No. 07-1223

In The
Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS IN SUPPORT OF RESPONDENT

JOEL R. BRANSCOM, PRESIDENT
VIRGINIA ASSOCIATION OF
COMMONWEALTH'S ATTORNEYS
P.O. Box 4
Fincastle, Virginia 24090
(540) 473-8227

Counsel of Record for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Bell claimed in state habeas that his trial counsel were constitutionally ineffective at sentencing for not investigating and presenting character witnesses. He presented affidavits of the witnesses in support of his claim. The state habeas court adjudicated Bell's claim on the merits: it assumed the truth of all of Bell's allegations, found that he failed to demonstrate either unreasonable performance or prejudice, and dismissed the claim on the pleadings. Bell presented this same claim to the district court along with several additional allegations of facts about his own background that trial counsel allegedly failed to investigate. The district court announced that Bell had not failed to develop his claim in state court and held an evidentiary hearing at which Bell presented some of his character witnesses. The district court then found that counsel's performance had been unreasonable, but denied relief on the strength of its independent finding that Bell failed to demonstrate prejudice. The Fourth Circuit expressly declined to address the performance issue and it too found that Bell failed to demonstrate prejudice. Given these circumstances:

> Did the Fourth Circuit err when it additionally applied the deferential standard of 28 U.S.C. § 2254(d) to Bell's claim that was (1) predicated on petitioner's factual allegations which the state court assumed were true and "adjudicated on the merits," and (2) supplemented by additional evidence permitted to be heard in an evidentiary hearing in the district court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND RULES

FEDERAL STATUTES:

28 U.S.C.:

CODE OF VIRGINIA:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Virginia Association of Commonwealth's Attorneys, established in 1939, is a voluntary association of Virginia's 120 independently-elected Commonwealth's Attorneys and approximately 700 Assistant Commonwealth's Attorneys.[1] The Association has among its purposes advancing the efficient and fair administration of the laws of the Commonwealth, and promoting uniformity in methods of procedure in the trials, appeals and subsequent review of criminal cases arising in the courts of the Commonwealth.

Members of the Association are the prosecutors in Virginia state court criminal trials, which this Court properly has recognized is the "main event" in the criminal justice system, "rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. 72, 90 (1977). The Association is particularly mindful of the unique role of the prosecutor in the criminal justice process. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, Comment 1, Virginia Rules of Professional Conduct.

Members of the Association also will be the attorneys for the Commonwealth if a criminal case returns for a retrial because error has been discovered in direct appeal or post-conviction review. This Court has acknowledged that federal habeas corpus review "entails significant costs" to the states. *Engle v. Isaac*, 456 U.S. 107, 126 (1982). "The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails." *Coleman v. Thompson*, 501 U.S. 722 (1991).

> As Justice Harlan once observed, '[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error, but rather on whether the prisoner can be restored to a useful place in the community.' *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (dissenting opinion).

Coleman, 501 U.S. at 748, *quoting Engle*, 456 U.S. at 127. In capital murder cases, the Commonwealth cannot begin to enforce a presumptively valid final judgment while the lengthy process of collateral review upon collateral review continues with no guarantee of increasing the quality of justice. *See Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("it is far from clear that a second trial 10 years after the first trial would produce a more reliable result").

> One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication.
>
> Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.'" Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

McCleskey v. Zant, 499 U.S. 467, 491 (1991) (internal citations omitted).

The Association is aware of the effect that a decision in this case may have on the way criminal trials are conducted in the Commonwealth and how they subsequently are reviewed. It participates here to inform the Court of state procedures to assure the Court that it may have confidence in the reliability of Virginia criminal judgments and the proper and efficient review of the judgments in Virginia's Supreme Court, and to express its concern with the application of federal law in the lower federal courts that has led to this Court's review of Bell's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Edward Bell, a Virginia inmate under sentence of death, presents an issue of federal habeas corpus procedure arising out of the lower federal courts' disposition of an ineffective assistance of counsel claim. The controlling precedent of this Court requires the inmate to demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner alleged that his trial counsel unreasonably failed to investigate or present certain mitigation evidence at his 2001 capital murder sentencing proceeding. The underlying facts concerning the ineffective assistance of

counsel claim are relatively straightforward and can be resolved without unnecessary confusion of issues. Every court that has reviewed Bell's claim has found that he failed to prove prejudice. The Virginia Supreme Court found that Bell failed to prove deficient performance or prejudice (JA 231); the federal district court conducted an evidentiary hearing and disagreed with the state court's finding as to the performance prong, but independently found no prejudice (JA 801-803); the Court of Appeals declined to address the performance prong, reviewed the state court record and the evidence from the federal hearing, and upheld the reasonableness of the Virginia Supreme Court's finding of no prejudice. (Pet. App. 13a-16a).

The failure to demonstrate prejudice ends an ineffective assistance of counsel claim:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697. The lack of prejudice is manifest in this case.

The record of the federal proceedings makes resolution of the federal habeas corpus procedure issue essentially an abstract exercise. Bell's complaint with

the Fourth Circuit rests on assumptions that the district court correctly followed the federal habeas statute in ordering an evidentiary hearing, but improperly relied on the federal rule of deference in denying relief. However, the federal district court improperly adopted an *ad hoc* procedure not authorized by federal law in ordering a hearing and deciding Bell's claim. This Court, accordingly should decline to reach the issue Bell asserts.

The peculiar *ad hoc* procedure employed by the district court in this case – hearing witnesses to determine whether the state court affidavits were true – should not be approved by this Court as an acceptable application of 28 U.S.C. § 2254(d) because it does not apply, or properly dispense with, the reasonableness inquiry of the federal statute. The district court's procedure, the order, the conduct of the hearing and the court's decision describe an independent inquiry into the correctness of the state court's decision, not the reasonableness inquiry of § 2254(d).

I. BELL CANNOT DEMONSTRATE *STRICKLAND* PREJUDICE.

A Virginia jury unanimously found beyond a reasonable doubt that Bell willfully, deliberately and premeditatedly murdered a law enforcement officer for the purpose of interfering with the officer's performance of his official duties. The murder of a police officer is a distinctly serious offense; many states, like Virginia, have deemed it punishable by death. This

Court has acknowledged the strength of public concern for these public servants even as it ruled that states may not impose a *mandatory* death sentence for the murder of a police officer. *Roberts v. Louisiana*, 431 U.S. 633 (1977).[2]

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

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[2] In *Roberts*, the Court noted that 129 officers were killed in the line of duty in 1975. *Id*. at 636 n.3. Department of Justice statistical reports indicate that 575 police officers were killed in the line of duty between 1996 and 2005. *See* United States Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/homicide/leok.htm.

Id. at 636-637. *Roberts* did not purport to establish an exclusive list of mitigating evidence for such murders, but the examples given all can be understood as having some genuine tendency to suggest a reason for a life sentence after a conviction for murdering a police officer in the performance of his duties. Bell never has suggested that he could present mitigation evidence of a comparable quality.

On the night of October 29, 1999, several law enforcement officers came upon Bell and another man engaged in what appeared to be a drug sale. (Pet. App. 183a). Bell fled, and Sergeant Ricky Timbrook gave chase on foot, yelling repeatedly, "Stop running. Police." (Pet. App. 185a). After pursuing Bell along several streets and alleys, Sergeant Timbrook was fatally shot at close range above his right eye as he climbed over a small fence. (Pet. App. 184a-185a). Timbrook had not even unholstered his sidearm. (Pet. App. 184a).

Police officers discovered Bell hiding in a coal bin in a nearby home. Gunshot residue was found on Bell's hands and evidence connected Bell to the murder weapon. (Pet. App. 186a-187a, 200a). Bell had $1800 worth of cocaine on his person. (VJA 2513).

Bell admitted to police that he was present in the area when the police car arrived; he fled and was chased, but did not know who pursued him or why; he heard a shot and hid in the basement where he was found; he denied having a gun. Later, Bell admitted to a jail inmate that he shot Sergeant Timbrook,

discarded the weapon, and broke into a house to hide. (Pet. App. 187a).

In fact, Bell knew Sergeant Timbrook well from at least three prior encounters. Timbrook arrested Bell in 1997 for carrying a concealed weapon. In 1998, Sergeant Timbrook participated in Bell's arrest pursuant to an INS detention order. And in 1999, Timbrook participated in the execution of a search warrant at Bell's home, and in Bell's presence. Bell disliked the officer and told acquaintances that he would like to see Timbrook dead. Bell boasted that he would shoot the officer in the head in a face-to-face encounter because he knew Timbrook wore a bullet-proof vest. (Pet. App. 187a-188a).

Capital murder, a distinct category of homicide in Virginia, is the willful, deliberate and premeditated killing of a person *and* one of 15 gradation factors. In Bell's case it is the willful, deliberate and premeditated murder of a law enforcement officer for the purpose of interfering with the officer's performance of his official duties. Virginia Code § 18.2-31. The facts of Bell's crime certainly were sufficient for a jury to find that Bell committed capital murder.

Bell's conduct in the murder also strongly influenced the capital murder sentencing proceeding. After a finding of guilty of a capital offense, Virginia law requires a separate sentencing proceeding where the Commonwealth must prove one or both of two statutory aggravating circumstances. Virginia Code § 19.2-264.4. Here, the jury unanimously found that the

Commonwealth proved Bell's "dangerousness" beyond a reasonable doubt – "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society." (JA 151). Virginia Code § 19.2-264.4.[3]

Bell chose to murder a police officer. The evidence would have permitted the jury to conclude that Bell was concerned about a felony drug offense conviction, the possibility of deportation, settling his grudge against Sergeant Timbrook, or all of the above. On this record, the jury was entitled to conclude that Bell's choice of the most extreme conduct to deal with his circumstances – murdering Sergeant Timbrook – objectively established his propensity to violence, fully satisfying the statutory requirement.

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[3] Bell erroneously suggests that a lengthy criminal record of convictions of violent crimes is contemplated for a finding of "future dangerousness" under Virginia law. The statute itself directs the sentencer to consider the defendant's prior record or the circumstances of the current offense. Virginia Code § 19.2-264.4. The Virginia Supreme Court also has confirmed that the statutory finding of dangerousness may be based solely on the circumstances of the murder. *See Beck v. Commonwealth*, 484 S.E.2d 898 (Va. 1997). In Bell's case, the Commonwealth established dangerousness based on his prior history and the current offense.

Significantly, both the facts of the current offense and evidence of Bell's history with law enforcement officers and jailors, excluded any pretense that Bell would be a trouble-free prisoner if sentenced to life imprisonment. He was convicted in Jamaica of assault and destruction of property in 1985. More recently in this country, he had possessed and sold illegal drugs; in 1997 he was found by police to have a concealed gun with the serial number obliterated; he had physically assaulted a pregnant girlfriend and threatened another acquaintance with a gun in 1997; and he had threatened employees of the local jail while awaiting trial. In encounters with law enforcement officers in West Virginia in 1999, Bell had been found in possession of .38 caliber ammunition and had used a false name before fleeing from an officer attempting to arrest him. (Pet. App. 188a). This evidence only confirmed Bell's dangerousness.

Bell's murder would be viewed by a jury as exceptionally aggravated because his victim was a police officer. And, by all accounts, Sergeant Timbrook was the very model of a dedicated, professional law-enforcement officer who is a credit to his community. Valued and respected by colleagues for his work, he served his community even beyond his immediate law enforcement responsibilities. (VJA 1683, 1687, 3019, 3031, 3033). Ricky Timbrook and his wife were expecting their first child – a son – at the time of his murder. His family testified at sentencing about the impact of the murder. (JA 120-129).

Bell denied the offense and provided his counsel with no basis to assert any defense, excuse or justification for his conduct. At the time of petitioner's sentencing, his lawyers presented the testimony of Bell's father and a sister to comment briefly on the defendant and his family, mainly to show the jury other people who would be affected by Bell's death. (JA 134-139, 148). At best, this evidence only technically was "mitigation," in that the trial court would have risked error in excluding it. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as *a mitigating factor*, any aspect of a defendant's character or record. . . ."). However, as the prosecutor at trial correctly observed, the defendant actually presented no "mitigation" evidence (JA 141, 143), in the sense of providing an actual opportunity, reason or incentive for a life sentence. Accordingly, counsel argued for a life sentence on other grounds, stressing the security of confinement in prison, the possibility of residual doubt about Bell's guilt, and a general plea that Bell's execution would not help Sergeant Timbrook's family and would impact Bell's innocent family adversely. (JA 144-148). The jury sentenced Bell to death for the capital murder and the maximum sentences for a possession with intent to distribute cocaine and use of a firearm.

Bell's state habeas corpus petition alleged a variety of circumstances in his background that trial counsel allegedly failed to investigate and present at

sentencing. When granted a federal evidentiary hearing, Bell presented only five "mitigation" witnesses. (JA 540-607). The district court believed that four of Bell's friends offered generally "helpful things to say about Bell's character"; characterizing Bell as "loving, decent and hard-working" and a "good father" to his children; one witness, Nicholson, also stated she could have contested prosecution evidence that Bell assaulted another girlfriend. (JA 799-800). Technically, it meets the broad definition of "mitigation," and certainly it would be admissible, but it drains any coherent meaning from the concept to suggest that Bell's habeas "mitigation" has any actual capacity to produce a reasonable probability of a life sentence in the context of this case.

Much like trial counsel's offered "mitigation" evidence, petitioner's flimsy "good character" evidence suggests no tangible reason for leniency and inspires no reasonable hope for a life sentence. This Court has recognized factors that might be considered mitigation evidence for crimes like Bell's, *see Roberts*, 431 U.S. at 636-637, and has identified substantial and compelling evidence in finding prejudice in previous "mitigation" cases. *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 517 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). Bell does not have evidence of comparable quality, as he readily admits. (Pet. Brief at 47-48).

As weak as it is, this Court also cannot reasonably assume that Bell's evidence would have been even marginally positive. The Virginia Supreme Court

correctly observed that Bell's proffered evidence could serve cross purposes; it cannot be sanitized so that it is entirely beneficial. (JA 229). These witnesses risked at least as much harm to Bell's cause as the limited bit of good they could do. Testimony from Bell's ex-wife and ex-girlfriends about their beliefs that Bell was hard-working, decent, and loving would not escape challenge from the experienced prosecutor who had just detailed evidence of Bell's bad character. Such testimony invites cross-examination to explore the witnesses' knowledge of other, more damaging aspects of the defendant's past conduct, and provides an easy opportunity to repeat and reinforce the aggravating nature of the defendant's conduct. The witnesses are subject to cross-examination on their obvious interest and bias; they still have affection for Bell and the children Bell fathered, but did not support; they have knowledge of Bell's drug use; and they have knowledge of Bell's assaultive behavior. Finding any inherent "mitigation" value in these witnesses that would survive even routine cross-examination is entirely speculative.

Bell's weak "mitigation" cannot be improved by watering down the *Strickland* prejudice standard and claiming that he merely needs to show that "one juror" probably would have voted for a life sentence if trial counsel had presented different evidence.[4]

[4] Virginia's capital sentencing statute directs the trial court to impose a life sentence in a capital case if the jury is unable to agree unanimously on a sentence. Virginia Code § 19.2-264.4(E).

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Strickland, however, commands that a reviewing court make an objective assessment of prejudice and explicitly prohibits finding prejudice even on the basis of *known* proclivities of a decisionmaker. *Strickland*, 466 U.S. at 695 (a finding of prejudice does not "depend upon the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). It hardly improves an objective prejudice standard to bind it to imagined juror propensities. For purposes of a prejudice analysis the only "juror" that may be identified is the presumptively reasonable, conscientious, and impartial juror who faithfully applies the law given by the court to the facts of the case, just like his or her fellow jurors, *not* "one juror" arbitrarily assumed to have a tendency to view the defendant's case favorably. *See Strickland*, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, 'nullification,' and the like.").

In Virginia, as elsewhere, individual jurors drawn from the community are questioned and found qualified to hear a criminal case. They come to their

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From this, Virginia Association of Criminal Defense Lawyers (VACDL) appears to assume that Bell's *Strickland* prejudice burden applies less stringently. (VACDL Br. at 2, 20). In the circumstance of a jury unable to agree on sentence, some factual basis exists to suggest that at least one juror had a differing opinion on the appropriate punishment on the facts of that case. Bell's jury was unanimous in returning a death sentence.

duty and deliberate together as a single jury that renders a single verdict to which each juror has sworn his or her individual assent. That is the only decisionmaker in a Virginia capital murder case to be considered in a *Strickland* prejudice inquiry.

II. THE DISTRICT COURT ADOPTED AN ERRONEOUS PERFORMANCE STANDARD.

In conducting the *Strickland* inquiry, the district court adopted a hindsight view of the circumstances presented to trial counsel. This was error. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *See Strickland*, 466 U.S. at 689.

The district court's dissatisfaction with trial counsel's efforts was based on an undisguised after-the-fact assessment of the case. The court discounted trial counsel's concerns about the risks of the "good character" evidence by stressing repeatedly that the verdict could not have been worse than a death sentence. (JA 793: "How could it have been any worse?"; "Could it have been any worse?").[5] The court concluded that counsel's concern about "double-edged

[5] The district court ruled from the bench at the conclusion of the evidentiary hearing and no subsequent opinion addressed the court's findings.

sword" evidence was unfounded because it already was before the jury in the prosecution's case. (JA 802). Trial counsel, however, lacked the benefit of the district court's after-the-fact certainty of a death sentence and reasonably was concerned about damaging evidence coming before the jury from the defendant's own witnesses.

The district court also substituted a performance standard that itself is contrary to this Court's precedent by embracing an apparent bright-line rule that would require some mitigating evidence to be offered as a matter of law, even if it could not affect the verdict. The court faulted trial counsel for presenting "zero mitigation" and failing to present evidence the court conceded would not have made any difference in the verdict:

> While I find that counsel should have done more in presenting this mitigating evidence, I have to say that based on all of the evidence presented, I believe that the jury would have arrived at the same verdict of death even had this mitigating evidence been presented.

(JA 803). The district court's methodology simply requires finding that a death sentence exists and that trial counsel put on no mitigation evidence, and the district court made that finding. If that now is the standard to determine performance, then trial counsel indeed performed deficiently. That standard, however, was an erroneous application of *Strickland*. *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not

require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case").

III. VIRGINIA PROVIDES ABUNDANT OPPORTUNITIES FOR THE LITIGATION OF CONSTITUTIONAL CLAIMS.

At every step of the proceedings in Virginia's courts, every participant – be it prosecutor, trial judge, defense attorney, juror, or Supreme Court Justice – is fully aware of their weighty responsibilities. A death penalty case does not suddenly for the first time become important or serious when the convicted inmate begins federal collateral review, and it is absurd to contend that federal habeas corpus review presents the first opportunity for a Virginia inmate to obtain review of claims of constitutional error in his state court trial. The Virginia General Assembly has mandated safeguards and extended opportunities for condemned inmates in the trial, appeal and post-conviction review of a capital murder case.

The trial court was obligated to appoint "one or more" attorneys to represent Bell from a list of qualified capital case attorneys. Virginia Code § 19.2-163.7 (1995). At the time of Bell's trial, the Virginia General Assembly required the Public Defender Commission

and the Virginia State Bar to adopt standards for the appointment of counsel in capital cases, "which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation." Virginia Code § 19.2-163.8(A) (1991). Further, the Public Defender Commission was made responsible for maintaining a list of qualified attorneys and inclusion on this list required an additional determination of "all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation," Virginia Code § 19.2-163.8(B) (1991). The statutory requirements were followed in Bell's case.

In capital murder cases there are no caps on the fees paid court-appointed counsel and court-appointed expert fee caps also may be disregarded. Virginia Code § 19.2-175. Upon motion of defense counsel and a finding of indigence a defendant charged with capital murder is entitled to a forensic mental health evaluation by one or more mental health experts. No *Ake* showing is required. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). (mental health expert assistance to be made available where defendant makes threshold

showing that mental condition is likely to be a significant factor at trial). The mental health expert is "to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense." Virginia Code § 19.2-264.3:1(C).[6]

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[6] Following this Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), the General Assembly enacted Virginia Code § 19.2-264.3:1.2 (2003), now also providing a capital murder defendant with the services of one or more qualified mental health experts to assess whether or not he is mentally retarded and to assist the defense in the preparation and presentation of information concerning mental retardation. Effective 2005, any criminal defendant may obtain the services of the Virginia Department of Forensic Science to conduct a scientific investigation of evidence relevant to his case simply by making a good faith request that is heard *ex parte* by the trial court. Virginia Code § 9.1-1104. Virginia law requires that all indigent defendants be provided with "the basic tools of an adequate defense." *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996), *quoting, Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). "[A]n indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the

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Appellate counsel for the convicted defendant also must be appointed from the qualified attorney list. All death sentences receive automatic review in the Virginia Supreme Court; no notice of appeal is necessary. Trial transcripts must be prepared "as expeditiously as practicable" and the record promptly filed with the Supreme Court. In addition to review of alleged trial errors raised by the defendant, the Virginia Supreme Court determines in every case whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The Supreme Court may affirm the death sentence, remand the case for a new sentencing proceeding, or commute the sentence to life imprisonment. By law, the Supreme Court must give priority to the review of death penalty appeals over other cases on its docket. Virginia Code § 17.1-313.

Within 30 days after affirmance of a death sentence on direct appeal, the trial court is to appoint counsel to represent the convicted capital murder defendant for a state habeas corpus petition; his

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subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," *Ake*, 470 U.S. at 82-83, and that he will be prejudiced by the lack of expert assistance. *Id.* at 83. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Husske*, 476 S.E.2d at 925.

petition must be filed no later than 60 days after this Court has denied certiorari or completed review on direct appeal. Virginia Code § 19.2-163.7. State habeas counsel also must be appointed from the list of qualified capital case attorneys. *Id.* In the event that appointment of habeas counsel is not timely, the inmate's habeas filing date is extended by operation of law to guarantee counsel no less than 120 days after appointment to prepare and file a habeas corpus petition, as was done in Bell's case. Virginia Code § 8.01-654.1 (1998).[7]

The Virginia Supreme Court has exclusive jurisdiction to consider habeas corpus petitions in death penalty cases. Virginia Code § 8.01-654(C)(1); § 17.1-310.[8] The Supreme Court is directed by law to "give priority to the consideration and disposition of petitions for writs of habeas corpus filed by prisoners held under sentence of death." Virginia Code § 17.1-313.

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[7] Virginia law also provides any convicted defendant with an additional opportunity for post-conviction review of previously unavailable DNA evidence in a "Writ of Actual Innocence," *see* Virginia Code § 19.2-327.1 (2005), or review of newly discovered evidence in a "Writ of Actual Evidence Based on Non-biological Evidence," Virginia Code § 19.2-327.10 (2004).

[8] In all other criminal cases the Supreme Court and the trial court have concurrent jurisdiction to consider petitions for habeas corpus relief; the Supreme Court may return a writ to the circuit court for an evidentiary hearing if necessary. The Supreme Court has exclusive appellate jurisdiction for all circuit court habeas petitions. Virginia's intermediate appellate court has no original or appellate jurisdiction in habeas corpus cases challenging criminal convictions.

IV. THE VIRGINIA SUPREME COURT PROPERLY ADJUDICATED BELL'S CLAIM ON THE MERITS.

Virginia's statutory post-conviction procedures provide an inmate the opportunity for full and fair adjudication of state habeas corpus claims as a matter of law and as is shown in Bell's case.[9] The Virginia Supreme Court properly adjudicated the merits of Bell's claim on the record according to Virginia law, accepting his facts as pleaded and finding them insufficient for relief. "In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record." Virginia Code § 8.01-654(B)(4). The state procedure for determining claims on the record is not defective or otherwise suspect. It is not noticeably different than that employed by a federal district court. *Schriro v. Landrigan*, 127 S.Ct.

[9] Virginia has not created state processes to be a part of federal habeas review. States are not required by the Federal Constitution to create and maintain any system of post-conviction review. *See Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 402 (2001) (no constitutional mandate that states create mechanism for direct appeal or post-conviction review); *Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Murray v. Giarratano*, 492 U.S. 1, 13 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). Virginia has chosen to establish its own comprehensive procedures for direct and collateral review of its own criminal judgments. Having made that choice, Virginia is not compelled to make its post-conviction procedures conform to a federal model. *Smith*, 528 U.S. at 275.

1933, 1940 (2007) (if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

Bell was not improperly denied a hearing or denied an opportunity to further develop his claim. Bell's habeas claims were "developed" at the time he filed the state petition because Bell was required by Virginia law to include all of his factual allegations in his state habeas filing:

> *Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing* and such petition shall enumerate all previous applications and their disposition.

Virginia Code § 8.01-654(B)(2) (emphasis added). "The statutory language could not be more explicit; *it means what it says*. At the time of filing the initial petition, the prisoner must include 'all' claims the facts of which are known to the prisoner." *Dorsey v. Angelone*, 544 S.E.2d 350, 352 (Va. 2001) (emphasis added). *See Lovitt v. Warden*, 585 S.E.2d 801, 817 n.4 (Va. 2003) ("We do not consider Lovitt's additional contention [raised after an evidentiary hearing]. Lovitt failed to make this allegation in his habeas petition. *See* Code § 8.01-654(B)(2)"); *Winston v. Warden of Sussex I State Prison*, 07 Va. S.Ct. UNP 052501, at 8 (Va. 2007) ("[A]s the facts which support this allegation were known to petitioner at the time he filed his oversized petition on December 2, 2005, Code § 8.01-654(B)(2) also bars our consideration of

this portion of claim (III)"). In Virginia, as in federal court, an inmate cannot make bare claims with the expectation of additional proceedings to flesh them out. *See Jones v. Polk*, 401 F.3d 257, 269 (4th Cir. 2005) (an evidentiary hearing is an instrument to test the truth of facts already alleged in the habeas petition).

Amicus VACDL suggests that Virginia law unfairly "restricts" the development of facts because the Supreme Court has exclusive jurisdiction over death penalty habeas corpus cases. The Commonwealth's highest court is not less knowledgeable than state trial courts about the Constitution, the writ of habeas corpus, ineffective assistance of counsel claims, or death penalty law.[10] Virginia law guarantees that the Virginia Supreme Court thoroughly reviews *every* Virginia death penalty case, on direct appeal and during state habeas review.

Prior to the 1995 reforms in Virginia's habeas corpus law, inmates challenging death sentences initiated state habeas petitions in the trial court and subsequently appealed to the Virginia Supreme Court. 1995 Va. ACTS ch. 503. The process allowed too many unnecessary habeas hearings in the trial courts, causing inconsistent applications of law and

[10] The Virginia Supreme Court's experience in habeas cases far exceeds that of any trial court. It considers hundreds of habeas corpus filings annually pursuant to its original and appellate jurisdiction. *See* "Virginia Supreme Court Case Type Filings," http://www.courts.state.va.us/csi/scv.html.

unnecessary delay. The General Assembly adopted a procedure for capital murder cases that eliminated the automatic two-stage state habeas corpus procedure.

The Virginia Supreme Court now has exclusive original jurisdiction for death penalty habeas cases. *See* Virginia Code § 8.01-654(C)(1); § 17-97. It receives the petition initially instead of on appeal, and it decides if a hearing is necessary or if the claims may be resolved on the record. When the Supreme Court identifies claims presenting disputed factual issues that cannot be resolved on the record, it refers the claims to the trial court for a hearing. Virginia Code § 8.01-654(C)(1) & (2). By statute, the circuit court must conduct a hearing and report recommended findings of fact and conclusions of law on a timetable that avoids unnecessary delays. Virginia Code § 8.01-654(C)(3). The Virginia Supreme Court preserves the trial court's traditional opportunity to decide disputed factual disputes and make credibility determinations by treating factual findings as binding if supported by evidence. *See Lovitt v. Warden*, 585 S.E.2d 801, 808 (Va. 2003).

V. THE DISTRICT COURT IMPROPERLY FAILED TO APPLY 28 U.S.C. § 2254(d).

In the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Congress established a general rule requiring federal courts to defer to the reasonable merits decisions of state courts. The structure of

28 U.S.C. § 2254(d) sets out a decisional checklist that encourages efficient resolution of habeas claims. No part of § 2254(d) involves the need for an evidentiary hearing.

The statutory general rule is stated in the clearest terms: the writ "shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings." § 2254(d). Whether the claim was decided in state court on the merits is a matter of record. The exceptions to the general rule all are determined on the state court record. Whether the inmate can demonstrate that the state court decision is contrary to, or an unreasonable application of, clearly established federal law also is evaluated on the record § 2254(d)(1); the district court determines the controlling precedent of this Court and assesses the reasonableness of the state court's application of law to an already established set of facts. Concerning the reasonableness of the state court's factual determinations, the federal habeas court looks to the state court record to identify the state court "decision," what facts are determined, and the "evidence presented in the state court proceeding." § 2254(d)(2). No need or opportunity for a federal evidentiary hearing even is suggested within § 2254(d).

The district court's puzzling order granting an evidentiary hearing cannot be ratified as an acceptable application of § 2254(d). The district court found a "colorable claim" that the Virginia Supreme Court's decision was an unreasonable determination of the

facts and an unreasonable application of controlling precedent. It is not clear what the district court meant by a "colorable claim" of unreasonableness, but the court clearly did not actually find unreasonableness. The court expressly declined to make a "final ruling" on the issue until an evidentiary hearing was held. The stated purpose of the evidentiary hearing was to have "the relevant issues . . . developed more fully."

An evidentiary hearing for an "unreasonableness" assessment cannot be reconciled with the record review contemplated by § 2254(d).[11] By its specific terms, § 2254(d) directed the district court to consider the "decision" of the state court and "the evidence presented in the state court proceeding." All of these matters already were before the federal court as a part of a complete state court record. Extrinsic evidence was unnecessary to establish the record to be reviewed. More importantly, because Congress explicitly limited the § 2254(d) inquiry to "the evidence presented in the state court proceeding," extrinsic evidence different than what the Virginia Supreme Court considered was not permitted.

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[11] Circumstances where the federal court lacks an accurate state court record detailing the "evidence presented in the state court proceeding" might call for different treatment. *See* § 2254(f) ("If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.").

The district court's order recites the factual allegations petitioner presented in his state habeas corpus petition. There were no facts to be "developed more fully." Section 2254(d) directs that the evidence presented to the state court is the totality of the evidence to be considered in the reasonableness inquiry, not a starting point for further development.

A hearing to develop facts "more fully" suggests an independent inquiry into whether the facts exist or are "true," or a design to allow a petitioner to further expand the factual basis of his claims. If the district court had intended the grant of an evidentiary hearing to signal permission for Bell to develop new facts never presented to the state court, it would have committed clear error. Again, § 2254(d) directs the federal court to look at the evidence presented in state court. And this Court has ruled that the federal habeas petitioner is limited to the factual basis of claims decided in state court absent a showing of "cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure." *Keeney v. Tamayo Reyes*, 504 U.S. 1, 11 (1992).

In fairness to the district court, its order did not necessarily imply a determination that Bell was free to present new facts he never raised in state court. The district court's comment regarding § 2254(e)(2) seems to say nothing more than that Bell did not fail to develop in state court the facts that Bell had developed in state court. The discussion of Bell's claim largely tracked the factual allegations of the

state court affidavits. The district court contemporaneously declined to address the Warden's objection to Bell's inclusion of defaulted facts, characterizing those items as "not critical to my decision on this claim." Petitioner already had assured the district court that he was presenting exactly the same claim that the Virginia Supreme Court decided. At the conclusion of the hearing, the district court's statements centered almost entirely on his satisfaction that the fact witnesses' federal testimony followed what their state court affidavits asserted. The district court apparently wanted to hear what the fact witnesses had to say.

The district court's order recited the belief that Bell alleged "facts that, if true," would entitle petitioner to relief, but a hearing to determine which facts were true was unnecessary. The Virginia Supreme Court's order sets out petitioner's alleged facts, accepting them as established facts and "true"; the state court's order did not suggest that any of petitioner's facts were not "true"; the Virginia Supreme Court simply ruled that Bell's facts as pleaded did not merit relief.[12] (JA 228-231). The district court did not

[12] The record does not support petitioner's argument that the state court "resolved important factual disputes against him" by concluding that Bell's "impeachment" witnesses also could be impeached and that defense attorneys reasonably may choose to avoid cross purpose evidence. (Pet. Brief at 58). The state court was entitled to notice other facts in the record, and settled principles of law, in deciding the legal significance of Bell's alleged facts that the Court had accepted as established.

need a hearing to accept Bell's state court facts as "true."

Most disturbing, however, is the district court's reliance on *Townsend v. Sain*, 372 U.S. 293, 313 (1963), as guaranteeing Bell a hearing because "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." The Virginia Supreme Court's "fact-finding procedure" in habeas corpus cases provides a "full and fair" opportunity to present constitutional claims and have them decided on the merits precisely as such claims are decided in federal court. In Bell's case, the Virginia Supreme Court's procedure in adjudicating the merits of petitioner's claim consisted of accepting Bell's factual allegations as pled. A federal court examination of the adequacy of a state court's procedures to provide a "full and fair hearing" is no longer the touchstone for federal evidentiary hearing. AEDPA "changed the standards for granting federal habeas relief." *Landrigan*, 127 S.Ct. at 1939. Section 2254(d) directs the federal court to first determine the *reasonableness* of the state court *decision*.

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. . . . *Because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those*

> *standards in deciding whether an evidentiary hearing is appropriate*.

Id. at 1940. (Emphasis added). The district court's decision to hold an evidentiary hearing *first*, in order to resolve the reasonableness inquiry later, inappropriately reversed the correct process.

Taking the district court's order and subsequent hearing together, this Court cannot endorse the decision to grant an evidentiary hearing as an appropriate application of § 2254(d). The district court had a hearing to decide if the state court correctly decided the claims. It conducted a *de novo* review of some of the facts presented in state court and independently decided the performance and prejudice inquiry of *Strickland* differently than had the Virginia Supreme Court, without ever finding the state court's decision "unreasonable." It did not apply § 2254(d) as Congress directed or consistent with this Court's understanding of AEDPA.

Petitioner obtained an undeserved windfall in the district court. He had an evidentiary hearing on a claim that he said was exactly the same as his unsuccessful state court claim, without any ruling that the state court's decision was unreasonable, and *de novo* review of the *Strickland* claim that applied an erroneous deficient performance standard. Nevertheless relief was denied because he could not demonstrate prejudice. The Fourth Circuit had the opportunity to correct the district court's errors, but instead decided the case on the alternate basis of no *Strickland*

prejudice, thoroughly reviewing the entire state and federal court evidentiary record, and upholding the state court's "no prejudice" determination under § 2254(d). That decision would have been unassailable had the district court properly applied § 2254(d). The result of these combined decisions is that petitioner frames an issue in this Court that assumes, among other things, that the lower courts applied § 2254(d)'s deferential review incorrectly after Bell properly received an evidentiary hearing on a claim that is so significantly different from the state court allegations as to constitute a new claim.

Petitioner has asked the Court to decide in this case what standard of review the district court and Fourth Circuit ought to have applied to decide his claim after the district court properly ordered an evidentiary hearing. The underlying premise for his argument is absent because the hearing was not properly ordered. The *ad hoc* procedure followed by the district court is not a proper application of § 2254(d). Petitioner has left this Court with an abstract question of law, divorced from the facts of his case, that should not be decided in his favor.

Petitioner cannot demonstrate *Strickland* prejudice for his claim under any available standard of review. The Virginia Supreme Court reasonably found no prejudice. The district court independently agreed after its own *de novo* review. Bell's failure to demonstrate prejudice is dispositive of his underlying claim. The Fourth Circuit correctly upheld the reasonable determination of the state court on the issue of

prejudice, even granting petitioner the benefit of additional facts developed in federal court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

JOEL R. BRANSCOM
Attorney for Amicus Curiae
Virginia Association of Commonwealth's Attorneys