able to fully develop the record.

24 And the State decided the case on an
25 inadequate record. It comes to Federal court. Do you

1 simply defer? I mean do you simply stop when you say
2 the State court reasonably decided this case based on an
3 inadequate State court record, or do you allow that
4 record to be fully developed and decide it on its
5 merits?

6 That's, I think, the issue that we are
7 presenting today. I'd like to reserve --

8 JUSTICE SOUTER: May I just ask one quick
9 question? The -- the answer, I take it, on -- based on
10 what you just said, the answer to the -- the need-
11 to-exhaust point is you don't have to exhaust because
12 you already tried to exhaust in the State court, and
13 they didn't give you enough time to get your evidence
14 in. That is --

15 MR. BRESS: That's precisely it, Your Honor.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Bress.

19 Ms. Burnett.

20 ORAL ARGUMENT OF KATHERINE BURNETT

21 ON BEHALF OF THE RESPONDENT

22 MS. BURNETT: Mr. Chief Justice, and may it
23 please the Court:

24 The claim in Bell's case is the textbook
25 example of a claim that the effective death penalty

1 intended for 2254(d) to apply to. In the Virginia
2 Supreme Court, Bell presented his claim with his
3 allegations of what he says counsel didn't present and
4 didn't find at trial. And the Virginia Supreme Court
5 assumed the truth of all of those allegations and did
6 not contest any of them. There were never any facts in
7 dispute. The State never contested any facts.

8 The State court assumed them all true, and
9 then applied -- faithfully applied this Court's
10 established precedent under Strickland and Wiggins, in
11 particular, and weighed that evidence that he had
12 claimed had not been found by his counsel against the
13 aggravating evidence in this case of a drug dealer who
14 killed premeditatedly a police officer in a small town
15 and upon weighing that found as a -- as a matter -- as a
16 de novo matter on the merits that he could not show
17 prejudice. Because there was no reasonable probability
18 that a jury would have found a life sentence giving --
19 assuming the truth of everything he alleged.

20 Now, when he went to Federal court, the
21 Fourth Circuit faithfully applied 2254(d) to that after
22 addressing all of the same evidence and also agreeing
23 that there was no prejudice, and then said that the
24 State court decision was not unreasonable under 2254(d).

25 Now, Bell comes to this Court and says for

1 the first time that I have a new claim, and that was not
2 made below, and this is not a new claim. Everything
3 that he presented in Federal court was presented to the
4 State court. There is absolutely no difference. In
5 fact, to the effect that there was some difference in
6 the district court and the State alleged -- we pleaded
7 default because he presented a few new affidavits.

8 The district court resolved that and said:
9 I'm not even going to look at those because they aren't
10 critical to my decision. I am only going to look at --
11 and he described in particular the exact same record
12 that the Virginia Supreme Court had found. And then the
13 district court --

14 JUSTICE GINSBURG: Well, what about the
15 point that Mr. Bress made that there wasn't enough time
16 in the Virginia Supreme Court on habeas to develop
17 everything that was later put before the district court;
18 that there was a very short time to get the petition in,
19 and there were many issues other than ineffective
20 assistance of counsel?

21 MS. BURNETT: Well, Justice Ginsburg, there
22 were approximately 12 issues in this case that the
23 district court disposed of in a very lengthy opinion.
24 It was only this one issue that the district court found
25 -- believed that he needed to have a hearing on, we

1 believe erroneously. But, nevertheless, he had the
2 hearing and -- and listened to all the same evidence.

3 Nothing, Justice Ginsburg -- in our opinion
4 nothing prevented Bell from presenting the allegations
5 that were presented to the Federal court and all the
6 allegations that he presented to the State court. There
7 was no State court procedure or denial of anything.

8 JUSTICE SOUTER: Did he make any request
9 from the State court for more time?

10 MS. BURNETT: Your Honor, I don't -- I don't
11 --

12 JUSTICE SOUTER: Your brother is nodding
13 yes.

14 MS. BURNETT: He may very well have, but the
15 point is, is that there was nothing that he presented to
16 the Federal court that he didn't also present to the State
17 court. So he was not prevented from -- that -- that's a
18 red herring in this case.

19 Now, he had some very strong arguments that
20 he made in both the State court and in the district
21 court on other claims; not this claim but on other
22 claims, that he believed that he should have been able
23 to develop certain evidence. And the district court
24 actually on those other claims -- some of them, it found
25 faulted and some not. But not on this claim. On this

1 claim --

2 JUSTICE SOUTER: If we had -- if we had --
3 and I -- I emphasize I'm -- I'm not suggesting this is
4 your case. But if we had a case in which with respect
5 to the disputed issue he had asked for more time -- I'll
6 make it easy. He had asked for more time and -- and had
7 -- had indicated that there were leads that needed to be
8 followed that couldn't be followed unless he got more
9 time and so on, and the State court refused. Could he
10 then come into the Federal court and say: My claim here
11 is not only ineffective assistance, but ineffective
12 assistance with the overlay of the refusal of the State
13 courts to give me an adequate opportunity to develop my
14 -- my ineffective assistance claim? And if he made a
15 colorable showing on those two issues, would he then
16 have an opportunity for a Federal evidentiary issue, and
17 would the findings that eventuated from that be subject
18 to -- in effect, to -- to being short-circuited by
19 deference to the State court findings?

20 MS. BURNETT: I think my answer to that has
21 to be that it depends because the statute before the
22 effective Death Penalty Act in 1996 had clearly had those
23 -- what we would call the Chandler v. Dane factors in which
24 you would look at the adequacy of a State court process.
25 Those were removed after 1996, so the statute does not

1 provide authority for a Federal court to go in and
2 determine was the process adequate if the decision,
3 itself, was reasonable. Now if we are talking -- this
4 is why this case --

5 JUSTICE SOUTER: But if you don't -- I guess
6 what I'm getting at is if we don't in that circumstance
7 recognize that there is a legitimately different claim
8 which is not, for the reason I suggested to Mr. Bress,
9 not subject to further exhaustion requirements because
10 they tried and the State court wouldn't let them do
11 it -- if we don't in that case recognize that there is a
12 claim that can be litigated in the Federal court, which
13 will not be subject to deference to State court
14 findings, then there is a very clear hole in the law,
15 and I assume Congress didn't mean to leave it. I
16 understand you're saying that is not this case. But
17 isn't that a legitimate problem to -- to face at some
18 point?

19 MS. BURNETT: Justice Souter, we don't
20 believe so and here's why: Because it is true, Congress
21 did not change the procedural default doctrine. In the
22 Effective Death Penalty Act Congress left that alone.
23 In fact, this Court recognized that in *House v. Bell*.
24 The -- the -- so when we are talking about new facts or
25 new claims, either one, you're talking about unexhausted

1 or defaulted matters, which the district courts are very
2 familiar how to handle that. Has he shown cause and
3 prejudice? Has he shown diligence?

4 JUSTICE SOUTER: I think you're right in the
5 main. I think that's generally correct. The case that
6 I'm concerned with is the case of the -- of the Brady
7 claim, because if we are proceeding under (e) then as I
8 understand the cause and prejudice can only be
9 established in the case we are talking about if there
10 can be shown a probability of a different verdict.

11 The Brady standard, however, does not
12 require the probability of a different verdict. Brady
13 uses the term "reasonable probability that there would
14 have been a different result," but that has been clearly
15 defined in the cases to mean reasonable possibility. So
16 that in fact with respect to Brady claims subsection (e)
17 is imposing a higher requirement than Brady did and a
18 higher requirement than would have been applied before
19 Brady. And that is the case, it seems to me, that we --
20 it may not be this case, but that's the case that we've
21 got to be concerned about in coming up with doctrine
22 here. Isn't that a legitimate concern?

23 MS. BURNETT: Justice Souter -- and I agree
24 that's not this case. But this Court's already crossed
25 that bridge. That was Michael Williams. Michael

1 Williams was where the individual comes to Federal court
2 with brand new evidence and he has no remedy left in
3 State court. It is defaulted, and what do we do with
4 that? And this Court very clearly -- now, as the issue
5 was presented to this Court in that case it was whether
6 he gets a hearing or not, so that's what was addressed.
7 But this Court also addressed the fact that it most
8 likely was and was a defaulted claim and that it --

9 JUSTICE SOUTER: But I don't -- I don't think
10 this Court understood the implication of it when you get
11 into the Brady issue. And my only concern is we've got
12 to leave that door open because I don't think Williams
13 confronted that.

14 MS. BURNETT: And I -- I agree with Your
15 Honor that it's not this case. I think Michael Williams
16 addresses it and I think that the current existing in
17 place cause and prejudice and actual innocence
18 exceptions to default answer all of that. And I believe
19 that --

20 JUSTICE SOUTER: I understand your position.

21 JUSTICE BREYER: I'm still trying to
22 understand the statute. I think their point is we get
23 around (d); (d) doesn't bar us because the district
24 court here, the Federal district court, found that it
25 was an unreasonable determination of the facts, not

1 unreasonable on the substance, but unreasonable because
2 of the procedure. In other words, the State that barred
3 this evidence was having an unreasonable procedure and
4 therefore the determination of the facts is
5 unreasonable. So you're saying that isn't what those
6 words "unreasonable determination of the facts" mean.

7 MS. BURNETT: Well, what I'm saying --

8 JUSTICE BREYER: You mean you're saying that
9 (d)(2), "unreasonable determination of the facts," means
10 the factual outcome. In other words, if the factual
11 outcome is reasonable it doesn't matter if the
12 procedures are inadequate; is that your claim?

13 MS. BURNETT: Well, no. I believe that --

14 JUSTICE BREYER: No? I thought you just
15 said that in answer to Justice Souter.

16 MS. BURNETT: I believe that (d)(2) very
17 clearly -- yes, I think I'm agreeing with you that
18 (d)(2) addresses the actual facts which underlay the
19 State court decision.

20 JUSTICE BREYER: And not whether their
21 procedures are correct?

22 MS. BURNETT: Correct.

23 JUSTICE BREYER: Okay.

24 MS. BURNETT: Correct.

25 JUSTICE BREYER: Okay. So that's the first

1 thing we have to decide to get to the question. If your
2 wrong on that -- and I doesn't know the answer to it --
3 if you're wrong on that, then they're rid of (d). So
4 they say then, we're rid of (e) because it falls within
5 (a)(2), the factual predicate and due diligence, okay?
6 They say we are rid of (e) because of that. Now, how
7 they get around capital (B) I'm not sure, but that isn't
8 in the case.

9 MS. BURNETT: Justice Breyer, I'm not sure
10 they they've argued those exceptions (a)(2) at (i) and
11 (ii). I believe they're simply arguing -- my reading --

12 JUSTICE BREYER: They're arguing due
13 diligence.

14 MS. BURNETT: My reading of their brief is
15 they are saying: We are Michael Williams and all
16 Michael Williams dealt with was the opening sentence of
17 (e)(2).

18 JUSTICE BREYER: (I). You mean of (e)(2) --

19 MS. BURNETT: Of (e)(2).

20 JUSTICE BREYER: Of (e)(2).

21 MS. BURNETT: "If the applicant has failed
22 to develop," and Michael Williams interpreted that as
23 someone who has not been diligent in developing the
24 record.

25 JUSTICE BREYER: Okay. So we also get --

1 they get around that because they say the due diligence.
2 So you also have an argument about how (2) applies. And
3 if you're wrong about both of those then we get to the
4 question, which would be: If the -- if the hearing's
5 properly before us and it's a new claim -- it's also
6 saying it's a new claim -- if it's a new claim it has to
7 be exhausted. So under Virginia law -- under Virginia
8 law, is it really true that -- suppose, not this case,
9 but suppose a Defendant 140 days after discovers the DA
10 says -- makes some remark. He couldn't have known about
11 it. He goes to a special file. He couldn't have found
12 out about. And lo and behold, it's the worst thing you
13 can imagine, and you can imagine some pretty bad ones
14 but this is even worse. Now under Virginia law are
15 you -- is it your view that Virginia courts would say
16 you're out of luck, good-bye?

17 MS. BURNETT: Yes, Your Honor, and this
18 Court has recognized that --

19 JUSTICE BREYER: No matter what, it's
20 goodbye?

21 MS. BURNETT: Yes, and here's why: Because
22 Virginia has twin statutes that would bar any further
23 applications to State court. One is the statute of
24 limitations that is strictly applied and the other is a
25 statute which says in essence --

1 JUSTICE BREYER: No excuse? Even if --

2 MS. BURNETT: That's correct.

3 JUSTICE BREYER: Okay.

4 MS. BURNETT: And this Court has recognized
5 that --

6 JUSTICE BREYER: So they are right about,
7 they are right about the exhaustion being futile.

8 MS. BURNETT: It is defaulted, yes, Your
9 Honor. They are -- in Virginia those are defaulted claims,
10 and now we are in Federal court with those claims. The
11 Federal court judges are very familiar with how to deal
12 with them. Has he shown cause and prejudice?

13 JUSTICE BREYER: The first time he discovers
14 DNA evidence in the DA's file that shows he couldn't
15 have done it, there is no way to get relief under
16 Virginia law?

17 MS. BURNETT: Not in State court.

18 JUSTICE BREYER: Not in State court.

19 MS. BURNETT: No, Your Honor.

20 JUSTICE BREYER: Okay, then they're right
21 about that.

22 MS. BURNETT: That's correct. So now he is
23 in Federal court and he has -- he has the thresholds of
24 cause and prejudice or actual innocence. And that's a
25 very familiar thing, is what I'm saying, is that the

1 district courts are familiar with.

2 JUSTICE BREYER: Okay, then let me ask you
3 on the merits. If he's right there and it's exhaustion
4 and it really was a new claim, then wouldn't we apply a
5 decision that does not defer to the State court, because
6 after all the State court never heard this issue?

7 MS. BURNETT: If we are talking -- that's not
8 this case. But in a hypothetical case where there are new
9 facts, unexhausted defaulted claims or facts that are
10 presented to a Federal court --

11 JUSTICE BREYER: Okay. There is no real
12 argument between the two of you as to the -- as to the
13 issue that we thought was presented.

14 MS. BURNETT: Well, I think not.

15 JUSTICE BREYER: But there's certainly an
16 argument --

17 MS. BURNETT: The argument is --

18 JUSTICE BREYER: If it's really a new claim,
19 you're going to say they applied --

20 MS. BURNETT: Well, our argument is that,
21 Court, don't use this case to say that, because if the
22 Court uses this case to say that it will be putting its
23 imprimatur on what the district court did in holding a
24 hearing when we don't think it was appropriate.

25 CHIEF JUSTICE ROBERTS: The Fourth Circuit

1 -- I'm sorry to interrupt you, but the Fourth Circuit
2 didn't decide that question either.

3 MS. BURNETT: They did not. It was not
4 presented to them, Your Honor.

5 Nothing --

6 JUSTICE SCALIA: How do you want us to
7 dispose of the case that doesn't -- that doesn't do
8 that? What do you want us to do?

9 MS. BURNETT: I think the Court could
10 dismiss this as improvidently granted.

11 JUSTICE SCALIA: That's it?

12 MS. BURNETT: I think the Court could do
13 that.

14 JUSTICE STEVENS: May I ask you, so I
15 understand your position on the underlying question if
16 we don't dismiss. Am I correct that the granting of an
17 evidentiary hearing was based on a showing by the
18 Petitioner that he failed to develop facts which might
19 change the result?

20 MS. BURNETT: Justice Stevens, there was
21 never any showing, there was never any showing of
22 diligence.

23 JUSTICE STEVENS: Why did the -- why did the
24 Federal court grant a hearing?

25 MS. BURNETT: The Federal court simply

1 announced that he was going to hold a hearing on this
2 claim and decide later --

3 JUSTICE STEVENS: Wasn't he only entitled to
4 do that on the basis of a showing that there was more
5 evidence that the State court did not consider?

6 MS. BURNETT: Yes, Your Honor. I believe
7 first he had --

8 JUSTICE STEVENS: So maybe the district
9 court was dead wrong, but the assumption I think we made
10 when we took the case was that there was a body of
11 evidence that had not been available in the State
12 proceeding that might be available in the Federal
13 proceeding.

14 MS. BURNETT: I think that was the
15 misunderstanding.

16 JUSTICE STEVENS: And if that were true -- I
17 know you disagree with that and I understand your
18 argument. Maybe we shouldn't have taken the case. But
19 if that were true and the Federal court then had to
20 decide on the basis of all the evidence, do you read the
21 statute to say at that time he may only rely on the
22 evidence presented to the State court?

23 MS. BURNETT: The way I read the statute is
24 that that is the first thing that the judge was required
25 to do. He had to first determine whether the State

1 court's decision was reasonable.

2 JUSTICE STEVENS: All right. Suppose he
3 looked at the State court evidence and he says, that was
4 not enough. The State court's decision on the merits
5 was reasonable based on that record. I have a different
6 record before me. May he look at the different record?

7 MS. BURNETT: He can -- I think -- I think
8 then we are talking about what I was just saying, new
9 facts, new claims.

10 JUSTICE STEVENS: That's what we're talking
11 about. May he look at it?

12 MS. BURNETT: And then the judge has to go
13 through the determination, before he can decide whether
14 he can look at it, of whether these new facts or new
15 claims meet cause and prejudice or actual innocence.

16 JUSTICE STEVENS: All right. Forget the
17 cause and prejudice for just a moment. But if he looks
18 at that new evidence and he decides that any neutral
19 judge would have reached a different result from the
20 State judge on that evidence, may he reach that result?

21 MS. BURNETT: I don't think just -- I do not
22 believe the judge can do that --

23 JUSTICE STEVENS: Then what's the point --

24 MS. BURNETT: -- just simply to say I'm
25 going to look at just the correctness of the decision

1 first, and then decide whether it's correct.

2 JUSTICE STEVENS: What you're saying is the
3 correctness of decision based on the State court record.
4 And if he decides there was a sound decision on that
5 record, that's the end of the ball game; is that your
6 position?

7 MS. BURNETT: Well, I think it is, unless --
8 unless there are actually new matters that are presented
9 to the Federal court that the Federal court now is going
10 to --

11 JUSTICE STEVENS: It's the same claim. It's
12 the same claim.

13 MS. BURNETT: Yes. Even on the same claim.

14 JUSTICE STEVENS: Then it seems to me the
15 statute has constructed a pointless procedure.

16 MS. BURNETT: Your Honor, I -- I don't see
17 that at all. It seems to me it's a very orderly
18 progression, that the -- that the -- the Effective Death
19 Penalty Act is now telling district court judges, and
20 has made clear that it's doing this for judicial -- for
21 purposes of judicial economy, for finality, for --

22 JUSTICE SCALIA: Why shouldn't the district
23 judge in light of the new evidence decide whether the
24 judgment of the State court was -- would have been
25 reasonable if it came out the same way, including this

1 new evidence in the -- in the consideration? Why
2 shouldn't he do it that way?

3 MS. BURNETT: It could do that, Justice
4 Scalia.

5 JUSTICE SCALIA: I know it could. But I'm
6 asking whether it should.

7 MS. BURNETT: I think -- I think that
8 doesn't really fit with the statute -- with the
9 statutory language.

10 JUSTICE SCALIA: Well, it seems to me the
11 statute certainly contemplates that the States have the
12 first --

13 MS. BURNETT: Yes.

14 JUSTICE SCALIA: -- the first cut at this
15 thing, right? How else do you give them the first cut?

16 MS. BURNETT: Yes. Absolutely. And that's
17 what I'm saying, and I think that -- to -- if the claim
18 is going to in any way differ, it's going to change from
19 what was presented to the State court. On one level,
20 that is all new matters that are defaulted, and in a
21 very literal sense how can -- and I don't believe
22 Congress intended for a Federal court to look at new
23 matters, however they got to them, that were not
24 presented to the State court, and on that basis
25 determine whether the State court's decision was

1 reached.

2 JUSTICE SCALIA: So the Federal court is
3 supposed to do what?

4 MS. BURNETT: The Federal court is supposed
5 to first look at the claim that was presented to the
6 State court, under 2254(d), and the claimants before it.
7 If it's the same claim, if it's the same matters that
8 were adjudicated on the merits in the State court, it
9 has to make the decision up front, was it reasonable or
10 not?

11 JUSTICE SCALIA: Okay.

12 MS. BURNETT: Okay. Now it makes that
13 decision, and then after that, if the Petitioner says
14 well, I have new matters, that I never presented to the
15 State court, the Federal court has a -- a road map.

16 JUSTICE SOUTER: No -- but the road map
17 that you are now saying should be followed is the same
18 road map implied by -- in your earlier answer to Justice
19 Scalia, your reference to the new claim as being a
20 defaulted claim.

21 MS. BURNETT: Yes.

22 JUSTICE SOUTER: But we are concerned -- I
23 think we are all concerned with the -- with the claim in
24 which it is not defaulted, in the sense that he is at
25 fault in any way for failing to get it into the Federal

1 court -- I'm sorry -- get his entire presentation now
2 into the State court then. So that it is not a
3 defaulted claim in the classic sense. It is not a claim
4 in which he is at fault by having failed to present it
5 in the State court.

6 And in that case, if it cannot go back, if
7 the State court will not take it back, don't we have to
8 find at least implicit in the totality of subsections
9 (d) and (e) the possibility of litigating the -- the
10 fully developed claim in the Federal court without a
11 need to defer to the State court findings?

12 MS. BURNETT: If implicit in your question
13 is -- yes, implicit in your question is that the
14 Petitioner has demonstrated cause; and he may or may not
15 have depended on the facts.

16 JUSTICE SOUTER: Well, he -- I agree with
17 you on the -- on the cause part; but the -- up to this
18 point. He has got to demonstrate cause and prejudice or
19 at least he has got to develop cause. Let me put it --
20 ask you this question. If he simply says look, I tried
21 to get this in to the State court, and he shows that,
22 but the State court for whatever reason just would not
23 take the evidence that he wanted to put in, is that
24 enough for him to have --

25 MS. BURNETT: It may be. It may be. And

1 once again, that's certainly not this case.

2 JUSTICE SOUTER: I'm -- I'm not asking to
3 you stipulate --

4 MS. BURNETT: Right.

5 JUSTICE SOUTER: -- that it's this case.
6 But it's the case we are worried about around the
7 corner.

8 MS. BURNETT: It may be. If that is --
9 this Court -- that's why I'm saying it's a very
10 established law as to what cause is, an external
11 impediment. I mean, this Court has many cases that
12 describe that. The lower courts are very familiar with
13 determining that, and so they can -- they are capable to
14 making that determination as to whether the Federal court
15 can now look at a new matter whether it's a new claim
16 or --

17 JUSTICE SOUTER: But all we are -- I think
18 all we are really getting at is that there are different
19 kinds of new matters. There are some new matters of
20 which he absolutely knew nothing at the State court
21 stage, and he is now saying don't hold that against me:
22 i.e., I'm showing cause and I'll show prejudice. This
23 is new matter that he did or potentially know about and
24 tried to get into, and under our hypothesis, the State
25 court says no, I'm not going to hear it, or I won't give

1 you the time, whatever the case may be.

2 In that case, isn't it -- don't we have to
3 say under the statute all he has got to show is cause in
4 the sense that he tried and the State court wouldn't let
5 him? In order to --

6 MS. BURNETT: And that may -- and that may
7 very well constitute an external impediment --

8 JUSTICE SOUTER: Okay.

9 MS. BURNETT: -- to him being able to
10 present it.

11 JUSTICE SCALIA: Having established cause,
12 he would then in your view not have the Federal court
13 decide the matter de novo. But the only question before
14 the Federal court was whether there was in addition
15 prejudice.

16 MS. BURNETT: Correct.

17 JUSTICE SCALIA: That is to say, whether --
18 but for the error, any reasonable factfinder would find
19 by clear and convincing evidence that he was innocent --

20 MS. BURNETT: Correct.

21 JUSTICE SCALIA: -- right?

22 MS. BURNETT: Correct. And --

23 JUSTICE KENNEDY: Is their position -- is there
24 room for the district court to hold an evidentiary
25 hearing?

1 MS. BURNETT: Well, I think then you get --
2 that's -- I think it's actually a separate matter. We
3 first have to get to whether the Federal court can look
4 at a new matter de novo. If it can look at it de novo
5 then I think we go to the pre-Effective Death Penalty
6 Act law about when you have a hearing. Are they
7 disputed facts? Are they -- that make a difference?
8 Is it something that actually, you know, needs to have
9 resolution in a hearing?

10 JUSTICE KENNEDY: Can you envisage
11 circumstances in which an ineffective counsel
12 assistance, an ineffective assistance of counsel claim
13 was presented in the State court and then there is a
14 second ineffective assistance in counsel's claims or a
15 further supplemental ineffective assistance of counsel
16 claim based on new evidence that the district court
17 might hear? Does that ever happen?

18 MS. BURNETT: I think it can happen,
19 certainly. I don't think it's restricted just to Brady.
20 I mean, I think that it -- it is -- it is the same
21 analysis, no matter what the claim is, it's the same
22 analysis that the Federal court needs to go through to
23 look -- to see whether it can consider new matter.

24 JUSTICE KENNEDY: So you think there could
25 be instances, we might imagine, in which there could be

1 two ineffective assistance of counsel claims, the second
2 of which could be heard in the district court with
3 evidentiary -- with an evidentiary hearing?

4 MS. BURNETT: I think it's certainly
5 possible. I think that the statutory setup and this
6 Court's established habeas procedures that it's had in
7 place for decades permits that.

8 JUSTICE SCALIA: I guess the State court can
9 say, you know, 60 days after the trial is -- is
10 doomsday. No more new evidence. We are not going to
11 consider anything new after that, even if you find Brady
12 stuff or anything else. Suppose that's
13 unconstitutional -- but it isn't. I mean, is that
14 unconstitutional?

15 MS. BURNETT: Well, no, Your Honor, I don't
16 believe it is. In fact, the State court -- we don't
17 have to provide for direct appeals.

18 JUSTICE SCALIA: Right. So if it's not
19 unconstitutional, then you just provide what you say,
20 that the district court sees whether by clear and
21 convincing evidence the case would have come out the
22 other way.

23 If it were unconstitutional, and I guess
24 this is what is sticking in our craw -- my craw,
25 anyway -- if it were unconstitutional, it seems to me

1 there ought to be a way to make the State take the first
2 cut at it. Make the State say oh, yes, even with this
3 new evidence we would still find this person guilty; and
4 then in Federal habeas you would -- you would apply the
5 deference that 2254(d) requires. You'd ask whether that
6 was a reasonable determination.

7 MS. BURNETT: Right. And all I can say to
8 that, Justice Scalia, is this Court has never held that
9 the Constitution applies anywhere after the direct
10 appeal, and that's only the right to cancel.

11 JUSTICE SCALIA: That's the fallacy in my --
12 in my reasoning. Or you're saying I shouldn't be
13 troubled by what has been troubling me, namely that he
14 had no way to get this before the State court. They are
15 entitled to close -- close the gates?

16 MS. BURNETT: Yes, Your Honor. And it's a
17 collateral review; that's where they are closing the
18 gate, not on direct review.

19 If there are no further questions, I simply
20 ask to affirm.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 REBUTTAL ARGUMENT OF RICHARD P. BRESS

23 ON BEHALF OF THE PETITIONER

24 MR. BRESS: I'd like to start where --

25 CHIEF JUSTICE ROBERTS: You have three

1 minutes remaining.

2 MR. BRESS: I'd like to start where the
3 General left off. In McNeal and Claudy, this Court did
4 hold that, in certain instances, a State habeas court
5 must hold a hearing if there are facts in dispute and
6 they are not willing to assume them. I agree that a
7 State doesn't have to have a proceeding at all, but if
8 it has one, it has to be fair.

9 I know that my time is short. I'd like to
10 go through some of the questions you've asked.

11 The State did deny us additional time,
12 expert assistance discovery, and a hearing in this case.
13 The Federal court specifically found that we were
14 diligent. That's at 84a. And in Michael Williams, this
15 court said that the finding of diligence also
16 constituted a finding of cause for purposes of cause and
17 prejudice, which makes sense because you've got a
18 prisoner who has done the most they can and yet hasn't
19 been able to fully develop the record. There was no
20 external impediment. As you'll recall, in Michael
21 Williams, the information was there; it was just very
22 hard to find.

23 Finally, we presented very substantial new
24 evidence on the Federal level here. It's simply not
25 true that there is no new evidence. The new evidence

1 included evidence undermining the sole aggravating
2 factor, both the live testimony of Joanne Nicholson,
3 which allowed the court actually to determine whether
4 she would have been a credible person to undermine the
5 testimony. The State had held on the papers she wasn't
6 credible, which the State can't do on the papers.

7 Secondly, the evidence said he was
8 physically abused as a child. He was beaten with
9 electrical cords, with planks, with a belt, leaving the
10 scars on his body that he bears today. He saw his
11 father knock his mother's teeth out for trying to
12 protect him.

13 JUSTICE ALITO: What is the test for
14 determining whether the addition of new evidence is
15 sufficient to make it a new claim?

16 MR. BRESS: Your Honor, I think the test
17 really ought to be whether an objectively reasonable
18 jurist could find it important in the overall mix of
19 information. And it just strikes me that, if you're the
20 judge in that kind of a case, what you're going to go
21 through is -- if I accept that the State court was right
22 with the evidence that it had and I sort of put myself
23 in that frame, would I, nonetheless, if I were that
24 State court, have found this evidence important when I'm
25 making this decision?

1 JUSTICE SOUTER: It's a materiality
2 standard, really.

3 MR. BRESS: Exactly, Your Honor.

4 CHIEF JUSTICE ROBERTS: So, it's a new claim
5 if it is one on which you would have prevailed, but it's
6 the same claim if the result would be the same.

7 MR. BRESS: I don't -- I don't think it
8 necessarily has to be that way, Your Honor. I think you
9 can have a case where the evidence that was before them
10 was absolutely nil; now they're offering a good bit of
11 evidence that you would at least want to weigh as an
12 objective jurist, even though you decide against them.
13 I think that's possible.

14 I think the reason you've got to adopt this
15 position, however, is that there is no DNA -- I mean, no
16 innocence exception that the General has put forward.
17 If the General is right, it isn't a new claim just
18 because you now have DNA evidence that proves you're
19 innocent. You made that claim of innocence earlier in
20 the proceeding, in your earlier ineffective assistance
21 of counsel claim. What you have new now is you've got
22 the DNA evidence. In her view, it's the same claim.

23 JUSTICE SCALIA: Well, you know, it does
24 read -- 2254(e) -- it does read, "a factual predicate
25 that could not have been previously discovered through

1 the exercise of due diligence." That sounds like
2 exactly what you're describing, the discovery of DNA
3 evidence you didn't know about.

4 MR. BRESS: And I agree completely, Your
5 Honor, that (e) says you can hear it, but the Attorney
6 General says you can't because under (d), she'd say,
7 you'd already be foreclose because the State court has
8 already adjudicated your claim on the merits --

9 JUSTICE GINSBURG: I think she said --

10 MR. BRESS: -- and these new facts don't
11 count.

12 JUSTICE GINSBURG: -- she answered -- the
13 answer that I heard is the same thing that you could
14 have on the Brady claim you could also have for
15 ineffective assistance of counsel. It's a wholly new
16 matter. I thought that's what she said.

17 MR. BRESS: Your Honor, I think she said
18 that what you would have to look for, I think, is
19 whether "wholly new matter" means "new evidence." If
20 she says it's new evidence, such as new DNA evidence, we
21 agree completely. That's not what she said previously
22 in this case. Previously, she had said that new
23 evidence in that sense, like DNA evidence, can't make
24 that claim a new claim and, therefore, you're foreclosed
25 under 2254(d), so long as the State court's opinion is

1 intrinsically reasonable based on its inadequate record.

2 JUSTICE SCALIA: Mr. Bress, I want to
3 apologize to you for accusing you of not printing
4 2254(d) and (e) in your brief. You indeed did.

5 MR. BRESS: Well, thank you, Your Honor. I
6 thought --

7 JUSTICE SCALIA: I'm grateful for your not
8 throwing it in my teeth.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 12:12 p.m., the case in the
13 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>ability 23:11</p> <p>able 6:24 10:2 10:13,14,17 12:4 23:19,23 23:25 26:23 30:22 48:9 52:19</p> <p>above-entitled 1:11 56:13</p> <p>absolutely 16:15 29:4 44:16 47:20 54:10</p> <p>abuse 21:23</p> <p>abused 53:8</p> <p>abusive 8:24 9:2</p> <p>accept 8:11 9:5 53:21</p> <p>account 6:5</p> <p>accusing 56:3</p> <p>acknowledge 19:15</p> <p>act 7:12 31:22 32:22 43:19 49:6</p> <p>actual 34:17 35:18 38:24 42:15</p> <p>addition 48:14 53:14</p> <p>additional 10:2 12:10 18:14 52:11</p> <p>address 14:9</p> <p>addressed 16:10 34:6,7</p> <p>addresses 34:16 35:18</p> <p>addressing 28:22</p> <p>adequacy 31:24</p> <p>adequate 14:2 31:13 32:2</p> <p>adjudicated 7:11 9:13,20 45:8 55:8</p> <p>adopt 54:14</p>	<p>adopted 10:8,9</p> <p>advanced 9:12 9:21,23</p> <p>adversary 9:17</p> <p>advocated 10:8</p> <p>affidavit 7:20,20</p> <p>affidavits 5:7 29:7</p> <p>affirm 51:20</p> <p>affirmed 24:7</p> <p>aggravating 7:9 28:13 53:1</p> <p>aggravation 7:8</p> <p>agree 18:6,8,12 33:23 34:14 46:16 52:6 55:4,21</p> <p>agreeing 28:22 35:17</p> <p>ahead 14:17</p> <p>albeit 18:4</p> <p>Alito 4:4 5:14 9:10,16 10:6 53:13</p> <p>allegations 28:3 28:5 30:4,6</p> <p>alleged 7:13 8:12,13 28:19 29:6</p> <p>allow 14:23 16:25 27:3</p> <p>allowed 15:3 53:3</p> <p>allows 11:23,25</p> <p>amicus 6:21</p> <p>analysis 49:21 49:22</p> <p>anecdote 22:8</p> <p>announced 41:1</p> <p>answer 10:5 25:12 27:9,10 31:20 34:18 35:15 36:2 45:18 55:13</p> <p>answered 55:12</p> <p>anyway 24:19 50:25</p>	<p>apologize 4:17 56:3</p> <p>appeal 21:3 51:10</p> <p>appeals 50:17</p> <p>appear 21:10</p> <p>APPEARAN... 1:14</p> <p>Appendix 21:16</p> <p>applicant 36:21</p> <p>application 18:18 19:22 26:4</p> <p>applications 37:23</p> <p>applied 26:15 28:9,9,21 33:18 37:24 39:19</p> <p>applies 37:2 51:9</p> <p>apply 26:16 28:1 39:4 51:4</p> <p>appreciate 11:11 12:13</p> <p>appropriate 39:24</p> <p>approximately 29:22</p> <p>area 22:5</p> <p>argued 15:11 18:16 36:10</p> <p>arguing 36:11 36:12</p> <p>argument 1:12 2:2,7 3:3,6 9:10 13:12 17:11 27:20 37:2 39:12,16 39:17,20 41:18 51:22</p> <p>arguments 30:19</p> <p>arms 22:4</p> <p>asked 5:12,13 5:15 31:5,6 52:10</p>	<p>asking 44:6 47:2</p> <p>aspect 9:22</p> <p>assault 7:13,18</p> <p>assistance 3:21 4:1 9:19 10:20 11:2,22 12:12 29:20 31:11,12 31:14 49:12,12 49:14,15 50:1 52:12 54:20 55:15</p> <p>assistance-of... 5:7</p> <p>Assistant 1:17</p> <p>assume 13:8 23:12,18 32:15 52:6</p> <p>assumed 20:7 28:5,8</p> <p>assumes 17:12</p> <p>assuming 16:13 28:19</p> <p>assumption 41:9</p> <p>attempting 10:15</p> <p>attention 6:8,10</p> <p>attorney 1:17 15:16 55:5</p> <p>attorneys 6:20</p> <p>attribute 26:20</p> <p>authority 32:1</p> <p>available 22:25 41:11,12</p> <p>a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 20:13 36:7</p> <p>back 13:18 17:19 21:17 24:4,15,20 46:6,7</p> <p>bad 7:11 22:11 37:13</p> <p>ball 43:5</p> <p>Banks 12:17 15:24</p> <p>bar 34:23 37:22</p>	<p>barred 35:2</p> <p>bars 13:19</p> <p>based 3:22 19:5 27:2,9 40:17 42:5 43:3 49:16 56:1</p> <p>basic 12:11,11</p> <p>basis 9:23 13:15 14:5 16:3,9 25:3,18 41:4 41:20 44:24</p> <p>bat 15:6</p> <p>bears 53:10</p> <p>beaten 53:8</p> <p>behalf 1:15,18 2:4,6,9 3:7 27:21 51:23</p> <p>behold 37:12</p> <p>believe 3:16 30:1 32:20 34:18 35:13,16 36:11 41:6 42:22 44:21 50:16</p> <p>believed 9:9 29:25 30:22</p> <p>Bell 1:3 3:4 8:24 11:21 13:3 23:12 28:2,25 30:4 32:23</p> <p>Bell's 27:24</p> <p>belt 53:9</p> <p>Billy 7:12,18,20</p> <p>bit 26:7 54:10</p> <p>blood 23:21</p> <p>body 41:10 53:10</p> <p>Bonnie 4:2,3</p> <p>Brady 5:10 10:10 12:18 15:17 16:4 33:6,11,12,16 33:17,19 34:11 49:19 50:11 55:14</p> <p>brand 34:2</p> <p>Bress 1:15 2:3,8</p>
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