IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD NATHANIEL BELL, :

Petitioner :

v. : No. 07-1223

LORETTA K. KELLY, WARDEN. :

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Washington, D.C.

Wednesday, November 12, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

RICHARD P. BRESS, ESQ., Washington, D.C.; on behalf of the Petitioner.

KATHERINE BURNETT, ESQ., Senior Assistant Attorney General, Richmond, Va.; on behalf of the Respondent.

C O N T E N T S

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

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

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

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

MR. BRESS: No, Your Honor. The State court did not refuse to consider evidence proffered to it. The State court refused to permit the full development of the evidence. And it -- I mean it misled the court --

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

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

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

MR. BRESS: Specifically, Your Honor, the

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

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

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

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

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

court.

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

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

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

JUSTICE SCALIA: Well, he could have a post-conviction proceeding in the State court.

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

JUSTICE SCALIA: A State habeas.

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

CHIEF JUSTICE ROBERTS: Well, weren't the facts merely cumulative evidence of his claim that was

before the State court?

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, I think that

supports my suggestion, which is that the evidence was cumulative. There was a dispute on that issue. There was evidence on both sides. And now you say, hey, we've got more evidence.

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

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

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

JUSTICE GINSBURG: They said they did.

MR. BRESS: They said, on the one hand, they did, and yet, on the other hand, when they were looking, for example, at Joanne Nicholson's testimony, they said she could have been effectively impeached by other statements that she had made, that in their household, she had never seen Bell be physically abusive to her daughter. Now, Joanne Nicholson and Tracy Nicholson have said throughout that he was never physically abusive to Tracy. The supposed impeachment would have

come from police court records that have never been introduced in this case. So the Virginia Supreme Court, without a hearing, just said, on the one hand, we accept these facts as true and, on the other hand, even though Joanne Nicholson would testify that this event never occurred that way, she would have been impeached so the jury wouldn't have believed it.

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

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

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

then, under your theory, that will be a new claim and it well get de novo review?

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

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

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

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

JUSTICE GINSBURG: So, it doesn't translate into ineffective assistance of counsel because the

client is not the one -- the lawyer has been -- has not been diligent, but there is nothing that the client could do. I just don't see how --

MR. BRESS: Well --

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

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

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

Now, in order to get here, you have to

demonstrate that diligence. You also have to demonstrate that you're able to develop new facts that matter, that are important, that are significant.

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

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

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

MR. BRESS: Yes.

JUSTICE BREYER: And it seems to me that the way it's supposed to work -- have you read, by the way,

the facts of the case for December in Bell v. Cohen? No? Okay. Forget that. I was going to shorthand that because it's similar to the hypothetical I'm thinking of.

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

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

I have no idea if that's what went on here, but if it -- it didn't seem to me -- there was some confusion about whether the procedures are adequate in the State. Then there is some other thing that this

might be the same claim. I mean, I don't see how we get to the question we took this case to decide, frankly, without knowing what the basis was and whether it was correct for the district court to give him any hearing at all.

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

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

MR. BRESS: Right. But it had to take that step. And it had to take that step, by the way, of course, with (d) in mind as well, because this Court in Schriro said there is no reason to have hearing if it is separately precluded by another predicate. In Schriro, obviously, it was the refusal to -- to allow mitigating evidence. So it does that. Then it determines separately under Townsend, was there a problem in State court that -- did you have a full and fair hearing, and if you can prove the facts that you state, would you

win, and so those allowed the court the discretion to hold a hearing.

JUSTICE BREYER: Well, why wouldn't you say right off the bat, new claim, go present it to the State court, and exhausts it?

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

JUSTICE BREYER: Why not?

MR. BRESS: Well as the State argued below, it would have been procedurally deficient.

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

MR. BRESS: Well, Your Honor, according to the warden at least, in this case if you took let's say the facts of Banks v Dretke, which this Court decided, where when you were in front of the State court, what you knew was that the girlfriend of the prisoner had said that one of the witnesses was particularly close to

law enforcement, and on that basis they made a claim, a Brady claim in State court. It was denied because it wasn't factually developed enough, all right?

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

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

MR. BRESS: Well, that's absolutely true --

JUSTICE BREYER: Suppose it were really new.

MR. BRESS: The State statute is unequivocal.

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

MR. BRESS: Your Honor, there is no exception here in Virginia.

JUSTICE BREYER: So in Virginia a person discovers for the first time, 140 days later looks at the D.A.'s files, and discovers something that shows the

whole trial was a farce -- I mean, something unbelievable, and there is no way for the person under Virginia law to bring that up in a State court?

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

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

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

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

MR. BRESS: Yes, it did, Your Honor. The Fourth Circuit viewed this as the same claim and that's the root of some of our disagreement with them.

CHIEF JUSTICE ROBERTS: And if fact you got more than you were entitled to, because it did look at the new evidence, albeit through the guise of deference,

but it shouldn't have even looked at that at all.

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

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

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

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

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

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

MR. BRESS: Sure.

JUSTICE SOUTER: -- my understanding is that in the United States District Court on the Federal habe

-- the district court made a -- drew a conclusion based on the evidence before it, no deference to the State court, that in fact your client did not demonstrate prejudice. And my understanding is that that -- although the Fourth Circuit did not rely upon that, my understanding is that that -- that finding remains undisturbed. Is that correct?

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

JUSTICE SOUTER: No.

MR. BRESS: However, when you look at what the State court wrote in its written ruling, what it says is there is a colorable claim that the State court was unreasonable, on -- in application of law to the facts and development of the facts, and then it said that they will -- that the court would not decide this issue yet, until it has a hearing; and so the Fourth Circuit looked at what the district court wrote and presumed that consistent with what it had written, it then confronted this issue, the issue of reasonability, orally; and it didn't require that when a judge is

saying something orally, as opposed to putting it in a written opinion, that it dot every i and cross every t. It assumed that it meant what it had said earlier. If this Court has any doubt about that, however, it could certainly remand with instructions.

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

MR. BRESS: Your Honor, consistent with the Fourth Circuit, we don't read him to say that. But even if he meant that, the Fourth Circuit certainly on -- looked at this from a reasonableness standpoint, and not from a de novo standpoint. So even had the district court meant a de novo review and engaged in it, we still didn't get the correct standard or review on appeal.

JUSTICE SOUTER: Oh, that may be. I didn't

mean to imply you didn't have a Fourth Circuit question. I -- I guess I was raising a question to whether it is wise to make this the case to decide the Fourth Circuit issue.

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

MR. BRESS: Yes, Your Honor.

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

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

CHIEF JUSTICE ROBERTS: I know, but they're -- your underlying theory is that if you get a lot of new evidence, that somehow changes the claim. And again, I think Justice Ginsburg -- I'm having trouble getting my arms around that, and particularly since it's

problematic in this area where there is always new evidence.

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

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

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

If you look at (e), (e) says that you can get a hearing even if you weren't diligent in State court, if the facts that you need to develop were not reasonably available in State court and if they would prove by clear and convincing evidence that you are innocent.

CHIEF JUSTICE ROBERTS: All right, well just -- we've got two but just to stop you on one. The

fact that they excuse your failure to raise and present the evidence in State court doesn't mean that when you get the evidence you have a new claim. It just means that they are going to let you raise a claim you could have raised before.

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

I'm sorry, Your Honor.

CHIEF JUSTICE ROBERTS: I've gotten over it.

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

Their claim is denied on the -- on the merits because they weren't able to get much of the evidence in and denied in State courts. They couldn't go to Federal courts where they were able to bring in all of that evidence, and let's say even more, enough to prove by clear and convincing evidence that they were innocent.

Under the warden's view, you'd still go back

to the State court opinion and decide whether it was intrinsically reasonable. And so long as it is, you wouldn't -- the State court gets affirmed, and none of that new evidence of innocence comes in.

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

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

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

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

Now we have the question, which when we took this we thought we could reach, but I don't know if we can -- now we have the question: When the judge makes the decision on the basis of those facts, if they have never developed any of this in State court, fine. Then

have -- then just do it. If it is a regular case, don't defer it.

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

MR. BRESS: Well, Your Honor --

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

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

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

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

MR. BRESS: Well, I think that, again, you have to defer under (e)(1) presumably to particular fact findings and find that by clear and convincing evidence you've disproved those facts. But, otherwise, I don't think you could find the application of law to fact. I

don't think you can under Holland, et cetera.

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

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

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

And the State decided the case on an inadequate record. It comes to Federal court. Do you simply defer? I mean do you simply stop when you say the State court reasonably decided this case based on an inadequate State court record, or do you allow that record to be fully developed and decide it on its

merits?

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bress.

Ms. Burnett.

ORAL ARGUMENT OF KATHERINE BURNETT

ON BEHALF OF THE RESPONDENT

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

The claim in Bell's case is the textbook example of a claim that the effective death penalty intended for 2254(d) to apply to. In the Virginia Supreme Court, Bell presented his claim with his allegations of what he says counsel didn't present and didn't find at trial. And the Virginia Supreme Court

assumed the truth of all of those allegations and did not contest any of them. There were never any facts in dispute. The State never contested any facts.

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

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

Now, Bell comes to this Court and says for the first time that I have a new claim, and that was not made below, and this is not a new claim. Everything that he presented in Federal court was presented to the State court. There is absolutely no difference. In

fact, to the effect that there was some difference in the district court and the State alleged -- we pleaded default because he presented a few new affidavits.

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

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

MS. BURNETT: Well, Justice Ginsburg, there were approximately 12 issues in this case that the district court disposed of in a very lengthy opinion. It was only this one issue that the district court found -- believed that he needed to have a hearing on, we believe erroneously. But, nevertheless, he had the hearing and -- and listened to all the same evidence.

Nothing, Justice Ginsburg -- in our opinion nothing prevented Bell from presenting the allegations

that were presented to the Federal court and all the allegations that he presented to the State court. There was no State court procedure or denial of anything.

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

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

JUSTICE SOUTER: Your brother is nodding yes.

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

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

JUSTICE SOUTER: If we had -- if we had -- and I -- I emphasize I'm -- I'm not suggesting this is your case. But if we had a case in which with respect

to the disputed issue he had asked for more time -- I'll make it easy. He had asked for more time and -- and had -- had indicated that there were leads that needed to be followed that couldn't be followed unless he got more time and so on, and the State court refused. Could he then come into the Federal court and say: My claim here is not only ineffective assistance, but ineffective assistance with the overlay of the refusal of the State courts to give me an adequate opportunity to develop my -- my ineffective assistance claim? And if he made a colorable showing on those two issues, would he then have an opportunity for a Federal evidentiary issue, and would the findings that eventuated from that be subject to -- in effect, to -- to being short- circuited by deference to the State court findings?

MS. BURNETT: I think my answer to that has to be that it depends because the statute before the effective Death Penalty Act in 1996 had clearly had what we would call the Chandler v. Dane factors in which would you look at the adequacy of a State court process. Those were removed after 1996, so the statute does not provide authority for a Federal court to go in and determine was the process adequate if the decision, itself, was reasonable. Now if we are talking -- this is why this case --

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

MS. BURNETT: Justice Souter, we don't believe so and here's why: Because it is true, Congress did not change the procedural default doctrine. In the Effective Death Penalty Act Congress left that alone. In fact, this Court recognized that in House v. Bell. So when we are talking about new facts or new claims, either one, you're talking about unexhausted or defaulted matters, which the district courts are very familiar how to handle that. Has he shown cause and prejudice? Has he shown diligence?

JUSTICE SOUTER: I think you're right in the

main. I think that's generally correct. The case that I'm concerned with is the case of the -- of the Brady claim, because if we are proceeding under (e) then as I understand the cause and prejudice can only be established in the case we are talking about if there can be shown a probability of a different verdict.

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

MS. BURNETT: Justice Souter -- and I agree that's not this case. But this Court's already crossed that bridge. That was Michael Williams. Michael Williams was where the individual comes to Federal court with brand new evidence and he has no remedy left in State court. It is defaulted, and what do we do with that? And this Court very clearly -- now, as the issue

was presented to this Court in that case it was whether he gets a hearing or not, so that's what was addressed. But this Court also addressed the fact that it most likely was and was a defaulted claim and that it --

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

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

JUSTICE SOUTER: I understand your position.

JUSTICE BREYER: I'm still trying to understand the statute. I think their point is we get around (d), (d) doesn't bar us because the district court here, the Federal district court, found that it was an unreasonable determination of the facts, not unreasonable on the substance, but unreasonable because of the procedure. In other words, the State that barred this evidence was having an unreasonable procedure and therefore the determination of the facts is

unreasonable. So you're saying that isn't what those words "unreasonable determination of the facts" mean.

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

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

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

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

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

JUSTICE BREYER: And not whether their procedures are correct?

MS. BURNETT: Correct.

JUSTICE BREYER: Okay.

MS. BURNETT: Correct.

JUSTICE BREYER: Okay. So that's the first thing we have to decide to get to the question. If your wrong on that -- and I doesn't know the answer to it -- if you're wrong on that, then they're rid of (d). So they say then, we're rid of (e) because it falls within

(a)(2), the factual predicate and due diligence, okay. They say we are rid of (e) because of that. Now, how they get around capital (B) I'm not sure, but that isn't in the case.

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

JUSTICE BREYER: They're arguing due diligence.

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

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

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

JUSTICE BREYER: (E)(2).

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

JUSTICE BREYER: Okay. So we also get -- they get around that because they say the due diligence. You also have an argument about how (2) applies. And if you're wrong about both of those then we get to the question, which would be: If the -- if the hearing's

properly before us and it's a new claim -- it's also saying it's a new claim -- if it's a new claim it has to be exhausted. So under Virginia law, under Virginia law, is it really true that -- suppose, not this case, but suppose a Defendant 140 days after discovers the DA says, makes some remark. He couldn't have known about it. He goes to a special file. He couldn't have found out about. And lo and behold, it's the worst thing you can imagine, and you can imagine some pretty bad ones but this is even worse. Now under Virginia law are you -- is it your view that Virginia courts would say you're out of luck, good-bye?

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

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

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

JUSTICE BREYER: No excuse? Even if --

MS. BURNETT: That's correct.

JUSTICE BREYER: Okay.

MS. BURNETT: And this Court has --

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

MS. BURNETT: It is defaulted, yes, Your Honor. In Virginia those are defaulted claims, and now we are in Federal court with those claims. The Federal court judges are very familiar with how to do with them. Has he shown cause and prejudice?

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

MS. BURNETT: Not in State court.

JUSTICE BREYER: Not in State court.

MS. BURNETT: No, Your Honor.

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

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

JUSTICE BREYER: Okay, then let me ask you on the merits. If he's right there and it's exhaustion and it really was a new claim, then wouldn't we apply a decision that does not defer to the State court, because

after all the State court never heard this issue?

MS. BURNETT: That's not this case. But in a hypothetical case where there are new facts, unexhausted defaulted claims or facts that are presented to a Federal court --

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

MS. BURNETT: Well, I think not.

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

MS. BURNETT: The argument is --

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

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

CHIEF JUSTICE ROBERTS: The Fourth Circuit -- I'm sorry to interrupt you, but the Fourth Circuit didn't decide that question either.

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

Nothing --

JUSTICE SCALIA: How do you want us to dispose of the case that doesn't, that doesn't do that? What do you want us to do?

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

JUSTICE SCALIA: That's it?

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

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

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

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

MS. BURNETT: The Federal court simply announced that he was going to hold a hearing on this claim and decide later --

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

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

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

MS. BURNETT: I think that was the misunderstanding.

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

MS. BURNETT: The way I read the statute is that that is the first thing that the judge was required to do. He had to first determine whether the State court's decision was reasonable.

JUSTICE STEVENS: All right. Suppose he looked at the State court evidence and he says, that was not enough. The State court's decision on the merits was reasonable based on that record. I have a different

record before me. May he look at the different record?

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

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

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

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

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

JUSTICE STEVENS: Then what's the point --

MS. BURNETT: -- just simply to say I'm going to look at just the correctness of the decision first, and then decide whether it's correct.

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

position?

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

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

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

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

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

JUSTICE SCALIA: Why shouldn't the district judge in light of the new evidence decide whether the judgment of the State court was -- would have been reasonable if it came out the same way, including this new evidence in the -- in the consideration? Why shouldn't he do it that way.

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

JUSTICE SCALIA: I know it could. But I'm

asking whether it should.

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

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

MS. BURNETT: Yes.

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

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

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

MS. BURNETT: The Federal court is supposed to first look at the claim that was presented to the

State court, under 2254(d), and the claimants before it. If it's the same claim, if it's the same matters that were adjudicated on the merits in the State court, it has to make the decision up front, was it reasonable or not?

JUSTICE SCALIA: Okay.

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

JUSTICE SOUTER: Now -- but the road map that you are now saying could be followed is the same road map implied by -- in your earlier answer to Justice Scalia, your reference to the new claim as being a defaulted claim.

MS. BURNETT: Yes.

JUSTICE SOUTER: But we are concerned -- I think we are all concerned with the -- with the claim in which it is not defaulted, in the sense that he is at fault in any way for failing to get it into the Federal court -- I'm sorry -- get his entire presentation now into the State court then. So that it is not a defaulted claim in the classic sense. It is not a claim in which he is at fault by having failed to present it in the State court.

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

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

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

MS. BURNETT: It may be. It may be. And once again, that's certainly not this case.

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

MS. BURNETT: Right.

JUSTICE SOUTER: -- that it's this case.

But it's the case we are worried about around the corner.

MS. BURNETT: It may be.

JUSTICE SOUTER: If that is -- this Court -- that's why I'm saying it's a very established law as to what cause is, and external impediments. I mean, this Court has many cases that describe that. The lower courts are very familiar with determining that, and so they can -- they are capable to making that determination as to whether the Federal court can now look at a new matter whether it's a new claim or --

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

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

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

JUSTICE SOUTER: Okay.

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

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

MS. BURNETT: Correct.

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

MS. BURNETT: Correct.

JUSTICE SCALIA: -- right?

MS. BURNETT: Correct. And --

JUSTICE KENNEDY: In that instance is there room for the district court to hold an evidentiary hearing?

MS. BURNETT: Well, I think then you get -- that's -- I think it's actually a separate matter. We first have to get to whether the Federal court can look at a new matter de novo. If it can look at it de novo then I think we go to the pre-Effective Death Penalty

Act law about when you have a hearing. Are there disputed facts? Are they -- that make a difference? Is it something that actually, you know, needs to have resolution in a hearing?

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

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

JUSTICE KENNEDY: So you think there could be instances, we might imagine, in which there could be two ineffective assistance of counsel claims, the second of which could be heard in the district court with evidentiary -- with an evidentiary hearing?

MS. BURNETT: I think it's certainly possible. I think that the statutory setup and this

Court's established habeas procedures that it had in place for decades permits that.

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

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

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

If it were unconstitutional, and I guess this is what is sticking in our craw -- my craw, anyway -- if it were unconstitutional, it seems to me there ought to be a way to make the State take the first cut at it. Make the State say oh, yes, even with this new evidence we would still find this person guilty; and then in Federal habeas you would -- you would apply the deference that 2254(d) requires. You'd ask whether that

was a reasonable determination.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

CHIEF JUSTICE ROBERTS: You have three minute remaining.

REBUTTAL ARGUMENT OF RICHARD P. BRESS

ON BEHALF OF THE PETITIONER

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

CHIEF JUSTICE ROBERTS: You have three minutes remaining.

MR. BRESS: I'd like to start where the

General left off. In McNeal and Claudy, this Court did hold that, in certain instances, a State habeas court must hold a hearing if there are facts in dispute and they are not willing to assume them. I agree that a State doesn't have to have a proceeding at all, but if it has one, it has to be fair.

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

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

Finally, we presented very substantial new evidence on the Federal level here. It's simply not true that there is no new evidence. The new evidence included evidence undermining the sole aggravating factor, both the live testimony of Joanne Nicholson,

which allowed the court actually to determine whether she would have been a credible person to undermine the testimony. The State had held on the papers she wasn't credible, which the State can't do on the papers.

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

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

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

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

MR. BRESS: Exactly, Your Honor.

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

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

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

JUSTICE SCALIA: Well, you know, it does read -- 2254(e) -- it does read, "a factual predicate that could not have been previously discovered through the exercise of due diligence." That sounds like exactly what you're describing, the discovery of DNA

evidence you didn't know about.

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

JUSTICE GINSBURG: I think she said --

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

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

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

JUSTICE SCALIA: Mr. Bress, I want to

apologize to you for accusing you of not printing 2254(d) and (e) in your brief. You indeed did.

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

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

(Laughter.)

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

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