No. 20-6712

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ARTHUR LEE SANFORD,

Appellant,

v.

HAROLD W. CLARKE,

Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia (1:18-cv-00303-LMB-TCB)

OPENING BRIEF

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STATEMENT OF JURISDICTION

On March 19, 2019, Arthur Lee Sanford filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. The district court dismissed the petition on February 6, 2019. Mr. Sanford timely appealed pursuant to the Federal Rule of Appellate Procedure 4(a) on February 6, 2019, and moved for a certificate of appealability. This Court declined to issue a certificate of appealability and dismissed the appeal on October 3, 2019. This Court denied rehearing en banc on November 5, 2019.

Mr. Sanford filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b) on November 13, 2019, which the district court denied on April 30, 2020. Mr. Sanford timely noted his appeal on May 14, 2020. On September 13, 2021, this Court granted Mr. Sanford's motion for a certificate of appealability, certifying one question for appeal: "whether the district court erred in denying his Rule 60(b) motion when he was not provided notice of the district court's receipt of state court records or served with complete copies of relevant state court documents that were relied on or referenced in his § 2254 proceedings, in violation of procedural due process and procedural rules." This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the State violated Habeas Rule 5 and the Rules of Civil Procedure by: (1) not attaching mandatory records to its answer, and (2) failing to serve Mr. Sanford records it had sent to the district court?

II. Whether the proceedings below violated procedural due process given that the district court (1) communicated ex parte with the State, (2) denied Mr. Sanford access to the records it relied on for its ruling, and (3) potentially ruled on an incomplete record?

STATEMENT OF THE CASE

I. Introduction

Mr. Sanford notified the district court three times that the State did not submit a complete answer to his habeas petition, two times that the court had an incomplete record, and three times that he did not have access to the information the district court had. At every turn, Mr. Sanford's arguments were rejected, leaving him to respond to the State's arguments that his petition be dismissed based on records he did not have and which he could not be sure the district court had either. Mr. Sanford maintained that he was unable to effectively litigate his case without access to the records he was entitled to receive and upon which the State relied. The district court nevertheless dismissed Mr. Sanford's habeas petition, purporting to rely on the very same records that were available to the State but not available to Mr. Sanford.

Steadfast in his belief that the proceedings violated the Habeas Rules and due process, Mr. Sanford filed a Motion for Relief from Judgment, in which he again argued: (1) that the State did not include all information required by Rule 5 of the Rules Governing § 2254 Cases ("Habeas Rule 5"), (2) that the district court did not have the full record before it when dismissing his petition, and (3) by not allowing him access to the records, the district court hamstrung his ability to litigate his claims. The district court denied the motion, reasoning that it had received all the

records it needed to make a ruling directly from the state courts, notwithstanding the fact that Mr. Sanford did not have access to those same records.

II. Habeas Proceedings

A. State Court Habeas Proceedings

In January 2013, Arthur Lee Sanford was convicted of second-degree murder in the Circuit Court for the City of Newport News, Virginia. *See* J.A. 235. After exhausting his direct appeals, Mr. Sanford, proceeding pro se, filed a writ of habeas corpus in state court in March 2015, in which he raised 21 claims. J.A. 163–65. Mr. Sanford asserted: (1) his double jeopardy rights had been violated; (2) the prosecutor gave false testimony; (3) the State knowingly relied on false testimony; (4) a *Brady* claim; and (5) seventeen claims of ineffective assistance of counsel. *See* J.A. 240–42.

Without holding a hearing, the state habeas court dismissed the petition. J.A 243. It rejected the ineffective assistance of counsel claims on the merits and the remaining four claims on procedural grounds. *Id.* Mr. Sanford, again proceeding pro se, appealed the dismissal of his petition to the Virginia Supreme Court, *see* J.A. 187, arguing the state habeas court erred by (1) summarily dismissing his petition, J.A. 197; (2) denying him the opportunity to present evidence in support of his double jeopardy and prosecutorial misconduct claims, J.A. 198–205; and (3)

rejecting his ineffective assistance of counsel claims, J.A. 206–10. The Virginia Supreme Court refused the appeal. J.A. 211.

B. Federal Habeas Proceedings

With state habeas procedures exhausted, Mr. Sanford turned to the federal courts for relief. He filed a federal habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia in March 2018. J.A. 5. In his petition, he identified four grounds for relief: (1) prosecutorial misconduct that resulted in double jeopardy and speedy trial violations, J.A. 9–26; (2) ineffective assistance of trial counsel, J.A. 26–47; (3) ineffective assistance of appellate counsel, J.A. 48; and (4) a freestanding claim of actual innocence, J.A. 50–52.

The district court ordered the State to show cause for why the writ should not be granted, and instructed the State to treat the order "as a request that the records of the state criminal and habeas proceedings, if pertinent and available, be forwarded to the [court]." J.A. 60. The State ordered the Newport News Circuit Court and the Supreme Court of Virginia to serve the records to the district court, but the State did not order those state courts to serve the records on Mr. Sanford. J.A. 286.

The State filed a Motion to Dismiss Mr. Sanford's petition and Rule 5 Answer along with a brief in support. J.A. 62, 65.

Attached to the brief were five exhibits. Exhibit A was the Court of Appeals of Virginia's per curiam opinion denying Mr. Sanford's direct appeal. J.A. 111.

Exhibit B was Mr. Sanford's pro se petition for a writ of habeas corpus that he filed in state court. J.A. 117. Exhibit C was the state habeas court's order dismissing Mr. Sanford's petition. J.A. 162. Exhibit D was Mr. Sanford's petition to appeal the state habeas court's dismissal filed with the Virginia Supreme Court. J.A. 187. And Exhibit E was the Virginia Supreme Court's refusal of the petition to appeal. J.A. 211. Despite frequently citing to transcripts in its brief, the State included none of the transcripts with its answer. *See* J.A. 73–80, 85, 90–91.

The State's Exhibit D—Mr. Sanford's petition to appeal the state habeas court's ruling—was incomplete. *See* J.A. 187. Presumably, there were at least thirty pages of the petition to appeal given that the table of authorities for the petition to appeal includes citations up to page thirty, but the petition ends abruptly on page twenty-four, mid-sentence and mid-citation. J.A. 188–96, 210. There is no table of contents, and the petition begins on page two, with page one nowhere to be found. J.A. 188. Mr. Sanford's petition references multiple exhibits, none of which were included with the State's filing. *See, e.g.*, J.A. 194, 202, 204–05. From the petition, it appears that many of the exhibits to Mr. Sanford's petition that the State failed to include with its answer at least comprised of transcript excerpts and other parts of the state court record that Mr. Sanford had identified as pertinent to litigating his claims. *Id.*

Mr. Sanford repeatedly notified the district court that the State's answer was incomplete. In his response, he pointed out that the State "only submitted twenty-four pages of [his] appeal petition," and had omitted the exhibits that had been attached. J.A. 213. He also noted that the State had failed to include any of the opposition motions he had filed during the course of the state court proceedings, contrary to the requirements of Habeas Rule 5. *Id.*

Next, Mr. Sanford attempted to obtain the missing records himself by filing a Motion to Order Records. J.A. 224–25. He argued that the State's "violation of [Habeas] Rule 5 foreclose[d] the [] development of a complete factual record for [the district court's] consideration of this case," and because of the State's failure to comply with Habeas Rule 5, he was "in no position to develop the evidentiary basis for a claim of ineffective assistance." J.A. 224–25.

The district court summarily denied Mr. Sanford's motion. J.A. 234.

In February 2019, the district court granted the State's Motion and dismissed Mr. Sanford's habeas petition, rejecting some of Mr. Sanford's claims as non-cognizable and dismissing others on their merits. J.A. 268, 245–67. In rejecting Mr. Sanford's claims of prosecutorial misconduct, the district court repeatedly referenced the trial transcript, even though the State had not submitted any portion of the transcript to the court. *See* J.A. 169–70 n.3, 182, 186. Furthermore, the district court only cited portions of the trial transcript that the State cited in its answer.

Compare J.A. 239, 252, *with* J.A. 73–76. The district court even specified in its order that no evidentiary hearing was necessary because the record, "including the trial transcript," was enough to show that Mr. Sanford's claims were without merit. J.A. 186.

This Court denied Mr. Sanford's request for a certificate of appealability and dismissed his appeal in October 2019, J.A. 274, and then denied his petition for rehearing en banc the next month. J.A. 285–87.

III. Rule 60(b) Motion

A. District Court Proceedings

Mr. Sanford next filed a Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure. J.A. 277. He asserted that the State violated its "constitutional procedural due process obligation to serve a complete habeas answer to the federal habeas court." *Id.* Further, he argued that due to these omissions, the district court "relied heavily on the incomplete copy of petitioner's brief," and erred by failing to require the documents be submitted before ruling. J.A. 278.

Despite acknowledging that Mr. Sanford had raised the issue of missing and incomplete records multiple times, the district court denied his Motion. J.A. 285. In its order, the court held that "the record does not support [Mr. Sanford's] claim about an incomplete record," revealing for the first time that it had received "the record of

the direct appeal and the habeas appeal" from "the Supreme Court of Virginia on May 7, 2018," and received the records of Mr. Sanford's "criminal trial and the circuit level habeas proceedings" from the state trial court on May 10, 2018. J.A. 286. The district court cited docket numbers 10 and 11 for this proposition. *Id.* However, in the public docket accessible to Mr. Sanford, docket 10 refers to the State's Roseboro Notice and docket 11 is not listed. Indeed, there is nothing in the public docket indicating that the district court received any records from the State.

B. The Present Appeal

Mr. Sanford appealed the district court's denial of his Rule 60(b) Motion to this Court, once again arguing that the State's omissions constituted reversible error and that the proceedings below violated due process. J.A. 295–300. After Mr. Sanford's appeal was docketed, this Court sent three follow up notices to the district court requesting full access to the record in the case, noting that the electronic transmission of the record was not transmitted correctly. J.A. 290–92. On April 28, 2021, this Court issued a Supplemental Record Request seeking the records from Mr. Sanford's state habeas proceedings, which it had not yet received, J.A. 293, and then issued a Supplemental Record Follow-Up Notice, again requesting that the district court send the records. J.A. 294. In total, five separate requests were made for the missing records.

On September 13, 2021, this Court entered an order issuing a certificate of appealability to Mr. Sanford. J.A. 312–14. In the order, this Court noted that the "state court records provided to this Court on appeal include the trial and direct appeal records, but [the Court] ha[s] been unable to locate the habeas records." J.A. 313, n.2. This Court further noted that it requested these records "from the district court, which confirmed it had sent all that was received," *id.*, presumably meaning that the district court did not have the state habeas records in its possession.[1]

Also in the order, this Court noted that the "district court detailed its receipt of state records, citing in part to a pleading that was not included in the electronic record provided to this Court on appeal. Moreover, there were no docket entries reflecting the court's receipt of the state records." J.A. 313, n.1. This Court thus "obtained the district court's internal docket sheet," and discovered "that these entries were made 'court only,' so they were evidently not accessible to the parties or the public." *Id.*

The Court appointed undersigned counsel to represent Mr. Sanford, and asked for the following question to be addressed:

> [W]hether the district court erred in denying his Rule 60(b) motion when he was not provided notice of the district court's receipt of state court records or served with complete copies of relevant state court

[1] Undersigned counsel has reviewed the documents that this Court received from the district court. Counsel has confirmed that those documents do not contain the records from Mr. Sanford's state habeas proceedings.

documents that were relied on or referenced in his § 2254 proceedings, in violation of procedural due process and procedural rules.

J.A. 313.[2]

[2] This Court reviews the district court's legal rulings de novo. *Thompson v. Greene*, 427 F.3d 263, 267 (4th Cir. 2005).

SUMMARY OF THE ARGUMENT

Habeas Rule 5 mandates that when answering a habeas petition, the State "*shall*" attach to its answer "portions of the transcripts . . . it deems relevant," and "a copy of the petitioner's brief on appeal." Habeas Rule 5(c)–(d) (emphasis added). The State violated Rule 5 by failing to attach transcripts it referenced repeatedly throughout its Motion to Dismiss and by failing to attach the entirety of Mr. Sanford's brief on appeal to the Supreme Court of Virginia, including the exhibits appended to the brief. The State also violated Habeas Rule 5 and the Rules of Civil Procedure ("Civil Rules") by having state court records that it deemed "pertinent" sent directly to the district court without serving Mr. Sanford those records. This Court has held that the failure of the state to abide by the procedural rules governing habeas proceedings requires reversal. *See Thompson v. Greene*, 427 F.3d 263 (4th Cir. 2005).

Mr. Sanford repeatedly notified the district court that the State's answer was incomplete and that he had not been served the relevant state records. Rather than ordering the State to comply with the Habeas Rules and to serve Mr. Sanford with the records, the district court issued its ruling dismissing Mr. Sanford's petition, relying on the State's incomplete answer and records it had received ex parte and marked as "court only." Reversal is also required because the proceedings below

violated basic notions of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Indeed, further underscoring the procedural unfairness of this case, the district court either cannot locate the state habeas records given it said it was in possession of them when issuing its ruling, or never had the state habeas records given it has failed to supply them to this Court. If the district court *did* have all the records, then it considered materially relevant information that Mr. Sanford did not have and could not respond to, thereby depriving him of the opportunity to fully and fairly litigate his petition. If the district court did *not* have all the records, then it issued multiple rulings with incomplete information. Either version of events is untenable. This Court should reverse.

ARGUMENT

I. The State Violated the Inclusion and Service Requirements of Habeas Rule 5 and the Civil Rules.

A. The State violated Habeas Rule 5 by failing to include pertinent transcripts with its answer and a complete copy of Mr. Sanford's brief appealing the denial of his state habeas petition.

The State violated the inclusion requirements of Habeas Rule 5 and the Civil Rules in two ways. First, the State failed to attach transcripts it referenced repeatedly throughout its Motion to Dismiss. J.A. 65. Second, the State failed to attach a portion of Mr. Sanford's brief on appeal to the Supreme Court of Virginia and completely omitted the exhibits Mr. Sanford had appended to that brief. *Id.*

When filing its answer, Habeas Rule 5 expressly requires the State to attach "parts of the transcript that [it] considers relevant" to its answer along with a "copy of the petitioner's brief on appeal," and "any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding." Habeas Rule 5(c)–(d)(1). In construing Rule 5, this Court in *Thompson v. Greene* made clear that without these attachments, "a habeas corpus answer must be deemed incomplete." *Thompson*, 427 F.3d at 268; *see also Watkins v. Waddington*, 106 F. App'x 582, 584 (9th Cir. 2004) (Habeas Rule 5 "requires the state to attach relevant portions of state court transcripts to its answer to a petition"). *Thompson* then looked to the Civil Rules to confirm that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the

pleading for all purposes." *Thompson*, 427 F.3d at 268 (quoting Fed. R. Civ. P. 10(c) and noting that the Civil Rules apply to habeas proceedings "when appropriate . . . to the extent that they are not inconsistent with [the Habeas Rules]"). Thus, under Rule 5, a complete answer must include all of the exhibits appended to a pleading and all transcripts referenced within. *See also Sixta v. Thaler*, 615 F.3d 569, 572 (5th Cir. 2010) ("When the respondent does, in fact, attach exhibits to the answer, there can be little dispute that those exhibits must be *served* together with the answer itself on the habeas petitioner.") (emphasis added).[3]

The State failed to follow the dictates of Rule 5. Throughout its answer to Mr. Sanford's petition, it cited portions of the trial transcripts, clearly indicating that it deemed these portions of the proceedings "relevant." Therefore, under Habeas Rule 5, the State had to, but did not, attach them to its answer. Moreover, it is clear that the State did not submit a full copy of the brief Mr. Sanford submitted on appeal during the state habeas proceedings, including the exhibits, which the Civil Rules state are considered part of a pleading. By not submitting Mr. Sanford's full petition to appeal with its answer, the State failed to comply with Habeas Rule 5 in yet

[3] Other courts have reached the same conclusion. *See, e.g., Turner v. Johnson*, 106 F.3d 1178 n.27 (5th Cir. 1997) ("The term 'pleadings' is defined by Rule 7(a) to include a complaint and an answer. It is noteworthy that an 'answer,' in the context of a habeas corpus proceeding, is defined by Habeas Rule 5 to include not only the bare answer of the state, but also relevant portions of the record."); *Flamer v. Chaffinch*, 774 F. Supp. 211, 215 (D. Del. 1991) (holding that relevant transcripts and records that the court or the petitioner request are necessary in the answer).

another way. Because the State omitted elements of its answer that are required by Habeas Rule 5 and the Civil Rules, its "answer must be deemed incomplete." *Thompson*, 427 F.3d at 268. The State's answer to Mr. Sanford's petition violated the Habeas Rules.

B. The State violated the Habeas Rules' service requirement when it had state court records sent to the district court without serving a copy on Mr. Sanford.

After failing to include with its answer the documents required by Rule 5, the State violated Habeas Rule 5 and the Civil Rules by failing to serve Mr. Sanford a copy of the state court records it had served upon the district court. As the Advisory Committee Notes accompanying Rule 5 make clear, although Rule 5 "does not indicate who the answer is to be served upon, [] it necessarily *implies* that it will be mailed to the petitioner (or to his attorney if he has one)." Advisory Committee Notes to Habeas Rule 5 (1976 Adoption) (emphasis added); *see also United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (Advisory Committee Notes are "a reliable source of insight into the meaning of a rule"). This requirement is strengthened and paralleled by the Civil Rules, which "apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings" is not specified by "the Rules Governing Section 2254 Cases." Fed. R. Civ. P. 81(a)(4)(A). The Civil Rules state that "every party" must be served "a pleading filed after the original complaint, unless the court orders otherwise." Fed. R. Civ. P. 5(a)(1)(B). This explicitly includes any "written

instrument that is an exhibit to a pleading." Fed. R. Civ. P. 10(c). This Court confirmed this understanding in *Thompson*, reasoning that the "Civil Rules clearly mandate service on an adversary of pleadings and their contents" and thus Habeas Rule 5 "necessarily implies" the same. *Thompson*, 427 F.3d at 268–69; *see also Pindale v. Nunn*, 248 F. Supp. 2d 361, 365 (D.N.J. 2003) (holding that Habeas Rule 5 implicitly requires service, and if not, the Civil Rules require service). Thus, under Habeas Rule 5 and the Civil Rules, not only must the State include certain documents with its answer, it must also serve those documents on the petitioner.

Here, the district court ordered the State to file an answer to Mr. Sanford's habeas petition explaining why it should not be granted. In so doing, the court requested that "the records of the state criminal trial and habeas corpus proceedings" be forwarded, "if pertinent and available." J.A. 60. Rather than file the state court records along with its answer, however, the State purportedly instructed the state courts to serve the records on the district court as reflected by the district court stating that it received the state records directly from the state courts. J.A. 286. But as Mr. Sanford has repeatedly alleged, he did not receive those same records. Indeed, the state court records that the district did purportedly receive were marked "court only." J.A. 313, n.1. And lest there was any doubt that these state court records were part of the State's answer, the State repeatedly referenced the trial transcripts in its answer, thus under Rule 5 those transcripts should have been attached to its answer.

But rather than append the transcripts to its answer, the State had them sent directly to the district court under separate cover without serving them upon Mr. Sanford, which is a clear violation of the Habeas Rules' service requirement.

C. The State's violations of the Habeas Rules requires reversal.

Mr. Sanford made the district court aware of the State's violations of the procedural rules, yet the court did not order the State to file a complete answer or order the State to serve Mr. Sanford a copy of the state records. Instead, the district court dismissed Mr. Sanford's habeas petition despite not having a complete answer from the State, and then relied on records the State never served upon Mr. Sanford when issuing its ruling. Under strikingly similar circumstances, this Court in *Thompson* and the Eleventh Circuit following *Thompson*, held that the State's failure to comply with Rule 5 required reversal. *See Thompson*, 427 F.3d at 265; *Rodriguez v. Florida Dept. of Corrections*, 748 F.3d 1073, 1074 (11th Cir. 2014).

In *Thompson v. Greene*, the Attorney General of Maryland served the State's answer to Mr. Thompson, "but failed to serve the [e]xhibits, which included trial and post-conviction hearing transcripts, the parties' state court briefs, and various state court opinions." *Thompson*, 427 F.3d at 265. Mr. Thompson contended that "he was entitled to be served with the [e]xhibits and that he could not adequately respond to the Answer without them." *Id.* at 266. The district court dismissed Mr. Thompson's petition, relying on the State's exhibits, including the transcripts. *Id.* The district

court denied Mr. Thompson's request for a copy of the State's exhibits, "reasoning that they were 'not necessary in explaining why [procedural] default may have occurred.'" *Id.* (internal citations omitted).

This Court held that the State's "failure to serve the [exhibits supporting its answer] violated the procedural rules governing service of such exhibits in habeas corpus proceedings." 427 F.3d at 265. This Court reasoned that "[t]he Habeas Rules [] view the exhibits contained in a habeas corpus answer to be a *part* of the answer itself, [and] without which a habeas corpus answer must be deemed incomplete." *Id.* at 268 (emphasis in original). "The Civil Rules also make clear that the written instruments made exhibits to any pleading are a part of the pleading (such as a habeas corpus answer)." *Id.* Furthermore, this Court noted that the "Civil Rules clearly mandate service on an adversary of pleadings and their contents" and Habeas Rule 5 "necessarily implies" the same. *Id.* at 269. Indeed, serving the opposing party is "an elementary step in litigation in our judicial system." *Id.* at 268. Based on this reasoning, this Court held that "the Attorney General's failure to serve the Exhibits violated the procedural rules governing service of such exhibits in habeas corpus proceedings" and remanded for further proceedings. *Id.* at 265. And when remanding, this Court emphasized that "it is irrelevant whether a petitioner can demonstrate need to the court, or whether he already has the documents." *Id.* at 271.

Similarly, in *Rodriguez*, the district court ordered the State to answer Mr. Rodriguez's petition, and with it, "to file a comprehensive appendix with copies of various pleadings, transcripts, briefs, motions, [and] other records from previous state court proceedings." 748 F.3d at 1074. There, "the State served Mr. Rodriguez with a copy of its answer," but omitted the exhibits it referenced in its answer, choosing instead to file the relevant state court records as a separate appendix with the district court a week after filing its answer without serving the appendix on Mr. Rodriguez. *Id.* After the district court dismissed Mr. Rodriguez's petition, he moved for reconsideration, "reiterating that he had never been given copies of the exhibits referred to by the State and the Court." *Id.* at 1075. The court denied Mr. Rodriguez's motion for reconsideration. *Id.*

Citing Habeas Rule 5, the Civil Rules, and *Thompson*, the Eleventh Circuit "conclude[d] that any exhibits or documents that are referenced in the answer and filed with the Court are part of the answer, whether the filings are made together or at different times." *Id.* The Eleventh Circuit held that once the State referenced state records in its answer, that "trigger[ed] a service requirement that the State did not meet and that the District Court failed to enforce." *Id.* To the Eleventh Circuit, it did not matter that the State technically filed its appendix separate from its answer. "Because the Civil Rules require service of all pleadings, it follows that the exhibits to the pleading must also be served, regardless of whether they were filed at the same

time." *Id.* at 1076–77. "[I]n light of the procedural error," the Eleventh Circuit held that the district court reversibly erred by denying "Mr. Rodriguez's motion for reconsideration." *Id.* at 1082.

Here, the State failed to attach the pertinent transcripts to its answer despite repeatedly referencing those transcripts. Instead, the State had the Virginia courts send a copy of the state court records directly to the district court. The transcripts and other state records referenced were records that had to be included with the State's answer under Rule 5, and must be considered part of the answer regardless of when they were filed with the district court. *See id.* at 1075. As such, the State was required to serve the records on Mr. Sanford, but did not. When a respondent fails to serve on the habeas petitioner "all documents referenced in the State's answer and filed with the Court," the court should instruct the State to correct its errors. *See id.* at 1077. In this case, however, the district court insisted that it had all the records and proceeded to dismiss Mr. Sanford's petition, notwithstanding the fact that Mr. Sanford did not have access to the records on which its dismissal was based, J.A. 268, 285, a fact that Mr. Sanford repeatedly raised with the court, J.A. 224, 277. And when Mr. Sanford asked the court to reconsider, again raising the fact the State's answer was incomplete and he did not have all the necessary records to litigate his claims, the district court denied Mr. Sanford's motion for reconsideration, asserting

it "was in possession of and considered all the records of the petitioner's state trial, appellate, and habeas proceedings." J.A. 286.

But even if this were true,[4] it does not matter that the *district court* had all the records. What matters is that the *habeas petitioner* has the records relied upon by the State and the district court so that he is able to fully and fairly litigate his claims. *See Thompson*, 427 F.3d at 271. The district court, by allowing the State to file an incomplete answer and then allowing the State to serve records upon it without serving Mr. Sanford, violated "an elementary step in litigation in our judicial system." *Id.* at 268. As this Court made plain in *Thompson*, "it is irrelevant whether [Mr. Sanford] can demonstrate need to the court, or whether he already has the documents." *Id.* at 271; *see also Rodriguez*, 748 F.3d 1079 (quoting *Thompson*). The harm occurred the moment the State failed to abide by the procedural Habeas Rules. Because the State violated both the inclusion and service requirements of Habeas Rule 5 and the Civil Rules, this Court should reverse.

[4] As explained more fully in Part II, due to the failure to compel service, Mr. Sanford is unable to determine whether the district court had all the material information before it when it issued its ruling. The district court has made inconsistent and contradictory statements about which records it did and did not have, further muddying the waters. Moreover, although the district court stated it had all the records in its possession, the district court's order only cited portions of the record that the State had identified in its answer.

II. The Proceedings Below Violated Due Process.

Reversal is also required because the proceedings below violated basic due process in at least three ways. First, by purporting to send records only to the court without serving Mr. Sanford, the State engaged in improper ex parte communication. Second, because Mr. Sanford was excluded from those communications, he did not have the ability to adequately and effectively respond to the State's arguments or the district court's rulings as due process requires. Third, it is unclear whether the district court even had the full or accurate record before it when it issued its decisions. On this record, this Court cannot be sure that the proceedings below comported with the "fundamental requirement of due process," that is, "the opportunity to be heard at a 'meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see* U.S. Const. amend. XIV, § 2.

First, it was a violation of due process for the State to communicate with the district court without Mr. Sanford knowing. In *Thompson*, this Court reasoned that "permitting the State to file exhibits that he fails to serve upon a habeas corpus petitioner would essentially allow him to communicate ex parte with the court, contrary to one of the basic tenets of our adversary system." 427 F.3d at 269 n.7. "As a general rule, ex parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance

with our conceptions of due process." *Doe v. Hampton*, 566 F.2d 265, 276 (D. C. Cir. 1977) (cited in *Thompson*).[5]

The "basic tenets of our adversary system" were violated when the State had documents sent to the district court without sending a copy to Mr. Sanford. When Mr. Sanford argued that the State's answer was incomplete and the court did not have all of the records when issuing its ruling dismissing his petition, the district court denied the claim under the reasoning that it did have "all the records." J.A. 286. In support, the district court stated explicitly that the state courts, at the State's prompting, sent records directly to the district court without sending a copy to Mr. Sanford. *Id.* Then, once the district court received the records, it marked them "court only," meaning they were reflected on the district court's "internal docket sheet" and not made available on the public facing docket. J.A. 313 n.1. As such, the records that the State had sent to the district court were "not accessible to [Mr. Sanford] or the public." *Id.* Therefore, not only did the State communicate ex parte with the district court, but the district court relied on the information it received ex parte when dismissing Mr. Sanford's petition and denying his motion for relief from judgment.

[5] Under the Code of Judicial Conduct for United States Judges, Canon 3(A)(4), a judge "should . . . neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

The proceedings below were "fundamentally at variance with our conceptions of due process." *Doe*, 566 F.2d at 276. [6]

Second, the proceedings below violated due process because Mr. Sanford was unable to litigate his claims based on the information relied on by the opposing party and the district court. As the Supreme Court has said, "At a *minimum* [the Due Process Clause] requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). However, Mr. Sanford could not be meaningfully heard when he did not have the information that the court relied upon to issue its ruling. Without that information, Mr. Sanford had no way of knowing whether the information the court had before it was complete or accurate, and thus was left litigating his habeas case in the dark.

This one-sided exchange of information, which led to Mr. Sanford's inability to litigate his claims, was especially problematic given that this is a habeas case. By their nature, habeas proceedings are complex and often involve voluminous records.

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[6] Indeed, keeping information off the public docket in this way may well violate the First Amendment. "It is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). Moreover, this is not a situation where the district court had some kind of pressing need to keep these records out of Mr. Sanford's hands or out of the public eye. *See e.g., United States v. Zubaydah*, No. 20-827 (U.S. argued Oct. 6, 2021) (litigating issues surrounding the state-secrets doctrine and the need to keep sensitive information private).

For that reason, the Habeas Rules are explicitly designed to help the district courts and to give adequate notice to petitioners by requiring the State to identify which parts of the state court record are pertinent to its defenses. It would be difficult indeed for a district court to master the entire record of every habeas case before it, and therefore the court reasonably relies on the records identified by the parties when resolving claims. As proof, here, the district court relied entirely on the portions of the record the State cited in its answer. "[M]uch rides on having an adversarial process structured in a way that best equips the District Court to get [habeas decisions] right." *Rodriguez*, 748 F.3d at 1080. However, when the State cites and then sends records to the reviewing court that the petitioner does not have access to, that violates the Habeas Rules and the due process concerns they are designed to protect. *Cf. Byrd v. Wainwright*, 722 F.2d 716, 719 (11th Cir. 1984) ("[D]enial of access to the transcript is 'incompatible with effective advocacy.'") (quoting *Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring)); *Gardner v. California*, 393 U.S. 367, 369 (1969) (holding that a state must provide a habeas petitioner with a copy of the trial transcripts to allow for "an effective presentation of his case").[7] The types of claims raised in Mr. Sanford's habeas petition, including

[7] As this Court stated, "The constitutionality of the Habeas Rules would be placed in serious question if they were read to exempt habeas corpus proceedings from the general service requirements." *Thompson*, 427 F.3d at 269 n.7. If the Habeas Rules were construed as to countenance what happened below, then their

claims of prosecutorial misconduct, "are indeed the kinds of claims that require provision of a verbatim transcript." *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971). Yet Mr. Sanford was denied "a record of sufficient completeness to permit proper consideration of his claims." *Id.* at 194 (quotation marks and parentheses omitted).

Finally, it is unclear whether the district court even had the full record when dismissing Mr. Sanford's petition. The Supreme Court has recognized that "adequate and effective appellate review is impossible without a trial transcript or adequate substitute." *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (abrogated on other grounds) (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). Just as an appellate court cannot review a trial without an accurate recount of the proceedings, a federal habeas court cannot review state habeas proceedings without an accurate record.

When the district court denied Mr. Sanford's motion for relief from judgment, it claimed it "was in possession of and considered all the records of the petitioner's state trial, appellate, *and habeas proceedings* before ruling on the motion to dismiss." J.A. 286 (emphasis added). But that seems increasingly unlikely. This Court has requested all the records from the district court multiple times and there

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constitutionality would be called into question. Therefore, this Court should interpret the rules in a way that comports with due process, and forbids what happened here. *See United States v. La Franca*, 282 U.S. 568, 574 (1931) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

are still missing records. J.A. 313 n.2. Specifically, the district court confirmed that all of the records that were before it have been submitted to this Court, and yet the state habeas records are not among them. *Id.* If the district court sent all the records it received, and the state habeas records were not among them, it is reasonable to infer that the district court was never in possession of the state habeas records. It is therefore possible that the district court issued its order dismissing Mr. Sanford's petition without access to the state habeas records, including Mr. Sanford's full petition to appeal the dismissal of his state habeas petition along with the exhibits he included with that petition in which he identified the portions of the record that he believed were pertinent to his claims. If this is the case, the due process concerns only become more acute because the petition was adjudicated "on a materially incomplete record." *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015).

More to the point, the due process violations and the gaps in the record both call into question the district court's order dismissing Mr. Sanford's petition and this Court's order dismissing his appeal. And they limit this Court's ability to provide meaningful appellate review. As this Court noted in the certificate of appealability, "The state court records provided to this Court on appeal include the trial and direct appeal records, but [it has] been unable to locate the habeas records. This Court requested the records from the district court, which confirmed it had sent all that was received." J.A. 313, n.2. Therefore, this Court cannot be sure that the district court

had the state habeas records when issuing its initial ruling dismissing Mr. Sanford's petition, which casts doubt on this Court's order denying Mr. Sanford's appeal from that ruling. In the words of the Supreme Court, "It cannot be gainsaid that meaningful appellate review requires the appellate court to consider the defendant's *actual* record." *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasis added). Or as Justice Sotomayor put it, "[a] reliable, credible record is essential to ensure that a reviewing court—not to mention the defendant and the public at large—can say with confidence that [due process] rights have been respected." *Townes v. Alabama*, 139 S. Ct. 18, 20 (2018) (Sotomayor, J., concurring). The district court's actions have made it impossible for this Court to meaningfully review Mr. Sanford's claims given the material gaps in the record and the confusion over what information the district court had before it when issuing its rulings.

In sum, based on the record and the information provided to this Court, there are just two possibilities, and both are constitutionally unacceptable: either (1) the district court ruled based on an incomplete record and said otherwise in a court order, given that it could not provide all the records to this Court, or (2) it misplaced the records and in so doing, frustrated this Court's ability to provide any meaningful review. Either calls into question the fairness and integrity of the entire proceeding. It cannot be said that the proceedings below comported with basic notions of fairness and due process, and this Court should reverse.

CONCLUSION

For these reasons, this Court should reverse the decision below and remand for further proceedings.

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REQUEST FOR ORAL ARGUMENT

Mr. Sanford respectfully requests that oral argument be granted in this case, pursuant to Rule 34(a) of the Federal and Local Rules of Appellate Procedure. The factual and legal issues presented in this case are sufficiently complex that oral argument would aid this Court in its decisional process.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 7,544 words.

Daniel S. Harawa

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I electronically filed he foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

Daniel S. Harawa