CAPITAL CASE
No. 15-9473

In the
Supreme Court of the United States

RICKY JOVAN GRAY,

PETITIONER,

v.

DAVID ZOOK, WARDEN,

RESPONDENT.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state court fact-finding process that does not provide the type of adversarial process historically thought essential to the truth-finding function of a court is adequate for reaching reasonably correct results and for the ascertainment of truth.

2. Whether a federal court's assessment of the reasonableness of a state court's decision under 28 U.S.C. § 2254(d)(2) must consider the manner in which purported "facts" are determined as well as the standard of review under which the decision is to be made, as exemplified in this Court's decision in *Brumfield*.

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), with more than 400,000 members, is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members practice in all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions. They are prosecutors, public defenders, private defense counsel, and appellate lawyers, as well as attorneys in law firms, corporations, non-profit organizations, and governmental agencies. Its members are also judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.

The ABA has a tradition of advocating in capital cases for the administration of justice and the effective representation of clients. Although the ABA takes no position on the death penalty as a general matter, over the course of the past thirty years, the

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[1] Pursuant to S. Ct. R. 37.6, counsel for all parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no counsel or any other party or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. This brief was not circulated to any member of the Judicial Division Council before its filing. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions taken in this brief.

ABA has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. The ABA supports efforts to ensure that death penalty cases are administered fairly, in accordance with due process, and to minimize the risk that innocent persons may be executed.

In 1989, the ABA adopted policy in the form of *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, which were designed to expand on positions previously adopted by the ABA "on effective assistance of counsel in capital cases" and to "enumerate the resources and practices necessary to provide effective assistance of counsel." In 2003, the ABA adopted revisions to the *Guidelines* that updated and expanded on the obligations of death penalty jurisdictions to ensure due process of law and justice. *See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). The *Guidelines* have been relied on and cited favorably by this Court in several cases. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

Perhaps most relevant for this case, in 2001, the ABA launched its Death Penalty Due Process Review Project to conduct research and educate the public and decision-makers on the operation of capital jurisdictions' death penalty laws and procedures. The Project has completed in-depth assessments for twelve states. The assessments are designed to provide policy-makers with an objective instrument

to evaluate each state's death penalty system by comparing actual practices in each state with a series of recommendations based on the 2001 ABA Protocols on the Administration of Capital Punishment, which are based on ABA policy, and the revised 2010 version of those Protocols. *See Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (2001) ("2001 Protocols"); *ABA Death Penalty Moratorium Implementation Project: Jurisdictional Assessments* (2010) ("2010 Protocols"). The assessment teams were composed of academics, prosecutors, defense counsel, current and former judges, state bar representatives, and state legislators, who lent their expertise and made specific recommendations for reform. The ABA assessments have also been relied on and cited favorably by this Court. *See, e.g.*, *Maples v. Thomas*, 132 S. Ct. 912, 917–18 (2012).

The Project completed its expert assessment of Virginia's death penalty system in 2013. *See Evaluating Fairness and Accuracy in State Death Penalty Systems: The Virginia Death Penalty Assessment Report* ("Virginia Assessment"). (A copy of the assessment is available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf.) The assessment evaluated Virginia's post-conviction procedures for death-sentenced inmates against the ABA Protocols, noted several areas of concern, and included specific recommendations for reform.

The ABA submits this brief to share the results of the Virginia Assessment and highlight the

foundational constitutional principles at stake in this case. The ABA believes that the information reflected in the Virginia Assessment will help the Court evaluate the merits of the petition. The ABA also believes that this case presents an ideal opportunity for the Court to address an important, recurring question of federal law: what are the minimum post-conviction procedures that a state must follow when adjudicating claims that a death-sentenced prisoner's constitutional rights have been violated. More specifically, the ABA urges the Court to grant review to provide guidance on two issues: first, in what circumstances may a state post-conviction court resolve disputed questions of fact without holding an evidentiary hearing, and, second, when a state court resolves disputed material facts without a hearing, should a federal court on collateral review defer to the state court's factual determinations under 28 U.S.C. § 2254(d).

INTRODUCTION AND SUMMARY OF ARGUMENT

When a court resolves disputed issues of material fact without an evidentiary hearing and without affording one of the parties a meaningful opportunity to develop and present evidence, it departs from accepted norms of judicial practice and violates basic principles of constitutional due process. In Virginia capital cases, however, that troubling practice is commonplace. The Supreme Court of Virginia, which has exclusive jurisdiction over capital habeas proceedings in the Commonwealth, regularly denies death-sentenced prisoners any meaningful opportunity to develop evidence to support claims of constitutional violations, and it frequently resolves disputed questions of material fact without an evidentiary hearing. Yet lower federal courts have failed to recognize that, in those circumstances, the state court's factual conclusions are not entitled to deference.

This case is part of that disturbing trend. The Virginia Supreme Court denied petitioner a meaningful opportunity to present evidence in support of his constitutional claims. It then resolved disputed questions of material fact without holding an evidentiary hearing. As a result, the state court failed to make reasonable credibility findings or to receive evidence necessary to resolve the disputed facts set forth in an affidavit petitioner submitted that contradicts the facts relied on by the Commonwealth in connection with a pivotal post-conviction issue. Nonetheless, the courts below deferred to the Virginia Supreme Court, assuming

that the state court's factual conclusions were reasonable.

The issues raised in this case are recurring and important. Procedures that Virginia adopted in 1995 to streamline post-conviction review have been interpreted by the Virginia Supreme Court to prevent death-sentenced prisoners from developing an adequate factual record to test the constitutionality of their convictions and sentences. As a result, post-conviction proceedings are not "conducted in a manner designed to permit the adequate development and judicial consideration of all claims." Virginia Assessment, at xxiii. That systemic failure not only hinders Virginia's ability to conduct meaningful constitutional review, it also upends how Congress intended federal post-conviction procedures to work. It shifts to federal courts the burdens associated with the Commonwealth's decision to impose the death penalty, and it puts federal courts in a difficult position—either assume that the state court's factual conclusions are reasonable despite the absence of a developed record (as the Fourth Circuit did below), or else undertake the essential fact-finding function that Congress intended the state court to perform in the first instance.

As part of a comprehensive review of death-penalty procedures in multiple states, an ABA expert assessment team confirmed that Virginia's post-conviction procedures are inadequate to present and develop claims of constitutional error. The system prioritizes finality and expediency at grave costs. *See* Virginia Assessment, at viii. Death-sentenced

prisoners are rushed out of the gate, with onerous deadlines; they are not given opportunities to develop evidence or amend pleadings with new evidence; and, most relevant here, they do not have meaningful access to an evidentiary hearing, even when they have raised disputed issues of material fact that cannot be reasonably resolved on a paper record. *See id.* at xxiv (chart summarizing problems infecting Virginia's post-conviction procedures). Together, these restrictions mean that Virginia's death-sentenced prisoners are often denied adequate post-conviction review.

Having chosen to impose the death penalty and to implement its own post-conviction procedures, it is Virginia's responsibility to ensure that those procedures are meaningful, that constitutional claims are properly adjudicated, and that constitutional violations are remedied. When Virginia has not performed the obligations that the Constitution demands, the federal courts should not defer to the Virginia Supreme Court's factual conclusions, as the courts did below. Instead, when a petitioner has raised a substantial claim of constitutional error, that claim should be given the full and fair consideration it deserves. *See* 28 U.S.C. § 2254(b)(1)(B).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to clarify what procedures are necessary to ensure that a death-penalty prisoner has a reasonable opportunity to fully and fairly adjudicate claims of constitutional error. Answering that question will help ensure that state courts comply with due process requirements and provide much-needed guidance to federal courts in understanding when they are required to defer to a state court's factual conclusions.

I. Virginia's Post-Conviction Procedures Raise Grave Constitutional Concerns.

States are not required to provide post-conviction procedures, but, if they do, the procedures they use must "compor[t] with fundamental fairness." *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987). A state's freedom to choose its own procedures, *id.* at 559, provides no license to dispense with due process or to "transgress[] any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. 437, 448 (1992).

The petition identifies serious flaws in the post-conviction procedures employed by the Virginia Supreme Court to resolve petitioner's constitutional claims. *See* Pet. 12, 21–22. Those flaws cast grave doubt on whether Virginia has acted "in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Moreover, the flaws described in the petition are not an isolated occurrence. They reflect systemic failures in

Virginia's capital habeas procedures, as the ABA's expert assessment explains in detail.

A. The ABA's Assessment Identifies Serious Deficiencies In Virginia's Capital Habeas Procedures.

Virginia, like all other states, provides a collateral, post-conviction corrective process. *See* Virginia Assessment, at 227 (citing Va. Code §§ 8.01-654, 19.2-163.7; Va. S. Ct. R. 5:7, 5:7A). But that process can operate in practice to prevent constitutional violations from being properly identified and remedied. As this case illustrates, the collateral review provided to death-sentenced prisoners in Virginia lacks the basic components of the "adversarial process historically thought essential to the truth-finding function of a court." *Gray v. Pearson*, No. 1:11-cv-630, 2012 WL 1481506, at *11 (E.D. Va. Apr. 27, 2012). As a result, "inmates are left with a limited record for federal courts to review in subsequent proceedings" and "the substance of habeas claims often go unaddressed." Virginia Assessment, at xxiv–xxv.

In cases of prisoners not sentenced to death, Virginia follows traditional norms of adjudication. Prisoners can choose whether to seek collateral review in the state supreme court or in the circuit courts where their cases were tried; they are afforded adequate time to develop and present their petitions for relief; they have access to reasonable discovery, court-appointed experts, investigative services, and evidentiary hearings; and they have the option of appealing decisions of the circuit courts regarding their petitions. *See, e.g.,* Va. Code § 8.01-654; *id.*

§ 8.01-655. One might expect that the Commonwealth would afford death-sentenced prisoners at least the same options as prisoners not sentenced to death. But in fact none of those options are available. *See* Virginia Assessment, at viii (noting that Virginia's procedures "effectively provide[] less due process to those under a death sentence than that which is afforded to non-capital inmates"). Instead, death-sentenced prisoners may be prevented from developing their constitutional claims, no matter how substantial and serious they may be. *See id.* at viii–ix, 232–36.

One of the more severe problems with the Commonwealth's post-conviction process is that it denies prisoners a meaningful opportunity to develop evidence during pre-petition discovery. *See id.* at 239–40. Only the Virginia Supreme Court has authority to grant discovery and its exclusive jurisdiction over capital habeas proceedings does not begin until after the initial petition is filed, leaving a critical gap in the process. *See id.* at 239 (citing Order Denying Motion for Pre-Petition Jurisdiction, *In re Gleason*, No. 111957 (Va. Oct. 17, 2012)). As a result, "no Virginia court has the jurisdiction or authority to grant pre-petition discovery in capital habeas cases." *Id.* Nor can prisoners obtain discovery through Virginia's Freedom of Information Act, as Virginia's prosecutors are exempt from the Act's provisions. *See id.* (citing *Connell v. Kersey*, 547 S.E.2d 228, 231–232 (Va. 2001)).

Prisoners' ability to develop evidence on their own and without compulsory process is also strictly limited. Death-sentenced prisoners are required to

file state habeas petitions within 60 days of this Court's resolution of a petition for writ of *certiorari* from the petitioner's direct criminal appeal, or within 60 days of the deadline for seeking *certiorari* if no petition is filed. *See* Virginia Assessment, at 230–32 (citing Va. Code § 8.01-654.1; Va. S. Ct. R. 5:7A(a)). And that initial petition is the prisoner's only realistic opportunity to present any and all of his constitutional claims. Petitions may be amended only within the 60-day deadline for filing an initial petition, *see* Va. S. Ct. R. 5:7A(i), and amendments are limited to the claims presented in the initial petition, *see Dorsey v. Angelone*, 544 S.E.2d 350, 351–352 (Va. 2001).

Equally troubling and directly relevant here, prisoners are often afforded no reasonable opportunity to present and test evidence in the state court's post-conviction proceedings—a problem that is only exacerbated by the lack of meaningful pre-petition discovery opportunities. "[M]any claims that are commonly presented in state habeas proceedings involve complex factual considerations that typically require the court to consider evidence that is not in the trial record and that cannot be fully developed in the absence of an evidentiary hearing, such as claims of ineffective assistance of counsel and prosecutorial misconduct." Virginia Assessment, at 233. But evidentiary hearings are almost never granted in Virginia and, as a result, the Virginia Supreme Court routinely decides disputed factual questions without any court receiving evidence, hearing testimony, or making essential credibility determinations. *See id.* at 234–36.

Remarkably, between 1995, when the Virginia Supreme Court obtained exclusive jurisdiction over capital habeas cases, *see* S.B. 969, 1995 Virginia Laws Ch. 503 (Va. 1995), and 2012, when the ABA experts completed their assessment, the court granted evidentiary hearings in only *five* cases—a fraction of the 64 capital habeas petitions it reviewed (only 7%). Virginia Assessment, at 233 (citing cases). (To the ABA's knowledge, the Virginia Supreme Court also has not granted a hearing since 2012 when the ABA experts completed their assessment.) Moreover, "the Court did not explain why it ordered hearings in only these cases, nor does there appear to be a common issue that distinguishes these five cases from the cases in which hearings were not granted." *Id*.; *see also id*. at 242. "By making findings of fact and conclusions of law without the benefit of an evidentiary hearing, and instead through review of affidavits," the Virginia Supreme Court has "prevent[ed] adequate development of habeas claims and limit[ed] its own ability to accurately assess the claims presented during capital habeas proceedings." *Id*. at 234.

B. Virginia's Post-Conviction Procedures Violate Both This Court's Instructions And The ABA's *Guidelines*.

While this Court has taken pains to emphasize the importance of state-court fact finding, *see Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), Virginia has tacked in the opposite direction. As far as the ABA can determine, the Virginia Supreme Court has not granted any death-sentenced prisoner's request for expert services or assistance, or any kind of discovery

or evidentiary hearing, *in almost a decade*. *See also* Virginia Assessment, at 248. Instead, as the ABA's Virginia Assessment determined, "factual disputes" in Virginia's habeas proceedings "appear to be" routinely "resolved based on review of affidavits submitted by the parties rather than through evidentiary hearings." *Id.* at viii. That is "particularly troublesome because many claims that are commonly presented in state habeas proceedings involve complex factual considerations that typically require the court to consider evidence that is not in the trial record and that cannot be fully developed in the absence of an evidentiary hearing." *Id.*; *cf.* 2010 Protocols, ch. 8; 2001 Protocols, at 17–22. Moreover, in the vast majority of cases, the Virginia Supreme Court waited to address and deny petitioners' motions for discovery or evidentiary hearings at the same time it granted the Warden's motion to dismiss—often without any explanation for the denial. *See, e.g.*, *Juniper v. Warden*, 707 S.E.2d 290, 311 (Va. 2011); *Teleguz v. Warden*, 688 S.E.2d 865, 879 (Va. 2010).

The end result is a combination of procedural deficiencies that in practice deny prisoners any meaningful opportunity to fully and fairly litigate claims of constitutional error. Virginia's restrictions on discovery contrast sharply with this Court's observation that the "pre-application phase of a habeas corpus proceeding" is a time when the "services of investigators and other experts" are "critical" to a petitioner's ability to identify, develop, and provide factual support for constitutional claims. *McFarland v. Scott*, 512 U.S. 849, 855 (1994); *see also ABA Guidelines*, 31 HOFSTRA L. REV. at 1079–80.

They are also in irreconcilable tension with this Court's acknowledgement that "the evidentiary basis" for constitutional claims "often turns on evidence outside the trial record" and that proceedings "without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317–18 (2012).

Virginia's procedures are also incompatible with "the standards for capital defense work articulated by the [ABA]—standards to which [this Court] long ha[s] referred as 'guides to determining what is reasonable.'" *Wiggins*, 539 U.S. at 524 (citation omitted). Those standards instruct post-conviction counsel to "continue an aggressive investigation of all aspects of the case," and emphasize that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation" because "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case." *ABA Guidelines*, 31 HOFSTRA L. REV. at 1085–86; *see also ABA Criminal Justice Standards for Post-Conviction Remedies*, Standard 22-4.5(a), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk.html ("Discovery techniques, specially adapted for post-conviction proceedings, should be utilized for assistance in advancing a case toward disposition by exploring and narrowing issues of fact.").

In short, Virginia's post-conviction procedures for death-sentenced prisoners stymie counsel from fulfilling their duties and prevent courts from

developing adequate evidentiary records. As a result, "[u]nder current collateral review procedures, a 'full and fair judicial review' often does not include reviewing the merits of the inmate's constitutional claims." Virginia Assessment, at 226. That raises serious concerns worthy of this Court's attention.

II. The Court Should Grant Review To Clarify When Federal Courts Should Not Defer To State Court Habeas Decisions.

When states do not provide adequate post-conviction procedures, federal courts should not defer to state-court decisions denying post-conviction relief. 28 U.S.C. § 2254(b)(1), (d). This petition provides an opportunity both to reinforce that basic principle and to elaborate the circumstances under which a federal court should defer to a state court's factual conclusions.

A. Adequate State Habeas Procedures Are The Cornerstone Of Proper Federal Habeas Review.

Today, "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). As this Court recently observed, "[t]he federal habeas scheme leaves primary responsibility with the state courts." *Pinholster*, 563 U.S. at 182 (citations omitted). Federal habeas rules presume that states will provide adequate procedures for resolving disputed questions of fact concerning the deprivation of federal constitutional rights.

In the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), Congress made clear that federal courts should defer to state courts only if they have fulfilled their obligation to provide adequate process for post-conviction review. *See* 28 U.S.C. § 2254(b)(1)(B)(i) (allowing federal courts to grant a writ of habeas corpus where "there is an absence of available State corrective process"); *id.* § 2254(b)(1)(B)(ii) (allowing federal courts to grant a writ where the state "process [was] ineffective to protect the rights of the applicant"). A federal court must not defer to a state court's factual conclusions when its decision is "based on an unreasonable determination of the facts in light of the evidence presented" in the state post-conviction proceedings. *Id.* § 2254(d)(2); *see also Williams*, 529 U.S. at 437.

This Court, too, has recognized that a state court's determinations are entitled to deference only if "the State has provided an opportunity for full and fair litigation of a [constitutional] claim." *Stone v. Powell*, 428 U.S. 465, 482 (1976). "If federal fact-finding is to be avoided" in federal habeas proceedings, "then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (finding Florida prisoner entitled to an evidentiary hearing in federal district court because Florida's statutory procedure "fail[ed] to include the prisoner in the truth-seeking process"). Accordingly, although this Court has limited the circumstances under which federal habeas courts may hold evidentiary hearings,

it has done so, in part, to "encourag[e] the full factual development in state court of a claim that state courts committed constitutional error" and to "ensur[e] that full factual development takes place in the earlier, state-court proceedings." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8–9 (1992), *superseded by statute*.

The adequacy of a state's post-conviction process is especially important in capital cases, where meaningful collateral review is essential to the fair administration of justice and where proper fact finding is crucial to the development of a complete, accurate record on which to base determinations of federal constitutional rights. *See* Virginia Assessment, at 225. That is why the ABA's assessment recommends that Virginia "[p]rovide an evidentiary hearing on any cognizable issue for which there is a genuine dispute of fact, thereby ensuring that factual findings are made after a careful consideration of the facts and law and not made solely by reference to affidavits." *Id.* at 238; *see also ABA Criminal Justice Standards for Post-Conviction Remedies*, Standard 22-4.6(a) ("A plenary hearing to receive evidence, by testimony or otherwise, is required whenever there are material questions of fact which must be resolved in order to determine the proper disposition of the application for relief.").

"It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring). In the vast majority of jurisdictions, including Virginia, post-conviction habeas review is

the sole means for determining whether capital defendants received adequate counsel at trial and on direct appeal. *See, e.g.*, *Browning v. Commonwealth*, 452 S.E.2d 360, 362, n.2 (Va. Ct. App. 1994) ("Claims of ineffective assistance of counsel may no longer be raised on direct appeal."); *see also Martinez*, 132 S. Ct. at 1317–21; *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). It is also often the first and only meaningful opportunity to uncover whether convictions or death sentences have been unconstitutionally infected by the misconduct of state agents, including prosecutors, police, jurors, or judges. *See, e.g.*, *Wolfe v. Johnson*, 565 F.3d 140, 150 (4th Cir. 2009) (death-penalty case where prosecutors coached witnesses and intentionally withheld exculpatory evidence).

B. The Virginia Supreme Court's Factual Conclusions Are Not Entitled To Deference.

Although the Fourth Circuit was correct to begin with the presumption that a state court's factual conclusions are ordinarily entitled to deference, *see, e.g.*, *Harrington*, 131 S. Ct. at 785, the absence of an evidentiary hearing and the existence of disputed facts should have prompted the Fourth Circuit to revisit that presumption. Where, as in this case, the state court does not provide any meaningful factual development or any opportunity to test evidence through an adversarial process, the state's factual determinations are unreasonable and the federal court should not defer. *See* 28 U.S.C. § 2254(d)(2); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2280–81 (2015).

In this case, the Fourth Circuit failed to take account of the many deficiencies in Virginia's post-conviction procedures. *See* Virginia Assessment, at 225–56 (Chapter 8). Instead, it assumed that the Virginia Supreme Court had read and considered petitioner's pivotal evidence undermining the affidavit of his trial counsel merely because the state court denied a motion to strike the relevant affidavit. *Gray v. Zook*, 806 F.3d 783, 791–92 (4th Cir. 2015). It then speculated why the Virginia Supreme Court might have credited the Commonwealth's evidence over petitioner's, even though the evidence was disputed and had never been tested through a traditional adversarial process. Nowhere did the Virginia Supreme Court discuss the affidavit, explain the implicit credibility findings that the Fourth Circuit assumed had prompted the petition's dismissal, or even attempt to suggest that it "engaged in the difficult process of weighing the credibility of the affiants on a conflicting record." *Id.* at 802 (Davis, J., concurring in part and dissenting in part).

The Virginia Supreme Court's resolution of disputed facts on the basis of affidavits represents a remarkable departure from both traditional procedures and basic understandings of what due process requires. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (finding that Oregon's abrogation of well-established common law procedures "raises a presumption that its procedures violate the Due Process Clause"). Proper adjudication in this country has always been thought to require the application of legal rules to facts that, if disputed, are determined only after the parties are

afforded a fair opportunity to be heard, with the presentation of evidence tested through an adversarial process. Our system does not permit "trial on affidavits." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Instead, "[w]hen evidentiary facts are in dispute, when the credibility of witnesses may be an issue, when conflicting evidence must be weighed, a full trial is clearly necessary regardless of whether it is a bench or jury trial." Federal Judicial Ctr., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* 39 (1991) ("Such disputes are not appropriately resolved on the basis of affidavits. Witnesses should be heard and observed, on direct and cross-examination"); *see also ABA Standards for Post-Conviction Remedies*, Standard 22-4.6(a).

That is why a court's authority to grant summary judgment is limited to motions where there is no "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). That is also why this Court appoints special masters to hear and take evidence in cases falling within its original jurisdiction. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725 (1981). And it is why appellate courts, which typically are not authorized to take testimony, review evidence, or hear witnesses, generally do not resolve disputed facts in the first instance. *See, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985).

Consistent with these principles, it has long been recognized that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an

evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled in part on other grounds by Keeney*, 504 U.S. at 5 (*Keeney* did not address *Townsend*'s holding authorizing a federal evidentiary hearing when "the fact-finding procedures employed by the state court [were] not adequate to afford a full and fair hearing," *Townsend*, 372 U.S. at 313); 28 U.S.C. § 2254(d)(2); *Williams*, 529 U.S. at 437; *cf. Brumfield*, 135 S. Ct. at 2277, 2280–81 (finding state court's refusal to grant an evidentiary hearing was unreasonable). If the post-conviction procedures a state elects to provide are not adequate and meaningful, federal courts should not sanitize those flawed procedures in the name of deference. *See Gray*, 806 F.3d at 802 (Davis, J., concurring in part and dissenting in part) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)).

III. There Are Compelling Reasons To Grant *Certiorari* In This Case.

The need for this Court's guidance is especially warranted in light of the important federalism and separation-of-powers concerns raised by Virginia's inadequate post-conviction procedures. Virginia's approach not only harms petitioners with meritorious claims, but it imposes enormous burdens on a federal system that is calibrated to rely on state-court records to evaluate the merits of petitioners' constitutional claims. Federal courts have been left either to defer to inadequate fact-finding and ignore potential constitutional violations (as the court did below), or to put themselves in the position of determining the merits of constitutional claims in the

first instance, contrary to what AEDPA and this Court's precedents generally require.

What may be most concerning about Virginia's system is that it affords fewer protections to capital habeas petitioners than it does to non-capital petitioners. "Death is different" is a reason given for why procedures are supposed to be more robust and review more stringent. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). In this Court, death-penalty cases generally receive greater scrutiny, not less. Virginia appears to take the opposite approach, however, denying capital cases the careful attention they deserve. The Commonwealth schedules executions to occur before the time allowed for this Court to review petitions for writs of *certiorari* in the normal course. *See* Virginia Assessment, at 236–37. And it takes other steps to execute sentences quickly and shield Virginia death-penalty cases from meaningful review. *See id.* at 236–38. Indeed, a 2002 report found that Virginia's error-detection rate in capital cases was the lowest in the nation, and two standard deviations below the mean for other states with the death penalty. *See* James S. Liebman, *et al.*, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 68 (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

The Court should grant review in this case to help restore confidence in the administration of justice in Virginia's death penalty cases. It should take this opportunity to make clear that when a prisoner's life and constitutional rights hang in the

balance, disputed questions of material fact cannot be fairly resolved by a state court without an evidentiary hearing. If a state court resolves disputed material facts without holding an evidentiary hearing, it has failed to make a reasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(2), and federal courts should step in to protect the constitutional interests at stake. The problems that infect Virginia's death-penalty procedures, and the court's error below, call for this Court's intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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