CAPITAL CASE
No. 22-6655

IN THE
Supreme Court of the United States

THEODORE WASHINGTON,
Petitioner,

v.

RYAN THORNELL, DIRECTOR,
Respondent.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

When the State of Arizona believes the Ninth Circuit failed to defer to state-court fact-finding in a habeas proceeding, it has not hesitated to urge this Court to intervene. But the State's Brief in Opposition urges this Court to ignore exactly that error, offering a series of diversions rather than acknowledge that the same deference the State seeks in other cases must apply here. Nor does the State seriously challenge the proposition that this petition presents an enduring and critical question about federalism and deference in habeas cases that applies to pre-AEDPA and post-AEDPA jurisprudence alike. None of the State's diversions should deter this Court from providing petitioner the relief that this Court has, in similar circumstances, routinely provided to various states, including Arizona.

This Court should summarily reverse the judgment below because the federal court "did not even *mention* the trial court's finding" regarding the sufficiency of the evidence against Washington, "much less explain why that finding [was] not entitled to a presumption of correctness." See *Burden* v. *Zant*, 498 U.S. 433, 437 (1991) (per curiam). In the alternative, the Court should grant review and reaffirm that federalism requires federal courts in habeas proceedings to defer to state court findings, including—and *especially*—when those findings support the petitioner.

I. THE NINTH CIRCUIT HAD JURISDICTION OVER WASHINGTON'S APPEAL

The State first attempts to circumvent the merits of this petition by arguing that "the Ninth Circuit lacked jurisdiction over the appeal." Opp. 7. But the Ninth Circuit properly held that it had jurisdiction in

Washington v. *Ryan*, 833 F.3d 1087 (9th Cir. 2016) (en banc), on a ground that is unassailable at this point; namely, that "court error [] prevented Washington from seeking an extension of time expressly allowed by the Rules," Washington filed just one day late, and there was neither bad faith nor prejudice to the State. 833 F.3d at 1089. This Court long ago denied the State's petition for certiorari on this very issue. *Ryan* v. *Washington*, 137 S. Ct. 1581 (2017) (mem.).

The Ninth Circuit's ruling was and remains correct. Under Rule 60(b)(1), district courts may vacate and re-enter judgments pursuant to Rule 60 to permit a timely appeal. See *Hill* v. *Hawes*, 320 U.S. 520, 523–24 (1944); *Klapprott* v. *United States*, 335 U.S. 601, 615 (1949). The Ninth Circuit correctly determined that all four Rule 60(b)(1) excusable neglect factors favor Washington. See *Washington*, 833 F.3d at 1098–99. First, the State suffered no prejudice from the single business day by which Washington's notice was allegedly late. *Id.* at 1098. Second, Washington filed one day into the 80-day period between the district court's judgment and ruling on Washington's COA motion, so the delay could not have impacted the proceedings. *Id.* And finally the last two factors—reasons for the filing delay and good faith—also counsel relief. There has never been any suggestion that Washington or his counsel acted in bad faith, and the reason for the filing delay was a combination of Washington's counsel's miscalculation of a date and the district court clerk's mishandling of the notice of appeal. *Id.* at 1098–99.

Exercising jurisdiction under Rule 60(b) does not conflict with *Bowles* v. *Russell*, 551 U.S. 205 (2007). See Opp. 8–9. In *Bowles*, the district court granted a FRAP 4(a)(6) motion to reopen the time to appeal, but ignored the explicit 14-day period provided by the rule and the statute, instead reopening the time to appeal

for 17 days. 551 U.S. at 207. This Court held that the court of appeals lacked jurisdiction to hear an appeal filed after the statutory 14-day period, rejecting the judicially created "unique circumstances" doctrine under which the lower court had provided relief. *Id.* at 209–10, 213–15; see *id.* at 214 (federal courts have "no authority to create equitable exceptions to jurisdictional requirements").

Bowles does not address Rule 60(b), and *Bowles* did not foreclose the continued application of Rule 60(b)'s standards in appropriate cases. To the contrary, *Bowles* relies on *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), a successful habeas case involving an untimely appeal by the state, where the state explicitly disavowed reliance on Rule 60(b). See *Bowles*, 551 U.S. at 209–10 (citing *Browder*). In fact, Justice Blackmun explained in his concurrence in *Browder* that had the state not disclaimed reliance on Rule 60, the district court could have issued an order reinstating its judgment resetting the appeal period and rendering the appeal notice timely. 434 U.S. at 272–74 (Blackmun, J., concurring).

II. WASHINGTON DID NOT WAIVE THE QUESTION PRESENTED

The State insists that the argument Washington raises in this petition—"that the federal courts failed to defer to the state courts' factual findings"—is a "new argument" and therefore waived. Opp. 9–10. It draws attention to other arguments Washington made below concerning the federal and state courts' treatment of aspects of the trial record. *Id.* But the waiver inquiry simply asks whether Washington raised the question presented in the courts below. And he did; Washington *expressly* made this argument in both the district court and Ninth Circuit.

In his habeas petition filed at the district court, Washington argued there was "insufficient evidence" to sustain his conviction in light of Mathers' "acquittal," emphasizing Judge Bradshaw's finding that he "ha[d] 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." Supp. App. 8a, 11a (habeas petition); see also Supp. App. 18a, 25a–27a (memorandum in support of habeas petition claims). And on appeal—after the district court held that Mathers' acquittal was "irrelevant" without even mentioning Judge Bradshaw's findings, Pet. App. 160a n.9—Washington raised the identical issue, requesting the Ninth Circuit to rule that "the evidence is insufficient to support Washington's conviction," given the "original trial judge recognized the evidence against Washington was no stronger than that against Mathers, whose conviction the Arizona Supreme Court vacated for insufficient evidence." Supp. App. 36a, 38a–39a (Ninth Circuit brief); see also Supp. App. 45a–46a (Ninth Circuit reply).

III. THE STATE POST-CONVICTION COURT'S 1992 RULING IS THE LAST REASONED DECISION

The State next argues that Judge Bradshaw's 1992 opinion is "not the last reasoned state court decision on the merits of Washington's sufficiency of the evidence claim." Opp. 11. This Court has made clear that federal courts must defer to "the *last related* state-court decision that [] *provide[s] a relevant rationale*" on an issue, focusing "exclusively on the actual reasons given by the lower state court." *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1192, 1195–96 (2018) (alteration and emphasis added); see also, *e.g.*, *Ylst* v. *Nunnemaker*, 501 U.S. 797, 805 (1991) ("[W]e begin by asking which is the last *explained* state-court judgment on the

[federal] claim."); *Premo* v. *Moore*, 562 U.S. 115, 123–33 (2011); *Sears* v. *Upton*, 561 U.S. 945, 951–56 (2010).

Here, the last decision to address Washington's sufficiency-of-the-evidence argument was Judge Bradshaw's 1992 opinion. See Pet. App. H. Washington argued that there was insufficient evidence to sustain a conviction because "the same deficiencies in the record which led to the dismissal of charges against James Mathers must also apply to the petitioner." *Id.* at 197a. Judge Bradshaw then considered the argument and weighed the evidence. *Id.* at 197a–99a; see Pet. 12–17.

The State further argues that Judge Bradshaw's 1992 opinion cannot be the last reasoned decision because it "did not consider the merits of the sufficiency of the evidence claim" and instead "found the claim precluded." Opp. 11 (citing Pet. App. 197a). But that legal determination "creates no bar to federal habeas review." See *Cone* v. *Bell*, 556 U.S. 449, 466 (2009). Nor does it mean that the 1992 opinion was not the last reasoned decision to which the federal habeas court must defer. Federal courts still defer to factual findings of state courts even where, as here, the state court determined no remedy was available as a matter of law. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 698–99 (1984) ("state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d)"); *Nix* v. *Whiteside*, 475 U.S. 157, 174–75 (1986) (deferring to state court's factual findings despite legal determination that conduct did not cause prejudice); *Sears*, 561 U.S. at 951–56 (deferring to state court's factual findings despite the state court's legal finding of no prejudice). The State cites no authority to the contrary. Regardless of whether Judge Bradshaw believed he had available a remedy, he analyzed the facts and made

findings specifically related to whether Washington could be convicted in light of Mathers' acquittal.

Moreover, it makes no sense, as the State suggests, to consider the Arizona Supreme Court's 1990 opinion on direct appeal, *State* v. *Robinson*, 796 P.2d 853 (Ariz. 1990), as the last reasoned decision. See Opp. 11. That opinion is neither last nor reasoned. 1992 is later than 1990. And the 1990 decision is not reasoned as to a sufficiency of the evidence challenge because Washington's appellate counsel *did not raise* that issue. Indeed, Washington asserted that this failure was grounds for finding his appellate counsel constitutionally ineffective in his state-court Rule 32 petition, federal habeas petition, and Ninth Circuit appeal. See Supp. App. 2a–3a (Rule 32 petition); Supp. App. 14a–15a (habeas petition); Supp. App. 30a–32a (memorandum in support of habeas petition claims); Supp. App. 39a–40a (Ninth Circuit brief). The Arizona Supreme Court's mere mention of the evidence in Washington's case—where his counsel did not dispute whether it was sufficient—does not constitute a "decision on the merits." See *Wilson*, 138 S. Ct. at 1195.

Nor does Judge Bradshaw's 1994 order change this analysis. See Opp. 11. That opinion dealt with a distinct claim under a separate analysis: whether Washington's *sentence* was unconstitutional because of Mathers's acquittal. See Opp. App. A-3. Washington claimed his sentence: (1) was an "unfair and excessive penalty because Mathers was the actual killer and was set free"; and (2) "violates constitutional protections" "considering Mathers' acquittal." See *id*. Judge Bradshaw held that Washington's penalty was constitutional, and as a matter of law, he could not consider Mathers' acquittal in determining the constitutionality of Washington's punishment. *Id.* ("the reversal of Mathers' conviction . . . does not mandate a change in

[Washington's] sentence"). In so doing, Judge Bradshaw did repeat a legal conclusion he also made in 1992—that he was precluded from addressing Washington's argument that no greater evidence was available to support his conviction than that of Mathers because the Arizona Supreme Court addressed the issue. *Id.* But he did not re-weigh his 1992 factual findings. And the 1994 opinion did nothing to change the 1992 opinion's factual findings, nor does it change the fact that the 1992 opinion was the last reasoned decision.

IV. JUDGE BRADSHAW'S 1992 FINDINGS ARE ENTITLED TO A PRESUMPTION OF CORRECTNESS

The State devotes a mere two-and-a-half pages at the very end of its Opposition to the merits of Washington's question presented. Opp. 15–17. It offers no meaningful rationale for failing to defer to state court fact-finding.

The State asserts that Judge Bradshaw's findings in the 1992 opinion related to the sufficiency of the evidence against Washington "are not 'facts' to which deference is owed." Opp. 15. But the quantum of evidence—*i.e.* the weight of the evidence—*is* a quintessential fact. See Pet. 12 (citing *Tibbs* v. *Florida*, 457 U.S. 31, 37–38 (1982); *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 164 (1988)). And Judge Bradshaw made clear factual findings. See Pet. 13–14. In the State's own words, Judge Bradshaw "compared the evidence against Washington to that against Mathers, concluding that the evidence against each was similar." Opp. 16. That is a fact-finding. This finding was entitled to deference—yet the district court and Ninth Circuit "did not even *mention* [Judge Bradshaw's] finding . . . , much less explain why that finding is not entitled to a presumption of correctness." See *Burden*, 498 U.S. at 437.

The State also suggests that Judge Bradshaw's findings on post-conviction review were mere "comments" rather than factual findings entitled to deference. Opp. 15. This Court rejected a similar mischaracterization in *Burden*. There, the Court summarily reversed the Eleventh Circuit for ignoring a state court's finding in a post-conviction report that favored the petitioner. 498 U.S. at 436–38. On remand, the Eleventh Circuit still refused to apply the presumption of correctness; like the State here, the court deemed the state trial court's statements in a post-conviction report as "comment[s]" and "personal impressions," not factual findings. *Burden* v. *Zant*, 975 F.2d 771, 772 n.1, 775 (11th Cir. 1992). This Court disagreed, summarily reversing the Eleventh Circuit a second time. *Burden* v. *Zant*, 510 U.S. 132 (1994) (per curiam).[1]

Surprisingly, the State's brief suggests that federal courts *can* make their own findings of fact on habeas review (at least in pre-AEDPA cases) and have no obligation to defer to the state court when it would favor a habeas petitioner. According to the State, a federal court's "disagree[ment] with a state court's finding that sufficient evidence supported a conviction . . . would be permitted." Opp. 15 n.4; see also *id.* at 12 (discussing the "Ninth Circuit's factual findings"); *id.* at 13 (discussing "two facts found by the Ninth Circuit").

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[1] The State also asserts that Judge Bradshaw's analysis of the evidence "may be interpreted as a criticism of Mathers' acquittal, and not a conclusion that the evidence against Washington was lacking." Opp. 15–16. That is an unreasonable interpretation of the 1992 opinion, especially in light of Judge Bradshaw's observation that his findings regarding the sufficiency of the evidence against Washington "may present a colorable claim for relief at some point in time." Pet. App. 199a.

The State cites no authority to support this position, because it is contrary to law. See, *e.g.*, 28 U.S.C. § 2254(d) (1994 ed.) ("[A] determination . . . of a factual issue, made by a State court . . . shall be presumed to be correct."); *Burden*, 498 U.S. at 437 ("A habeas court may not disregard th[e] presumption [of correctness] unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion."); *Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983) (court of appeals "failed . . . to accord [the state courts' factual findings] the 'high measure of deference' they are entitled" (citation omitted)); *Sumner* v. *Mata*, 455 U.S. 591, 591–92 (1982) ("28 U.S.C. § 2254(d) *requires* federal courts in habeas proceedings to accord a presumption of correctness to state-court findings of fact." (emphasis added)).

Finally, the State argues the Court should deny Washington's petition because it is governed by pre-AEDPA standards. Opp. 17. But Washington's petition does not ask this Court to "clarify the contours of federal habeas law" only as it pertains to the pre-AEDPA standard, as the State suggests. See *id.* The Ninth Circuit's error is not a creature of pre-AEDPA law. Indeed, both pre- and post-AEDPA, *the State itself* has emphasized to this Court the importance of federal courts deferring to factual findings of state courts on habeas review. See, *e.g.*, Reply to Br. in Opp. to Pet. for Writ of Certiorari at 3, *Stewart* v. *Carriger*, No. 97-1509 (Apr. 23, 1998), 1998 WL 34112289, at *3 ("No matter how one views the state court record, it is patently clear that the majority below stripped away the presumption of correctness due [to] the state court's [factual finding] in violation of 28 U.S.C. § 2254(d) and this Court's well-established caselaw."); Br. in Opp. at 10, *McGill* v. *Shinn*, No. 22–5073 (Oct. 12,

2022) ("A reviewing federal court must also presume that a state court's factual findings are correct."). Both pre- and post-AEDPA, principles of federalism and comity demand deference to state court fact findings. See, *e.g.*, *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1739 (2022); *Sumner* v. *Mata*, 449 U.S. 539, 547 (1981). Nothing about the fact that this case arises under pre-AEDPA standards diminishes the continuing importance of the even-handed administration of justice when it comes to deference to factual findings of state courts.

CONCLUSION

Washington faces execution despite that the *judge that tried his case* stated in the last reasoned state-court decision that he had "a great deal of difficulty finding a basis to hold this defendant culpable" and "any evidence linking Washington to the crime." Pet. App. 197a–98a. In view of his factual finding that there exists no greater evidence against Washington than against his co-defendant who was acquitted for insufficient evidence, Judge Bradshaw "allow[ed] counsel to make a record so it could be examined" for "another court wish[ing] to accept review." *Id.* at 199a. This is that proceeding. See *Wellons* v. *Hall*, 558 U.S. 220, 220 (2010) (per curiam) ("From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect."). This Court can—and should—prevent this blatant constitutional violation.

Respectfully submitted,

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