CAPITAL CASE
No. 22-

IN THE
Supreme Court of the United States

THEODORE WASHINGTON,
Petitioner,
v.
DAVID SHINN, DIRECTOR,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a federal habeas court defer to a state-court finding of fact that favors the defendant?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Theodore Washington. Respondent is David Shinn, Director, Arizona Department of Corrections. No party is a corporation.

RULE 14.1(B)(III) STATEMENT

The proceedings that are directly related to the case are as follows:

Arizona v. *Robinson*, No. C-14064 (Yuma Cty. Az. 1988)

Arizona v. *Robinson*, Nos. CR-88-0002-AP, CR-88-0003-AP (Az. 1990)

Arizona v. *Mathers*, No. CR-88-0001-AP (Az. 1990)

Arizona v. *Washington*, No. C-14064 (Yuma Cty. Az. 1992).

Robinson v. *Schriro*, No. CV-96-00669-JAT (D. Az. 1999)

Washington v. *Schriro*, No. CV-95-2460-JAT (D. Az. 2005)

Washington v. *Shinn*, No. 05-99009 (9th Cir. 2006)

Robinson v. *Schriro*, No. 05-99007 (9th Cir. 2010)

Washington v. *Ryan*, No. 07-11536 (9th Cir. 2016)

Ryan v. *Washington*, No. 16-840 (U.S. 2017)

Washington v. *Ryan*, No. CV-95-02460-PHX-JAT (D. Ariz. 2017)

Washington v. *Ryan*, No. 05-99009 (9th Cir. Jan. 15, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Theodore Washington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not published in the Federal Reporter, but may be found at 840 F. App'x 143. Pet. App. 85a. The Memorandum of Decision and Order of the United States District Court for the District of Arizona is not reported in the Federal Supplement, but may be found at No. CIV 95-2460, 2005 WL 8147365. Pet. App. 147a.

JURISDICTION

On April 17, 2019, in *Theodore Washington* v. *David Shinn*, No. 05-99009, the Ninth Circuit entered a memorandum disposition affirming the district court's denial of a subset of the claims presented in petitioner's habeas petition (Pet. App. 139a) and issued a separate opinion reversing the district court's denial of relief as to the remaining claim concerning ineffective assistance of counsel. *Id.* at 94a. Both petitioner and respondent filed timely petitions for rehearing en banc. On January 15, 2021, the Ninth Circuit withdrew its previous opinion, denied respondent's petition for rehearing en banc as moot, issued an order amending the April 2019 memorandum disposition, and denied petitioner's petition for rehearing en banc with respect to the claims addressed in the memorandum disposition. *Id.* at 85a. The Ninth Circuit did not re-enter judgment but instead directed further briefing and set oral argument. On December 20, 2021, the Ninth

Circuit issued a new opinion affirming the denial of petitioner's ineffective assistance of counsel claim (*id.* at 45a), and petitioner timely filed a petition for rehearing en banc. On August 29, 2022, the Ninth Circuit issued a third, amended opinion, again affirming the denial of the ineffective assistance of counsel claim and denied petitioner's petition for rehearing en banc. *Id.* at 1a.

On October 21, 2022, Justice Kagan extended the time within which to file this petition to and including January 26, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d) (1994 ed.) provided that:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the applicant shall establish or that it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

INTRODUCTION

In one respect, this is a case like so many others this Court has reviewed and reversed. Despite the clear language of both the federal habeas statute and this Court's decisions, the Ninth Circuit refused to defer to a state court's factual findings with respect to a criminal judgment. See, *e.g.*, *Demosthenes* v. *Baal*, 495 U.S.

731, 735 (1990) (vacating stay of execution for Ninth Circuit's failure to defer to state finding of fact); *Rushen* v. *Spain*, 464 U.S. 114, 120–22 (1983) (reversing Ninth Circuit on similar basis); *Sumner* v. *Mata*, 455 U.S. 591, 597–98 (1982) (same). But this case is also critically different. This time, the state court's factual finding favors the habeas petitioner and would require vacating his conviction. There is no basis in statutory text, case precedent, or principles of federalism and comity for the Ninth Circuit's refusal to respect the state court's factual findings. Indeed, there is no more authority for disregarding the state court's findings here than there would be if, as is more common, circumstances were reversed and the State were demanding respect for its courts' factual findings.

Fred Robinson, James Mathers, and petitioner Theodore Washington were each convicted of first degree felony murder and sentenced to death in a joint trial. But the Arizona Supreme Court directed Mathers' acquittal on direct review because the evidence introduced at trial was insufficient to sustain his conviction. *State* v. *Mathers*, 796 P.2d 866 (Ariz. 1990).

In reviewing Washington's petition for post-conviction relief, Arizona state court Judge H. Stewart Bradshaw, who had also presided over the joint trial, stated that he had "a difficult task in finding *any* evidence linking Washington to the crime" and "a great deal of difficulty finding a basis to hold Washington culpable which does not apply, at least equally or in a greater manner, to James Mathers." Pet. App. 197a–98a (emphasis added). Judge Bradshaw explicitly found that "[i]f Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place Washington at the scene." *Id.* at 98a. Judge Bradshaw acknowledged that this issue "may present a colorable

claim for relief at some point in time," yet determined that he was powerless to apply these factual findings and vacate Washington's sentence. *Id.* at 199a. Instead, Judge Bradshaw simply "allow[ed] counsel to make a record so it could be examined in the event that another court wishes to accept review." *Id.*

This federal habeas petition is that proceeding. Washington's habeas petition pointed out that Judge Bradshaw found that the insufficiency of evidence that led to Mathers' acquittal also applies to him. Both the district court and the Ninth Circuit ignored that finding. Instead, both courts reviewed the evidence themselves anew, ignoring that the Supreme Court of Arizona vacated Mathers' conviction for insufficient evidence and directed his acquittal, and that Judge Bradshaw—the author of the last reasoned decision on the merits and the person best positioned to have evaluated all of the evidence against all defendants—found that the evidence allegedly connecting Washington to the crime was "no greater" than that against Mathers.

This Court's review is urgently needed to promote fairness in the administration of federal habeas and to prevent an execution based on insufficient evidence of guilt. This Court should summarily reverse the judgment below, or in the alternative, grant certiorari and declare that the presumption of the correctness of state-court findings of fact on habeas review applies regardless of which party that evidence favors.

FACTUAL AND PROCEDURAL BACKGROUND

Ralph and Stirleen Hill, parents of Robinson's wife Susan Hill, were shot in their home on June 8, 1987 in Yuma, Arizona, and Stirleen Hill died. Pet. App. 148a. Robinson was apprehended fleeing the scene. *Id.* at 151a–172a. The only two eyewitnesses could not identify Washington in photo and in-person lineups. ER 397–404, 414–20, 485–87.[1] No physical evidence connected Washington to the crime.[2] Nevertheless, Washington was charged along with Robinson and Mathers with felony murder for Stirleen Hill's death.

Washington and his co-defendants were tried jointly over Washington's objection in the Yuma County court. In the glaring absence of evidence against Washington, the prosecution focused heavily on co-defendant Robinson's actions and the evidence against him. Witnesses testified to observing Robinson and Mathers packing a duffel bag with multiple guns and planning to "take care of some business" before departing for Yuma from Robinson's home in Banning, California. ER 340–41. Robinson, who was apprehended

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[1] References to "ER" refer to the record in *Washington* v. *Ryan*, No. 05-99009, Excerpts of R. Volumes I, II & III, Dkt. 224 (9th Cir. Oct. 16, 2017).

[2] Expert witnesses testified that evidence recovered from the scene and Robinson's car found within blocks of the crime scene did not match Washington's fingerprints, hair, writing, or shoe prints. ER 253–55, 428–33 (fingerprints recovered from the scene and objects there did not match Washington's); ER 278–82 (same for shoeprints recovered from the scene); ER 257–60 (same for fingerprints on shotgun recovered a block from the scene); ER 422–25 (analyst "excluded Mr. Washington. . . as having been [a] possible source of the hair . . . on the bandana" recovered from Robinson's car a block from the scene); ER 458 (handwriting analyst's testimony that "neither Mathers or Washington executed" a note with the Hill's address found in Robinson's car).

fleeing the crime scene, was the common-law husband of the Hills' daughter Susan, and had violently abducted Susan and their children on multiple occasions after she had left him. See, *e.g.*, ER 294–98, 323–26, 350–59, 368–74, 460–73, 506–14. At the time of the murder, Susan had left Robinson yet again, and Robinson believed she had gone to her parents' home in Yuma. ER 298–99. With little evidence towards Washington's or Mathers' culpability, the State closed its case by arguing to the jury that "[t]here is a guilt by association in this case," that "in Yuma, Robinson was associated with Washington and Mathers," and that the jury should "consider guilt by association, because of the past track record of Robinson." ER 523. The jury convicted all three defendants.

On direct appeal, Mathers argued that the evidence was insufficient to support his conviction. The Arizona Supreme Court agreed, holding that the State failed to prove Mathers' conviction beyond a reasonable doubt and directing Mathers' acquittal. *Mathers*, 796 P.2d at 873. Although Robinson and Washington also directly appealed their convictions in state court, Washington's counsel failed to challenge the sufficiency of the evidence. The Arizona Supreme Court subsequently affirmed Washington's and Robinsons' conviction, never reaching that issue. *State* v. *Robinson*, 796 P.2d 853 (Ariz. 1990).

Washington turned to state post-conviction proceedings for relief. There, with new counsel, Washington raised the sufficiency issue, pointing out that "the same deficiencies in the record which led to the dismissal of charges against James Mathers must also apply to" him. Pet. App. 197a. Judge Bradshaw, the same state judge who presided over Washington's and Mathers' trial, found that the evidence against Washington was "no greater" than against Mathers, which

the Arizona Supreme Court ruled as insufficient. *Id.* And he found the disparate treatment of Washington and Mathers troubling. Judge Bradshaw explained:

> Quite truthfully, this court has a great deal of difficulty finding a basis to hold Washington culpable which does not apply, at least equally or in a greater manner, to James Mathers. If Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place Washington at the scene.

Id. Nevertheless, despite his factual findings as to the sufficiency of the evidence, Judge Bradshaw believed he lacked authority to address the disparity and denied relief. *Id.*

Washington subsequently sought federal habeas review on numerous grounds, including as relevant to this petition, that the evidence against him was insufficient to support his conviction in light of Mathers' acquittal and the state court's factual finding that the evidence against him was no stronger than that against Mathers. Washington also pursued the related claim that he was deprived of the effective assistance of counsel on direct appeal because appellate counsel failed to raise the sufficiency of evidence question. The district court denied relief on these claims, declaring that "how the Arizona Supreme Court resolved [the sufficiency of the evidence] claim as to Mathers is irrelevant," and ignoring Judge Bradshaw's findings on post-conviction review about how the evidence against Mathers related to the evidence against Washington. *Id.* at 160a–61a & n.9. The Ninth Circuit affirmed. *Id.* at 142a–43a.

In disposing of Washington's petition, both the district court and Ninth Circuit weighed the evidence anew. Neither court discussed the state court's findings, nor explained how the federal courts' new view of the record was consistent with that of the state court. Instead, the district court and Ninth Circuit overrode the state court's findings, stating that "a rational trier of fact could have found beyond a reasonable doubt that Washington participated in the crime," *id.* at 143a (Ninth Circuit); see also *id.* at 161a (district court), even though Judge Bradshaw, the trial judge, had found quite the opposite.

Robinson also filed a habeas petition. The Ninth Circuit granted his petition, holding the state court erred in finding sufficient evidence to apply the especially cruel, heinous, or depraved conduct aggravating factor and that Robinson received ineffective assistance of counsel in the penalty phase. *Robinson* v. *Schriro*, 595 F.3d 1086 (9th Cir. 2010). As a result, Robinson was resentenced to sixty-seven years to life. The Ninth Circuit initially also reversed the district court's denial of Washington's habeas petition as to the penalty phase, holding that Washington received ineffective assistance of counsel at the penalty phase and was prejudiced thereby. Pet. App. 94a–116a. The Ninth Circuit subsequently withdrew that opinion. A reconfigured panel (following the retirement of Judge N.R. Smith) subsequently affirmed the denial Washington's petition, reaching the opposite conclusion with respect to ineffective assistance of counsel, on the same record and without any intervening change in the applicable law. *Id.* at 6a–43a.

As a result, the person with the least evidence against him remains the sole co-defendant on death row. Washington has now languished there for a majority of his life. This case warrants review because the

district court and Ninth Circuit refused to defer to the state court's factual findings, which upended the balance between federal and state power.

REASONS FOR GRANTING THE PETITION

I. BOTH THE DISTRICT COURT AND NINTH CIRCUIT FAILED TO DEFER TO THE STATE COURT'S FINDINGS OF FACT

When reviewing Washington's claims on habeas review, both the district court and Ninth Circuit erred by weighing the evidence against Washington anew, ignoring the state court's factual findings and improperly substituting their own judgment for that of the state court, without explanation. The federal courts' disregard of a state court's factual findings should not stand—especially where, as here, the state court's findings benefit a criminal defendant.

A. Federal Courts Must Accord a Presumption of Correctness to State-Court Findings of Fact On Pre-AEDPA Habeas Review

Even in pre-AEDPA[3] habeas cases, "a determination . . . of a factual issue, made by a State court . . . shall be presumed to be correct." 28 U.S.C. § 2254(d) (1994 ed.); see also *Sumner* v. *Mata (Sumner II)*, 455 U.S. 591, 591–92 (1982) (per curiam) ("28 U.S.C. § 2254(d) requires federal courts in habeas proceedings to accord a presumption of correctness to state-court findings of fact." (citing *Sumner* v. *Mata* (*Sumner I*), 449 U.S. 539 (1981))); *Miller-El* v. *Cockrell*, 537 U.S. 322, 356 & n.1 (2003) (Thomas, J.,

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[3] There is no dispute that AEDPA does not apply here, because Washington filed his habeas petition before AEDPA's enactment. Pet. App. 21a; *see Bobby* v. *Van Hook*, 558 U.S. 4, 5–6 (2009) (per curiam).

dissenting). "This requirement could not be plainer." *Sumner II*, 455 U.S. at 592. Although the pre-AEDPA § 2254(d) presumption is rebuttable, if the presumption "does not control," the reviewing court "must provide a written explanation of the reasoning that led it to conclude that one or more of the first seven factors listed in § 2254(d) were present, or the 'reasoning which led it to conclude that the state finding was not fairly supported by the record.'" *Id.* at 593 (internal quotation marks omitted) (quoting *Sumner I*, 449 U.S. at 551).

In so holding, the Court honored the federal courts' responsibility to adhere to the system of federalism and respect for state-court findings of fact. See *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1739 (2022) ("In our dual-sovereign system, federal courts must afford unwavering respect to the centrality 'of the trial of a criminal case in state court.'" (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977))); *Cabana* v. *Bullock*, 474 U.S. 376, 391 (1986) ("Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants."), *abrogated on other grounds*, *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Sumner I*, 449 U.S. at 547 ("interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of state courts"). Deference to state-court findings of fact is also a matter of practicality. "Federal courts, years later, lack the competence and authority to relitigate a State's criminal case." *Ramirez*, 142 S. Ct. at 1739; see also *Rushen*, 464 U.S. at 120 ("the state courts were in a far better position than the federal courts to answer" a factual question and thus "deserve[] a 'high measure of deference'" (quoting *Sumner II*, 455 U.S. at 598)).

B. The Ninth Circuit's and District Court's Disregard of State-Court Findings of Fact Conflicts With This Court's Habeas Jurisprudence

The district court and Ninth Circuit both failed to presume the correctness of and defer to the state court's clear factual findings regarding the lack of evidence tying Washington to the crime for which he was convicted. Judge Bradshaw found that "no greater evidence seem[ed] to place Washington at the scene" than his co-defendant, Mathers, and that the court had no "basis to hold Washington culpable which does not apply, at least equally or in a greater manner," to Mathers, Pet. App. 197a—whom the Arizona Supreme Court acquitted for insufficient evidence. *Mathers*, 796 P.2d at 873. Judge Bradshaw reviewed the record to determine what, if any, facts connect Washington to the crime that would "separate[] him from Mathers." Pet. App. 199a. And Judge Bradshaw ultimately concluded that he "ha[d] a difficult task in finding *any* evidence linking Washington to the crime." *Id.* at 198a (emphasis added).

Judge Bradshaw's factual findings are owed deference because the weight of the evidence is a question of fact. *Tibbs* v. *Florida*, 457 U.S. 31, 37–38 (1982) ("[T]he weight of the evidence refers to a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.") (citation and internal quotation marks omitted)); see also *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 164 (1988) ("A common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence.'" (quoting *Finding of Fact*, Black's Law Dictionary 569 (5th ed. 1979))).

It does not matter that Judge Bradshaw ultimately concluded that his factual finding did not authorize him, under Arizona law, to provide relief. That is a legal conclusion. And § 2254(d) says, plainly, that a "determination after a hearing on the merits of a *factual* issue," as opposed to a *legal* issue, "shall be presumed to be correct." 28 U.S.C. § 2254(d) (1994 ed.) (emphasis added). That express language requires federal courts to defer to factual findings without regard to any ultimate legal conclusion reached by the state court. *Id.*; see *Sumner I*, 449 U.S. at 547 (The "interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of state courts."). This Court's pre-AEDPA jurisprudence, which holds that questions of law "warrant independent review by a federal habeas court," reinforces that Congress intended deference to Judge Bradshaw's factual findings, not legal conclusions, for these purposes. See *Thompson* v. *Keohane*, 516 U.S. 99, 116 (1995); cf. *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963), *overruled on other grounds*, *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992) ("Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law.").

Yet, the district court and Ninth Circuit ignored the state court's findings related to the sufficiency of the evidence against Washington. Their analysis directly contradicted several of the state court's factual findings related to Washington's lack of involvement in the crime. For example, Judge Bradshaw found that "[n]o evidence suggests that Washington said anything about the trip or its purpose." Pet. App. 198a. The Ninth Circuit and district court contradicted that finding, erroneously asserting that "Washington discussed going to Yuma on the day of the crimes." *Id.* at 90a; see

also *id.* at 161a (same). As another example, in assessing and rejecting as inadequate the evidence against Washington, Judge Bradshaw found that Robinson, when arrested, had a red bandana in his car with hairs that did not match Washington. *Id.* at 199a. Yet the Ninth Circuit cited the same red bandana as evidence supporting *Washington's* conviction. *Id.* at 90a. Ignoring Judge Bradshaw's findings and relying upon its own, mistaken findings, the Ninth Circuit declared that "a rational trier of fact could have found beyond a reasonable doubt that Washington participated in the crime." Pet. App. 90a-91a.

The district court and Ninth Circuit offered no explanation for ignoring the presumption of correctness of state-court findings. Arizona has never argued—and the Ninth Circuit and district court did not find—that any exceptions listed in Section 2254(d) applied in this case. This Court has admonished the Ninth Circuit and its sister circuits that this sort of silence is clear error. See *Sumner II*, 455 U.S. at 596 (finding clear error when "the Court of Appeals found that it was not necessary for it to apply the presumption of correctness or explain why the presumption should not be applied"); see also *Burden* v. *Zant*, 498 U.S. 433, 438 (1991) (vacating Eleventh Circuit's order where "the Court of Appeals did not even *mention* the trial court's finding . . . , much less explain why that finding is not entitled to a presumption of correctness" (emphasis in original)).

The Ninth Circuit's decision cannot stand where, as here, the federal court found facts "contrary to the express finding[s] in the state trial court's" record without so much as "*mention[ing]* the trial court's finding[s]." See *id.* at 436–37. This Court has routinely vacated pre-AEDPA federal appellate court cases just like the one here that do not "presum[e]. . . correct"

state-court findings of fact under § 2254(d). See, *e.g.*, *id.* at 437–38 (reversing the Eleventh Circuit); *Sumner II*, 455 U.S. at 598 (reversing the Ninth Circuit for failing to heed its instruction to "apply the statutory presumption or explain why the presumption was not applicable"); *Sumner I*, 449 U.S. at 543, 547–52 (reversing the Ninth Circuit for making findings "considerably at odds with the findings made by" the state court despite that no § 2254(d) exception applied); *Rushen*, 464 U.S. at 120–22 (reasoning that "the factual findings arising out of the state courts' post-trial hearings" that the jury's deliberations as a whole were not biased were entitled to a presumption of correctness); *Wainwright* v. *Witt*, 469 U.S. 412, 435 (1985) (reversing the Eleventh Circuit, noting the lack of "clear and convincing evidence that the factual determination by the State court was erroneous"); *Marshall* v. *Lonberger*, 459 U.S. 422, 433 (1983) (reversing the Sixth Circuit for erroneously applying the § 2254(d) standard to make a credibility finding for itself). The Ninth Circuit's independent fact-finding here thus clearly violates § 2254(d).

In any event, none of the § 2254(d) exceptions apply to Washington's case. Sections 2254(d)(1)–(7) are irrelevant. And § 2254(d)(8) "requires that a federal habeas court do more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair[ ] support' in the record." *Marshall*, 459 U.S. at 432. The exception is not a license for federal courts to conduct an independent review of the facts and reach their own conclusions. See *id.* at 434–35 (Congress did not "intend[] to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself.").

Here, Judge Bradshaw explained the support for his finding that that the evidence against Washington was no greater than that against Mathers. He analyzed the evidence to support his conclusion that "no greater evidence seems to place Washington at the scene." Pet. App. at 197a–99a. Accordingly, the Ninth Circuit was not entitled to "substitut[e] its views of the facts for that of" Judge Bradshaw. See *Wainwright* v. *Goode*, 464 U.S. 78, 85–86 (1983) (reversing the Eleventh Circuit's application of Section 2254(d) on an "ambiguous" record, because the state court's conclusions found "fair support in the record"); *Marshall*, 459 U.S. at 433–35 (holding the Sixth Circuit "erroneously applied the [§ 2254(d)(8)] 'fairly supported by the record' standard," explaining that the Sixth Circuit's "reliance on respondent's testimony" and the lack of "contrary evidence[]" are "quite wide of the mark for purpose of determining whether factual findings are fairly supported by the record"); *Maggio* v. *Fulford*, 462 U.S. 111, 113 (1983) (reversing the Eleventh Circuit because that court's finding that the eighth exception applied boiled down to "substitut[ing] its own judgment as to the credibility of witnesses for that of the Louisiana courts—a prerogative which 28 U.S.C. § 2254 does not allow").

On habeas review, the district court and Ninth Circuit owed deference to the opinion of Judge Bradshaw as to the quantum of evidence against Washington. Federal courts must "look[] through" to "the last reasoned decision" of the state courts on the merits. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991). Here, Judge Bradshaw issued a post-conviction order, and the Arizona Supreme Court was "silent" on those findings in its summary denial of review. See *id.* at 804. Therefore, Judge Bradshaw's findings represent the "last reasoned decision" of the state-court. See, *e.g.*, *id.* at

805 (reasoning that because the "California courts were silent," the "last state opinion on the [federal] claim is that of the [lower court]").

C. Basic Logic Compels Vacating Washington's Conviction

Adhering to this Court's longstanding habeas jurisprudence and in deference to the state court's factual findings, a federal court on habeas review *must* accept that the evidence against Washington is no greater than the evidence against Mathers. See *Marshall*, 459 US at 435 (state court findings were "factual conclusions which the federal habeas courts were bound to respect in assessing respondent's constitutional claims").

Had the federal courts deferred to Judge Bradshaw, then it necessarily follows that the evidence against Washington is insufficient to support his conviction. The Arizona Supreme Court determined that the evidence was insufficient to sustain Mathers' conviction. Judge Bradshaw then found that the quantum of evidence against Washington is less than the evidence against Mathers. Thus, the evidence against Washington was also necessarily insufficient to sustain Washington's conviction, and no rational trier of fact could find Washington guilty of murder beyond a reasonable doubt. Accordingly, this Court's precedent—and the only reasonable inference from Judge Bradshaw's findings—compels that Washington's conviction must be vacated. See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (compelling the grant of habeas when the prosecution fails to meet its burden to prove guilt beyond a reasonable doubt).

II. DEFERENCE TO STATE-COURT FINDINGS OF FACT IN HABEAS CASES APPLIES WITH EQUAL FORCE TO FINDINGS IN A HABEAS-PETITIONER'S FAVOR

There are no loopholes to the longstanding principles of federalism and state-court deference in the federal habeas context. The Court should make that clear in this case.

Consider if the roles were reversed, and a state court finds, on postconviction review and as a matter of fact, that the evidence *is* sufficient to support an individual's conviction. A federal court, on habeas review, ignores that finding, instead determining in its own view that the evidence *is not* sufficient. Would such actions flout deference? Of course they would. So too here.

Indeed, although concerns over federalism and comity often result in the *denial* of habeas relief, in Washington's case it is precisely the respect for these ideals and the preservation of the state factfinding process that compels the *grant* of relief. By announcing that the presumption of deference applies to all state-court findings—not just those favorable to the State but also to the criminal defendant—this Court would provide critical guidance to lower courts that they must adhere to that principle consistently.

This case neither implicates nor upsets the dual-sovereign system: The state court concluded that it was powerless to remedy the apparent contradiction that Washington faced a murder conviction and death sentence even though the court agreed that there was no greater evidence against Washington than his co-defendant, and the Arizona Supreme Court had already directed the acquittal of that co-defendant for insufficient evidence. The state court instead commented that it would be "most appropriate to allow counsel to

make a record so it could be examined in the event that another court wishes to accept review." Pet. App. 199a.

A federal court, on habeas review, is that court. It is the job of the federal court to examine the record and ensure that any convictions were secured consistent with the Constitution while deferring to the factual findings in the last reasoned state court decision. Leaving Washington's death sentence in place notwithstanding the insufficiency of evidence against him is precisely the kind of constitutional error that federal habeas review is designed to correct. See, *e.g.*, *Winship*, 397 U.S. at 364 (foreclosing any doubt as to the constitutional stature of the reasonable-doubt standard); *Jackson*, 443 U.S. at 322 ("Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection that follows from *Winship,* . . . [i]t is the occasional abuse that the federal writ of habeas corpus stands ready to correct."); *Moore* v. *Dempsey*, 261 U.S. 86 (1923) (requiring federal courts to entertain habeas petitions based on the facts to determine whether a violation of law or the Constitution has occurred). Here, the district court and Ninth Circuit improperly bypassed their critical obligation to review Washington's petition with the required deference to the state court's evidentiary finding, and to thereby safeguard Washington's constitutional rights.

Summary reversal also may be appropriate here because Washington faces death, and as this Court has recognized, "death is different." *Woodson* v. *North Carolina*, 428 U.S. 280, 322 (1976); *accord Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irremediable and unfathomable of penalties."); *Woodson*, 428 U.S. at 303–05 (holding that the death penalty is "a punishment different from all other sanctions in kind rather than degree," and thus "differs

more from life imprisonment than a 100-year prison term differs from one of only a year or two"); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 607 (2016) (summary reversals are "lightning bolts" "used predominantly for the benefit of those sentenced to death" and "are best understood as reflecting the continuing influence of the idea that death is different"). Indeed, this Court has granted summary reversals to numerous capital defendants in recent years. See, *e.g.*, *Bosse* v. *Oklahoma*, 580 U.S. 1 (2016) (per curiam); *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam); *Wearry* v. *Cain*, 577 U.S. 385 (2016) (per curiam); *Christeson* v. *Roper*, 574 U.S. 373 (2015) (per curiam); *White* v. *Wheeler*, 577 U.S. 73 (2015) (per curiam); *Hinton* v. *Alabama*, 571 U.S. 263 (2014) (per curiam); *Sears* v. *Upton*, 561 U.S. 945 (2010) (per curiam); *Jefferson* v. *Upton*, 560 U.S. 284 (2010) (per curiam); *Porter* v. *McCollum*, 558 U.S. 30 (2009) (per curiam); *Corcoran* v. *Levenhagen*, 558 U.S. 1 (2009) (per curiam). Summary reversal here also provides an efficient means to clarify the contours of federal habeas law. See Richard C. Chen, *Summary Disposition as Precedent*, 61 Wm. & Mary L. Rev. 691, 730 (2020) (proposing summary reversals as an efficient means to lend "greater clarity" to habeas cases, which involve "high-level," vague standards).

CONCLUSION

For these reasons, petitioner respectfully requests that this Court grant the petition, vacate the Ninth Circuit's decision, and remand to that court with an order to direct Washington's acquittal.

Respectfully submitted,

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