No. 23-

IN THE

Supreme Court of the United States

LEE E. STEPHENS, JR.,
Petitioner,

v.

STEPHEN T. MOYER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether reasonable jurists could debate whether habeas relief and resentencing is required when a defendant's sentence was premised on prior convictions and a sentence that were later found unconstitutional and vacated?

2. Whether reasonable jurists could debate whether Stephens's counsel were ineffective in failing to challenge his prior unconstitutional convictions and sentence?

3. Whether reasonable jurists could debate whether Stephens's right to testify was violated because he relinquished that right under the misapprehension that he could be impeached with his prior unconstitutional convictions?

RELATED PROCEEDINGS

Stephens v. *Moyer*, No. 20-7776 (4th Cir.) (judgment issued on December 16, 2022; panel and en banc rehearing denied on April 25, 2023).

Stephens v. *Moyer*, No. 1:18-cv-00493-RDB (D. Md.) (judgment issued on November 3, 2020).

Stephens v. *State of Maryland*, No. 02-K-08-000646 (Md. Ct. Spec. App.) (order issued on January 12, 2018).

Stephens v. *State of Maryland*, No. 02-K-08-000646 (Md. Circ. Ct.) (judgment issued on June 30, 2017).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTION AND STATUTORY PROVISIONS

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Lee E. Stephens, Jr., respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Lee E. Stephens, Jr. is currently serving a life sentence without the possibility of parole, a sentence that is based on now-vacated prior convictions and life sentence that the State has conceded were unconstitutional. But for the jury's consideration of those prior convictions and sentence, there is every reason to think that Stephens would have received a sentence allowing for parole.

Under clearly established law, due process requires that Stephens be given the opportunity to argue for that lesser sentence in a new proceeding that is not contaminated by those unconstitutional prior convictions and sentence. *See Johnson* v. *United* States, 544 U.S. 295, 303 (2005); *Johnson* v. *Mississippi*, 486 U.S. 578, 590 (1988); *United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972); *Townsend* v. Burke, 334 U.S. 736, 741 (1948). To date, *no court* has adequately explained how his continued incarceration on that sentence comports with due process. And no court could. In fact, the Fourth Circuit failed even to consider Stephens's arguments on the merits, instead denying a Certificate of Appealability (COA) and dismissing the appeal. Thus, at this stage, the only question is "whether a claim is reasonably debatable"—*i.e.*, whether "jurists of reason could disagree with the district court's resolution" of Stephens's claim. *Buck* v. *Davis*, 580 U.S. 100, 115 (2017). That standard is easily met here, and these exceptional circumstances justify certiorari.

In two respects, Stephens's current life-without-parole sentence is a consequence of his prior unconstitutional convictions and incarceration. In 1999, after an initial mistrial, Stephens was convicted on four charges related to a murder in Wicomico County, Maryland, and sentenced to life-plus-fifteen years' imprisonment. In 2012, while serving that sentence, Stephens was convicted of the murder of a corrections officer in Anne Arundel County, Maryland. After hearing extensive evidence about the 1999 Wicomico convictions and life sentence, the Anne Arundel jury rejected the death penalty and instead imposed life without parole—the minimum additional punishment possible given the life sentence he was already serving for the 1999 Wicomico convictions.

The 1999 Wicomico convictions and sentence, however, were obtained unconstitutionally, as became clear and as the State acknowledged only after the Anne Arundel trial. The State's ballistics "expert" had lied under oath about his credentials and provided ballistics evidence later shown to be false. The State also withheld the lengthy disciplinary record of a police officer whose testimony was the only link between Stephens and the purported murder weapon—a disciplinary record that, the State conceded, called into question the officer's credibility.

In 2013, the State agreed to vacate the four Wicomico convictions and the life-plus-fifteen years sentence in exchange for a sentence of time served and an *Alford* plea to a single charge, through which Stephens maintained his innocence.

But by that point it was too late, as the unconstitutional Wicomico convictions and sentence had already played a central role in the sentencing phase of the Anne Arundel trial. The State there had sought the death penalty and, to justify so severe a punishment, relied on the fact that Stephens had already been convicted of murder and was already serving a life sentence *with* the possibility of parole. In response, the jury sentenced Stephens to life *without* the possibility of parole. There is no reasonable debate that the unconstitutional Wicomico convictions and sentence infected the Anne Arundel sentence. And there is no dispute that the prior convictions and sentence were found unconstitutional and vacated (and three of the convictions and sentence never reinstated). But neither the State postconviction court, the district court below, nor the Fourth Circuit panel in its summary order justified this clear deprivation of due process. The Court should grant certiorari to address that deprivation. At a minimum, Stephens's sentencing

raises issues that reasonable jurists would debate, and the Fourth Circuit's denial of a COA was error warranting summary reversal.

Certiorari is also appropriate to consider whether Stephens's counsel were ineffective in failing to challenge the Wicomico convictions and sentence prior to the Anne Arundel trial. The postconviction court agreed that "trial counsel's lack of due diligence in pursuing Wicomico County Post Conviction [relief] was a deficient act." App.119a. The court nonetheless denied relief under the mistaken finding that there was no prejudice. As already explained, however, the Wicomico convictions and sentence played a central role in Stephens's sentencing, and it is highly probable that Stephens would have received a lesser sentence if his prior unconstitutional convictions and sentence had already been vacated. The state court's denial of this ineffectiveness claim was thus contrary to and an unreasonable application of clearly established law. At the very least, reversal is appropriate so that the Fourth Circuit can fully consider the impact of counsel's serious failure.

Stephens was also unlawfully denied his constitutional right to testify in his own defense. Stephens was deprived of that right because his decision not to testify was made in response to the threat that he would be impeached with his unconstitutional prior convictions and sentence. Such impeachment is improper, however, and so any wavier of his right to testify was involuntary. Moreover, by being forced to forgo his right to testify on his own behalf to avoid being impeached by the prior unconstitutional convictions, Stephens was impermissibly forced to relinquish one constitutional right to protect another. The State postconviction court's conclusions to the contrary contravene clearly established federal law.

Again, reversal is also appropriate to allow the Fourth Circuit to fully consider this substantial claim.

Finally, Stephens's petition presents several exceptionally important questions that warrant this Court's review. The serious constitutional errors in Stephens's case undermine vital protections afforded to defendants in our criminal justice system. As a result of those errors, and absent review by this Court, Stephens faces life in prison without ever having a fair chance to argue for the possibility of parole. At the heart of those errors is repeated misconduct by the State, whereby the State's expert knowingly offered false testimony and the State failed to disclose and turn over substantial *Brady* material. Certiorari is needed to correct these grave injustices.

OPINIONS BELOW

The Fourth Circuit's per curiam order denying a Certificate of Appealability and dismissing the appeal (App.1a-2a) is unreported but available at 2022 WL 17729233. The district court's decision denying habeas relief (App.3a-76a) is unreported but available at 2020 WL 6450284. The Fourth Circuit's order denying panel and en banc rehearing (App.125a) is unreported.

JURISDICTION

The Fourth Circuit entered judgment on December 16, 2022. It denied Stephens's timely petition for panel rehearing or rehearing en banc on April 25, 2023. On June 13, Chief Justice Roberts extended the time to file a petition for a writ of certiorari through September 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall ... deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Lee E. Stephens, Jr. is serving a life sentence without the possibility of parole entered in 2012. That sentence and the underlying conviction are tainted by four prior convictions and a sentence from 1999 that were

found unconstitutional and vacated in 2013. Indeed, the 1999 convictions and sentence were repeatedly emphasized during Stephens's 2012 sentencing hearing, and the threat that he would be impeached with those earlier convictions prevented him from testifying on his own behalf. Stephens seeks habeas relief for the constitutional injuries caused by his prior unconstitutional and now-vacated convictions and sentence.

1. In 1997, Stephens was charged with murdering Duane Holbrook in a crowded parking lot in Wicomico County, Maryland. Despite the crowd, no witness testified that they saw Stephens shoot a gun. The only links between Stephens and the murder weapon were (1) testimony from Officer Elmer Davis, who claimed he saw Stephens discard a gun during an unrelated arrest months later, CA4 App.471-473, and (2) the testimony of Joseph Kopera, who claimed to be a firearms expert and to have determined that the bullets fired at the crime scene came from the gun that Officer Davis claimed had been discarded by Stephens, CA4 App.485-488. Stephens's first trial resulted in a hung jury and mistrial. CA4 App.238. At the second trial in 1999, the jury convicted Stephens of four offenses: first-degree murder, first-degree assault, using a handgun in commission of a felony, and carrying a handgun. He was sentenced to life with the possibility of parole for the murder conviction and to a consecutive fifteen-year sentence for the use-of-a-handgun offense (together with the other convictions, the "Wicomico convictions and sentence").

2. In 2006, while Stephens was incarcerated in the Maryland House of Corrections in Anne Arundel County for the Wicomico convictions, corrections officer Corporal David McGuinn was fatally stabbed on Stephens's tier. The State charged Stephens and another inmate for the murder, although the other inmate was found

incompetent and never tried. At trial, Stephens declined to testify based on advice from counsel that he would be impeached with his Wicomico convictions and sentence. CA4 App.224-225. The State's evidence against Stephens was limited and its reliability firmly contested, and the jury took six days to return a guilty verdict, CA4 App.49, 414-419.

3. Seeking the death penalty, the State's opening argument at sentencing made many references to Stephens's prior Wicomico convictions: it told the jury that Stephens was "tried and convicted in 1999 of the murder of Holbrook," was "found guilty of the use of a handgun in the commission of a crime of violence for which he received another 15 years," and that "the sentence that he was serving on July 25, 2006 was a life sentence for the murder." CA4 App.424. The State's exhibits and first sentencing witness detailed Stephens's commitment record and the State's version of facts relating to the Wicomico case. *See* CA4 App.535, 541. The State further emphasized the Wicomico convictions in its sentencing closing. CA4 App.456-457, 463. The jury, however, declined to impose the death penalty and instead, in February 2012, sentenced Stephens to life without the possibility of parole—the minimum sentence that would add to Stephens's previous Wicomico sentence.

4. Two unconstitutional aspects of the Wicomico proceedings later came to light. *First*, by 2007, it was revealed (through public reporting) that Kopera had falsified his credentials as a ballistics expert when testifying in hundreds of cases in Maryland, including Stephens's. *See* CA4 App.513. In March 2013, after Stephens's new counsel pursued postconviction relief for the Wicomico convictions, the State retested the ballistics in Stephens's case and found that, contrary to Kopera's testimony, not all casings at the crime scene

were fired by the gun allegedly discarded by Stephens; instead, some of the casings were in fact fired from a different gun. CA4 App.547. *Second*, the State in 2012 disclosed for the first time (again in response to efforts by Stephens's new counsel) disciplinary files for Officer Davis that contained substantial derogatory information that was material and disclosable under *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See* CA4 App.242. Given these conceded constitutional errors, the Wicomico postconviction court found in 2013 that "there exists grounds … for a new trial." CA4 App.570.

5. In July 2013, the State agreed to vacate the Wicomico convictions and sentence in exchange for an *Alford* plea to the first-degree murder charge and a sentence of time served. Stephens maintained his innocence while agreeing to the plea, as permitted under state law. *See Abrams* v. *State*, 933 A.2d 887, 889 n.1 (Md. Ct. Spec. App. 2007). The State formally abandoned the remaining three Wicomico charges. *See* CA4 App.225, 234, 225, 570-571. His life-plus-fifteen-years sentence for the Wicomico convictions was vacated.

6. Stephens timely sought postconviction relief for his 2012 Anne Arundel conviction and sentence. During the postconviction proceeding, the court observed that "there are really some tough issues in this case" (CA4 App.272) and was "confident that whatever decision I make, a panel of three [judges of the Maryland Special Court of Appeals] is going to look at it and maybe a panel of seven [the en banc Maryland Court of Appeals] is going to look at it, and who knows who is going to look at [it] again." CA4 App.275. The court also observed that Stephens's constitutional rights had been violated during the Wicomico trial, remarking that "you don't see

[the State admit a constitutional violation] too often." CA4 App.279.[1]

While recognizing the need for appellate review given the serious constitutional issues, the postconviction court denied relief. CA4 App.83. The State during the postconviction proceeding likewise acknowledged the need for appellate review, noting that "they probably are decisions for the Appellate Court to make." CA4 App.272, 275-276. Notwithstanding the State's concession and Stephens's unopposed application for leave to appeal, the Maryland Court of Special Appeals denied Stephens's application in a one-sentence, unreasoned order. CA4 App.575. As a result, Stephens did not receive the appellate review that both the postconviction court and State agreed were necessary.[2]

7. On February 16, 2018, Stephens filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District Court for the District of Maryland. The district court denied the petition, reasoning in part that Stephens's 2013 *Alford* plea to the single murder charge somehow validated the 2012 Anne Arundel conviction and sentence. *See* CA4 App.45. Stephens timely filed a notice of appeal and a brief requesting a COA. On

[1] In late 2022, Maryland changed the names of its two highest courts to the Appellate Court of Maryland (previously Maryland Special Court of Appeals) and the Supreme Court of Maryland (previously Maryland Court of Appeals). For purposes of this petition, Stephens refers to the previous names that were in effect at the time his postconviction claims were in State court.

[2] This was perhaps unsurprising. Of the 631 applications for leave to appeal filed with the Maryland Court of Special Appeals in postconviction cases between 2014-2016, the court granted *only one*. *See* Court Operations Dep't, Maryland Judiciary, *Annual Statistical Abstract* (2016), http://mdcourts.gov/publications/annualreport/reports/2016/fy2016statisticalabstract.pdf.

December 16, 2022, a panel of the Fourth Circuit issued a one-page per curiam order denying Stephens a COA and dismissing his appeal, without addressing any of Stephens's arguments. The Fourth Circuit then denied Stephens's timely petition for panel rehearing and rehearing en banc on April 25, 2023.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted given the significant errors committed by the postconviction court, as well as the district court and Fourth Circuit, and the manifest injustice of Stephens serving the remainder of his life without parole sentence without ever having a fair opportunity to argue for a lesser sentence. The postconviction court contravened or misapplied clearly established federal law in denying Stephens's claims: (1) his sentence violates due process because it was premised on prior unconstitutional convictions and a sentence that were later vacated; (2) Stephens's counsel were ineffective in failing to challenge those unconstitutional convictions before his subsequent trial; and (3) Stephens decided not to testify on his own behalf based on his misapprehension that he could and would be impeached with his prior unconstitutional convictions, rendering the waiver of that right involuntary. In each instance, the district court relied on the flawed reasoning of the postconviction court to uphold its decision.

The Fourth Circuit, in contrast, said nothing about the merits of Stephens's arguments. The court instead denied a COA and dismissed Stephens's appeal without addressing his arguments. Thus, at this stage of the proceeding, "the only question is whether [Stephens] has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate

to deserve encouragement to proceed further.'" *Buck* v. *Davis*, 580 U.S. 100, 115 (2017). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El* v. *Cockrell*, 537 U.S. 322, 338 (2003). Here, habeas relief is appropriate because Stephens was denied core constitutional rights. At the very least, the Fourth Circuit erred in denying a COA even to consider the merits of Stephens's claims. This Court's review is appropriate to address those serious issues.

In the alternative, and at a minimum, summary reversal is appropriate to have the Fourth Circuit grapple with the substantial issues raised in Stephens's habeas petition. Summary reversal is appropriate where a court of appeals decision is "obviously wrong and squarely foreclosed by [Supreme Court] precedent." *Shoop* v. *Cassano*, 142 S.Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari). Here, the Fourth Circuit's decision upholding the postconviction court's determinations is obviously wrong, and Stephens's briefing plainly established that jurists could disagree with the district court's decision. Because the Fourth Circuit was wrong on both the merits and its COA determination, summary reversal is appropriate under the circumstances. *E.g.*, *Tharpe* v. *Sellers*, 583 U.S. 33, 34 (2018) (summarily reversing denial of COA where lower court erred in upholding state court no-prejudice finding); *Sears* v. *Upton*, 561 U.S. 945, 946 (2010) (per curiam) (summarily reversing because misapplication of *Strickland* was "plain from the face of the state court's opinion"); *Porter* v. *McCollum*, 558 U.S. 30, 31 (2009) (per curiam) (summarily reversing where "it was objectively unreasonable [for state court] to conclude there was no reasonable probability the sentence

would have been different if the sentencing judge and jury had heard the significant mitigation evidence" counsel failed to present).

I. THE DECISIONS BELOW ARE WRONG UNDER THIS COURT'S CLEARLY ESTABLISHED PRECEDENTS

A. Stephens's Sentence Premised On Unconstitutional and Later-Vacated Convictions Violates Due Process

Stephens's life-without-parole sentence violates his due process right to be sentenced based on accurate information. Because the jury considered his prior unconstitutional and subsequently vacated convictions and sentence in determining his sentence now before this Court, that sentence must be vacated. The postconviction court's decision rejecting that claim is contrary to clearly established federal law, and the district court and Fourth Circuit likewise erred in denying relief.

1. Over 70 years ago, the Court recognized in *Townsend* v. *Burke*, 334 U.S. 736 (1948), that sentencing a defendant "on the basis of assumptions concerning his criminal record which were materially untrue … is inconsistent with due process of law." *Id.* at 741. There, a defendant's sentence was seemingly premised, at least in part, on the sentencing court's mistaken belief that the defendant had seven prior convictions when in fact he had only four. *See id.* at 740. This Court held that reliance on those three non-existent convictions meant that the sentence was "predicated on misinformation." *Id.* at 741. Such a result was "inconsistent with due process of law" and thus the sentence could not stand. *Id.* Although the Court could not say with certainty that the "false assumptions" concerning those three prior charges influenced the sentence, it was "not at liberty to

assume that items given such emphasis by the sentencing court[] did not influence the sentence." *Id.* at 740. The proper inquiry was limited to assessing whether the defendant's sentence was issued in the context of "assumptions concerning his criminal record which were materially untrue." *Id.* at 741.

Two decades later, the Court reaffirmed its holding that a sentence cannot take into consideration inaccurate information about a defendant's prior convictions. In *United States* v. *Tucker*, 404 U.S. 443 (1972), the defendant's 1953 sentence was premised at least in part on three previous felony convictions. *Id.* at 444. Several years later, however, a state court determined that two of those prior convictions were unconstitutional. *Id.* at 444-445. As a result, the Court held that the defendant was entitled to resentencing for the 1953 sentence. *Id.* at 448. As in *Townsend*, the defendant was sentenced on materially untrue assumptions concerning his criminal record: the judge considered two previous convictions that, "it [was] now clear …[,] were wholly unconstitutional." *Id.* at 447. The Court made clear that due process would not tolerate "a sentence founded at least in part upon misinformation of constitutional magnitude." *Id.*

The Court has on multiple occasions reiterated its *Townsend* and *Tucker* holdings. In *Johnson* v. *Mississippi*, 486 U.S. 578 (1988), for instance, the Court held that due process requires habeas relief and a new sentence if "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590. There, like in *Tucker*, the jury was allowed to consider a prior felony conviction that was subsequently overturned as unconstitutional. *Id.* at 582-583. Because the jury was allowed to consider that "materially inaccurate" conviction, a new sentence was required.

Id. at 590. And in *Johnson* v. *United States*, 544 U.S. 295 (2005), the Court yet again confirmed that a sentence premised on inaccurate information cannot be allowed to stand, recognizing that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Id.* at 303.

2. Applying that clearly established federal law, Stephens is entitled to habeas relief. During sentencing, the State repeatedly emphasized that Stephens had previously been convicted of murder and sentenced to life. At the beginning of its sentencing opening argument, the State told the jury that Stephens was "tried and convicted in 1999 of … murder," was "found guilty of the use of a handgun in the commission of a crime of violence for which he received another 15 years," and that "the sentence he was serving on July 25, 2006 was a life sentence for the murder." CA4 App.424. The State's exhibits and first sentencing witness detailed Stephens's commitment record and the State's version of facts relating to the Wicomico case. *See* CA4 App.541 (commitment record); CA4 App.535 (State's version of facts); CA4 App.427-429, 457. The State again emphasized the Wicomico convictions in its closing during the sentencing phase. It relied on them to negate the mitigating factor that Stephens had not previously been found guilty of a crime of violence (CA4 App.456-457), and to rebut mitigating evidence offered by the defense—that Stephens had been surrounded by violence (CA4 App.463).

The four Wicomico convictions and sentence were subsequently vacated after the Wicomico postconviction court found that Stephens's constitutional rights had been violated and that "there exist[ed] grounds … for a new trial." CA4 App.570. Stephens later accepted an *Alford* plea on one of the charges to avoid a second trial (and through which he maintained his innocence), but

three of the four underlying charges were dismissed in their entirety, and his life-plus-fifteen-years sentence was never reinstated. CA4 App.224-226, 234.

Given how prominently the Wicomico convictions and sentence featured in the State's sentencing arguments, this Court's precedents require that Stephens's current sentence be vacated. Because "[t]he prosecutor repeatedly urged the jury to give [Stephens's Wicomico convictions] weight" when assessing the appropriate sentence, prejudice is "apparent," and relief is required. *Johnson*, 486 U.S. at 586.

3. In stark conflict with this Court's clearly established precedent, the postconviction court denied Stephens's claim for relief. The court concluded that resentencing was not required because (1) Stephens's subsequent *Alford* plea "maintain[ed] the murder charge on his record" and (2) "it would be too speculative in nature to pretend that if the vacatur had been secured before [his subsequent conviction] that it would have made any difference to the jury." CA4 App.35.

In two respects, that determination contravenes and is an unreasonable application of this Court's clearly established law. Either error independently merits relief.

First, the court's consideration of Stephens's subsequent *Alford* plea is contrary to this Court's precedents. The proper inquiry is limited to whether a defendant was sentenced "on the basis of assumptions concerning his criminal record which were materially untrue." *Townsend*, 334 U.S. at 741. That was indisputably the situation in Stephens's case: his convictions and sentence were concededly unconstitutional and subsequently vacated. CA4 App.225, 234, 553-554. The postconviction court's consideration of a separate conviction, based on a distinct plea agreement and resulting in a

materially different sentence, thus flouts *Tucker* and its progeny.

Moreover, this Court has made clear that it is irrelevant that a defendant might later properly be found guilty of the crimes underlying the unconstitutional or vacated convictions. In *Tucker*, the Court explained that courts "need not speculate about whether the outcome of the respondent's [prior unconstitutional convictions] would necessarily have been different." 404 U.S. at 447. "Such speculation is not only fruitless, but quite beside the point." *Id.* at 447-448. "[T]he real question," the Court elucidated, "is … whether the [subsequent] sentence … might have been different if the sentencing judge had known that … the respondent's previous convictions had been unconstitutionally obtained." *Id.* at 448. (Indeed, in *Tucker*, sentencing relief was required even though the defendant had admitted his guilt to the prior unconstitutional convictions. *See id.* at 450 (Blackmun, J., dissenting)). In other words, all that matters is whether the sentencing court considered a conviction or sentence that was later vacated or found unconstitutional. That happened here, and the postconviction court's consideration of Stephens's *Alford* plea is contrary to this settled law.

Beyond contravening established law, the postconviction court's reliance on the *Alford* plea to reject Stephens's due process claim was also premised on an unreasonable factual determination. It was not the case, as the court appeared to assume, that Stephens's prior convictions and sentence were reinstated wholesale, such that his criminal record was the same both before and after the *Alford* plea. As explained, three of the four prior convictions were vacated entirety, and the life-plus-fifteen-years sentence was never reinstated. *See* CA4 App.224-226, 234, 553-554. To the extent the court

did not misconstrue the record, its disregard for the three convictions and sentence that were not reimposed by the *Alford* plea underscores the court's erroneous application of settled law.

Second, in rejecting the due process claim as "purely speculative" (CA4 App.82), the postconviction court imposed a heightened burden that contravenes established law. Resentencing is required where a later-vacated conviction or sentence is presented to the jury during sentencing. Thus, in *Johnson*, the Court recognized that due process required a new sentence because "the jury *was allowed to consider* evidence that has been revealed to be materially inaccurate." 486 U.S. at 590 (emphasis added). There, the later-reversed conviction "was 'vigorously' argued to the jury" during sentencing. *Id.* at 590 & n.8; *see also id.* at 586 ("The prosecutor repeatedly urged the jury to give [the unconstitutional sentence] weight in connection with its assigned task of balancing aggravating and mitigating circumstances."). "Even without that express argument," the Court explained, the mere "possibility" that the prior conviction might have impacted the jury's decision was sufficient to justify relief. *Id.* at 586.

Likewise, in *Tucker*, the Court concluded that resentencing was required based solely on evidence that the judge heard testimony about the defendant's prior convictions during sentencing. *See* 404 U.S. at 444 n.1, 447-448 & n.7. Indeed, in *Tucker*, the Court ordered relief even though the sentencing judge, who also oversaw the defendant's habeas petition, indicated that "he would have imposed the [same] sentence anyway" even without considering the two unconstitutional convictions. *Id.* at 452 (Blackmun, J., dissenting). That did not matter, the majority explained, because the sentencing judge would not "'undoubtedly' impose the same sentence"

after reconsidering the defendant's criminal record. *Id.* at 449 n.8 (majority op.); *see also Townsend*, 334 U.S. at 740 ("We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.").

Here, applying *Johnson* and *Tucker*, the simple fact that Stephens's later-vacated convictions and sentence were repeatedly emphasized to the jury during sentencing compels relief. The postconviction court's rejection of Stephens's due process claim as "too speculative" contravenes that established law.[3]

Even if those circumstances alone were not enough to establish Stephens's right to relief, the record demonstrates that Stephens's sentence likely would have been different absent evidence about his prior, unconstitutional convictions. In Maryland, a jury's decision to sentence a defendant to life without parole must be unanimous. Md. Code Crim. Law § 2-304(b)(1). Had the jury not been exposed to evidence concerning Stephens's prior convictions and sentence of life-plus-fifteen years, or had it known that the previous convictions had been unconstitutional (and that Stephens should not have even been in prison at the time of McGuinn's death), it is likely that at least one juror would have favored a life with possibility of parole sentence. *Cf. Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003).

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[3] Even if the more state-friendly *Strickland*-prejudice standard were appropriate here, the postconviction court's decision remains an unreasonable application of established law. The Court has explained that evaluating prejudice at sentencing under *Strickland* "will necessarily require a court to 'speculate' as to the effect of the new evidence." *Sears*, 561 U.S. at 956.

This Court's analysis in *Tucker* is illustrative of the prejudice here:

> [I]f the trial judge … had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.

404 U.S. at 448. Had the jury learned that Stephens's prior convictions and sentence were unconstitutional and that he had wrongly spent thirteen years in violent prisons, one juror might have decided against imposing a life-without-parole sentence. Indeed, the jury had already found that Stephens's exposure to an "excessive amount of violence" in prison was a mitigating factor. CA4 App.467. It is likely that they would have imposed a more lenient sentence had they known that Stephens should not have even been incarcerated.

Moreover, even putting aside the convictions, the unconstitutional prior life-plus-fifteen years *sentence*—which was not reimposed by Stephens's subsequent *Alford* plea—undoubtedly affected the jury's deliberations. Jurors saw a man who was already serving a life sentence. A sentence of life with possibility of parole thus would have imposed no additional punishment. Unsurprisingly, the jury opted to impose a stiffer sentence by denying parole. Had the jury instead seen a man whose constitutional rights had been violated and who

was not otherwise serving a sentence—either because he had no prior murder conviction or because he accepted the State's offer of an *Alford* plea in exchange for a time-served sentence, as Stephens eventually did—life with parole would have been a serious punishment indeed. At least one juror might have decided that such penalty was sufficient.

4. The lower federal court decisions affirming the postconviction court are tainted with the same errors. The district court concluded that *Tucker* was inapposite because "Stephens remains convicted of the Wicomico County murder through a properly obtained *Alford* plea." App.75a. Thus, like the postconviction court, the district court (1) inappropriately considered Stephens's subsequent *Alford* plea, (2) disregarded that Stephens's sentence and three of his other prior convictions were not reimposed by the *Alford* plea, and (3) ignored that under the *Alford* plea, Stephens maintained his innocence, avoided a second trial, and guaranteed a time-served sentence.

Faced with that flawed decision, the Fourth Circuit failed even to grant a COA to fully consider Stephens's arguments. The only explanation offered for dismissing the appeal by the court's unpublished per curiam memorandum opinion was that "Stephens has not made the requisite showing." App.2a. Because at the very least reasonable jurists could debate the merits of Stephens's due process claim, the Fourth Circuit's decision denying a COA is wrong.

B. Stephens's Counsel Were Ineffective In Failing To Challenge Stephens's Prior, Unconstitutional Convictions And Sentence

Stephens's trial counsel failed to reasonably pursue a postconviction challenge to his unconstitutional

Wicomico convictions and sentence prior to the Anne Arundel trial. That dereliction was constitutionally deficient and prejudicial, warranting relief under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

1. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. *Strickland*, 466 U.S. at 686. If counsel's assistance is ineffective—*i.e.*, if counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"—the Sixth Amendment entitles the defendant to a new trial. *Id.* A defendant establishes ineffective assistance by showing (1) that "counsel's performance was deficient"—*i.e.*, "that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-688, and (2) that "the deficient performance prejudiced the defense"—*i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 687, 694.

2. With respect to the deficiency prong, the State postconviction court correctly found "that trial counsel's lack of due diligence in pursuing [vacatur of the Wicomico convictions and sentence] was a deficient act." App.119a. Neither the district court nor the Fourth Circuit questioned this conclusion. *See* App.2a, 46a.

The postconviction court's conclusion is inescapable considering the clearly established law requiring defense counsel to investigate all potentially mitigating evidence, *see Wiggins*, 539 U.S. at 533-534, including convictions that may be germane to sentencing, *see Rompilla* v. *Beard*, 545 U.S. 374, 387-388 (2005). The ABA Guidelines—"'guides to determining what is reasonable,'" *Wiggins*, 539 U.S. at 524—likewise prescribe that

counsel must "investigate prior convictions … that could be used as aggravating circumstances or otherwise come into evidence," ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), Notes to 10.7. And "[i]f a prior conviction is legally flawed, counsel should seek to have it set aside." *Id.*; *accord id.*, Notes to 10.11 ("If the prosecution relies upon a prior conviction …, counsel should also determine whether it could be attacked" and should "determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.").

Counsel's failure to pursue a challenge to the Wicomico convictions and sentence prior to the 2012 Anne Arundel trial is all the more egregious considering that Kopera's fraud was highly publicized as early as March 2007. *See Hunt* v. *State*, 252 A.3d 946, 948 n.1 (Md. 2021) (referring to 2007 reporting on the discovery of Kopera's fraud); McMenamin, *Police Expert Lied About Credentials*, Baltimore Sun (Mar. 9, 2007), https://www.baltimoresun.com/maryland/bal-te.md.forensics09mar09-story.html. Thus, by the time of the Anne Arundel trial in 2012, a reasonable attorney would have been acutely aware of the potential for vacatur in any of the hundreds of "Kopera cases," *Hunt*, 252 A.3d at 948, being revisited across Maryland. In fact, Stephens's counsel *were* aware of Kopera's fraud: they filed a petition for postconviction relief for the Wicomico convictions in 2009—just days before the state-law deadline—arguing among other things that Kopera had falsified his credentials. CA4 App.513. Yet Stephens's attorneys did not pursue that petition after its filing (as one later testified, they simply "kicked it down the road and we never really did anything other than file the postconviction petition," CA4 App.197), and did nothing to

obtain vacatur of the Wicomico convictions and sentence before the 2012 Anne Arundel trial. As the postconviction court found, that failure was deficient.

3. The postconviction court nonetheless refused to grant sentencing relief after concluding that Stephens could not establish prejudice. App.119a-120a. The court reasoned that Stephens's attorneys' failure to seek to overturn his Wicomico convictions before the Anne Arundel trial was not prejudicial because the court "would have to assume that first, the defendant *would have been successful* in the Wicomico County post conviction, and second, that the outcome of the Anne Arundel County case *would have been different* as a result of that post conviction." *Id.* (emphasis added). That decision was based on an unreasonable application of clearly established law as well as unreasonable factual determinations.

First, the postconviction court contravened established law that a petitioner need not prove that the results of a case *would have* been different. *Strickland* does not require a petitioner to show that, absent counsel's failure, the result of the case *would have* been different, or even that the error "more likely than not altered the outcome." *Strickland*, 466 U.S. at 693. Rather, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. By requiring that Stephens demonstrate that the "outcome … would have been different"—as opposed to applying the proper "reasonable probability" standard—the postconviction court applied the outcome-determinative standard that *Strickland* rejects.

Second, the postconviction court's reasoning was based on unreasonable factual determinations and is otherwise an unreasonable application of clearly established law. To the extent the postconviction court was suggesting that Stephens may not have been able to obtain vacatur of the Wicomico convictions and sentence, *see* CA4 App.80, that assertion is unfounded. To start, the postconviction court never found that Stephens would not be entitled to postconviction relief for his Wicomico convictions, nor did it cite any evidence that would support that proposition. Instead, the record plainly establishes that Stephens would have obtained relief in Wicomico County, not least because he was in fact successful in doing so. The Wicomico postconviction court expressly found that "there exists grounds to grant [p]ost [c]onviction relief for a new trial" with respect to Stephens's four prior convictions and sentence. CA4 App.570. Moreover, the State conceded the constitutional infirmity of the Wicomico convictions during the Anne Arundel postconviction proceeding, CA4 App.242-245, 248, causing the postconviction court to note how rare it was for the State to confess to such errors, CA4 App.279 ("[Y]ou don't see [the State concede constitutional errors] too often."), CA4 App.279 (noting that the court "see[s] a lot of things in this case that I haven't seen before in postconvictions"). There is no basis to question whether Stephens would have been able to obtain relief from his Wicomico convictions and sentence before the Anne Arundel trial if his counsel's performance had not been deficient.

The postconviction court's related finding that "the connection between the Wicomico County case and the outcome of this trial is too tenuous" to establish prejudice, *see* CA4 App.80, was also an unreasonable application of clearly established law and based on

unreasonable factual determinations. As explained, *supra* Section I.A.2, the unconstitutional Wicomico convictions and sentence were an essential part of the State's argument at sentencing. Because there is a reasonable probability that at least one juror would have imposed a sentence less than life without the possibility of parole if the jury had not been permitted to consider Stephens's prior unconstitutional convictions and life-plus-fifteen-years sentence, counsel's failure to challenge those convictions and sentence before the Anne Arundel sentencing was prejudicial under *Strickland*.

4. The district court upheld the postconviction court's decision, concluding that that court's rationale was not "so lacking in justification" as to merit habeas relief. CA4 App.28; *see also* CA4 App.45. For all the reasons just explained, the district court's conclusion cannot withstand scrutiny. And again, the Fourth Circuit said nothing about this claim, instead denying a COA and dismissing the appeal without any discussion of Stephens's arguments.

C. Stephens's Now-Vacated Unconstitutional Convictions Denied Him His Right To Testify

Stephens decided not to testify at his Anne Arundel trial out of fear that he could and would be impeached by his (then-unvacated) prior unconstitutional convictions and sentence. That decision was thus involuntary, impermissibly infringing his right to testify.

1. A criminal defendant has the constitutional right to testify on his own behalf. *Rock* v. *Arkansas*, 483 U.S. 44, 49-53 (1987). A waiver of that right is "personal" and must be made voluntarily and knowingly. *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Whether such a waiver is voluntary and knowing depends in part on

whether a defendant was "aware[] of the relevant circumstances and likely consequences," *id.*, and thus requires "'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it,'" *Berghuis* v. *Thompkins*, 560 U.S. 370, 382-383 (2010). Moreover, a "misrepresentation or other impermissible conduct by state agents" renders a waiver involuntary. *Brady*, 397 U.S. at 757.

A defendant also has a due-process right not to be impeached by an unconstitutional prior conviction—even where the unconstitutionality of the prior conviction only becomes apparent after the trial and regardless of the defendant's guilt of the impeaching offense. *See Loper* v. *Beto*, 405 U.S. 473, 483-484 (1972). Accordingly, a defendant's bedrock right to testify is violated when the waiver of that right is predicated on the defendant's misapprehension that he would be impeached with a prior conviction unconstitutionally obtained. *See Brady*, 397 U.S. at 748. Sanctioning a defendant's waiver under these circumstances would impermissibly force a defendant to give up one constitutional right to protect another, in contravention of clearly established law. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968).

2. Stephens's waiver of his right to testify was not knowing or voluntary because it was based on the misapprehension that he would be lawfully impeached with his prior unconstitutional convictions. Indeed, the record establishes that Stephens would have testified at trial had he not faced impeachment by his prior convictions. *See* CA4 App.224-225. When he expressed his desire to testify to his counsel, his counsel advised him that his previous Wicomico convictions would cause the jury to "really look at [him] like, well, he's already a murderer and he's already locked up for murder anyway." *Id.* Because Stephens could not be impeached with those

unconstitutional convictions, *Loper*, 405 U.S. at 483-484, his belief to the contrary resulted in a misapprehension that rendered the wavier of his right to testify involuntary, *see Brady*, 397 U.S. at 748. By surrendering his right to testify in order to protect himself from impeachment with an unconstitutional conviction, Stephens was improperly forced to give up one constitutional right to protect another. *See Simmons*, 390 U.S. at 394.

Moreover, as discussed, there is no dispute that Stephens's Wicomico convictions were unconstitutional in multiple respects. First, the State knowingly used false evidence through purported ballistics expert Kopera, CA4 App.513, 547. *See Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) (holding it violates due process for the State to "knowingly use false evidence … to obtain a … conviction"). Second, the state withheld information that it was required to provide under *Brady* v. *Maryland*. *See* CA4 App.242. The State conceded those constitutional errors, *see* CA4 App.242-245, 248, and the Wicomico postconviction court found that "there exists grounds to grant [p]ost [c]onviction relief for a new trial," CA4 App.570.

The denial of Stephens's right to testify is a structural error that requires relief without further analysis. The "structural error" doctrine ensures "certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver* v. *Massachusetts*, 582 U.S. 286, 295 (2017). Such errors "'affect[] the framework within which the trial proceeds,'" thereby "'def[ying] analysis by harmless error standards.'" *Id.* Structural errors include violations of constitutional rights "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest," such as rights "based on the fundamental legal principle that a defendant must be allowed to make his own

choices about the proper way to protect his own liberty." *Id.* These decisions "reserved for the [defendant]" include "whether to … testify in one's own behalf." *McCoy* v. *Louisiana*, 138 S.Ct. 1500, 1508 (2018). Indeed, the "right to testify on one's own behalf" is, like the right to self-representation, "'essential to due process of law in a fair adversary process'"; the Sixth Amendment "grants to the accused personally the right to make his defense." *Rock*, 483 U.S. at 51-52. Violation of such a right "ranks as error of the kind our decisions have called 'structural'" and "is not subject to harmless-error review." *McCoy*, 138 S.Ct. at 1511.

3. The postconviction court rejected Stephens's right-to-testify claim based on a counterfactual assumption regarding Stephens's *Alford* plea. Specifically, the court found that "[e]ven if the Wicomico County murder conviction was vacated prior to the termination of the Anne Arundel County trial, and the defendant still plead[ed] guilty to that murder for time-served (as he did), the jury still would have been made aware of the defendant's murder plea through the State's cross examination of the defendant." CA4 App.77. For two reasons, that conclusion is an unreasonable application of clearly established law and an unreasonable factual determination.

First, Stephens's subsequent *Alford* plea is legally irrelevant. At the time of his Anne Arundel trial in 2012, Stephens's decision to waive his right to testify was involuntary because he incorrectly believed that he could be impeached by the unconstitutional Wicomico convictions. *See* CA4 App.224-225. His constitutional rights were violated in that moment. The subsequent *Alford* plea did not retroactively cure that constitutional violation. Accordingly, the postconviction court's analysis of what might have happened after the constitutional

violation, including how the *Alford* plea may have impacted Stephens's trial, improperly assesses whether any error was harmless. Simply put, because Stephens's right to testify was violated, and because that violation is structural error, habeas relief is required.

Second, as a factual matter, Stephens entered his *Alford* plea only *after* the vacatur of the Wicomico convictions and in exchange for a sentence of time served. Had his Wicomico convictions been vacated first, it is unlikely the State would have offered the plea and, even if they had, that Stephens would have taken it. CA4 App.79-80, 225-226. And even if Stephens had still agreed to an *Alford* plea, he could have explained that plea to the jury: it allowed him to maintain his innocence and obtain a guaranteed sentence of time served rather than face a retrial. Accordingly, he would have had no reason to fear that it was "game over" if the jury heard about the "conviction." CA4 App.199. Those changed circumstances would have allowed him to testify on his own behalf without being impeached by an unconstitutional conviction—thus preserving both constitutional rights.

4. The district court largely adopted the postconviction court's reasoning, concluding that "[t]he fact that Stephens remained convicted of the Wicomico County murder undercuts Stephens's contention that but for the Wicomico County conviction, he would have testified on his own behalf at the Anne Arundel County trial." App.42a. That is wrong for the reasons just stated: Stephens's prior convictions and sentence were unconstitutional, meaning that he could not have been impeached with them in the Anne Arundel trial. His belief to the contrary—shored up by the advice of counsel—rendered his waiver of the right to testify involuntary. And while the district court stated that the postconviction court did

not employ a harmless-error analysis, that conclusion is plainly wrong. The counterfactual repeated by the district court is only relevant to assess the harm posed by the constitutional violation—*i.e.*, in conducting a harmless-error analysis. If no harmless-error analysis were necessary or appropriate, as the district court seems to suggest, then there would have been no need to analyze whether the outcome in Stephens's case might have been different.

Furthermore, the district court also deemed *Loper* v. *Beto* "inapplicable" because Stephens chose not to testify and therefore "there was no need for the State to attempt to impeach him." App.42a. But again, that misses the point: Stephens chose not to testify *based on a misapprehension* that his unconstitutional prior convictions could be used to impeach him—caused by the State's own prior unconstitutional behavior. *Loper* establishes that impeachment by those unconstitutional convictions would have been improper, forming the basis of his misapprehension. As a result, under clearly established law, Stephens's waiver of his right to testify was involuntary. The district court's holding to the contrary would force a defendant to forgo one constitutional right to exercise another, which is contrary to clearly established Supreme Court law. *See Simmons*, 390 U.S. at 394.

As with the other claims, the Fourth Circuit provided no explanation for its decision to deny a COA and dismiss Stephens's appeal. App.2a.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

Stephens's petition presents several exceptionally important questions that warrant this Court's review.

The egregious constitutional errors in Stephens's case undermine the core protections afforded by our criminal justice system. As a result of those errors, Stephens faces life imprisonment, without ever having a fair opportunity to argue for the possibility of parole. And at the heart of those errors is the State's extraordinary misconduct. Certiorari is needed to correct these profound injustices.

A. Review is appropriate here to prevent a grave miscarriage of justice. Because of the constitutional violations outlined above, Stephens faces life in prison without the possibility of parole. To date, no court has adequately explained how Stephens's life without the possibility of parole sentence can remain intact even though it was predicated on concededly and demonstrably unconstitutional prior convictions. Stephens is currently 44 years old and has already been incarcerated for most of his life—24 years—as a result of his unconstitutional convictions. Because he is ineligible for parole, he will likely spend decades more in prison. Stephens should be given a fair opportunity to argue for a sentence other than life in prison without the possibility of parole. Indeed, this Court has long recognized both the significance of a life-without-parole sentence, *e.g.*, *Graham* v. *Florida*, 560 U.S. 48, 69 (2010) ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences."); *Miller* v. *Alabama*, 567 U.S. 460, 474-476 (2012) ("Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable."), and that certiorari is often appropriate to address substantial errors even in circumstances (unlike here) where the sentence may change only slightly, *e.g.*, *Concepcion* v. *United States*, 142 S.Ct. 2389, 2392 (2022) (defendant sought to have 228-month sentence reduced

to within the 188-to-235 Guidelines range); *Chavez-Meza* v. *United States*, 138 S.Ct. 1959, 1961 (2018) (defendant sought to have 114-month sentence reduced to 108 months).

B. This Court's review is also appropriate to address the exceptional failures by the State. *First*, the State's ballistics expert Kopera fabricated his credentials and offered false testimony that the gun connected to Stephens had fired all the bullet casings found at the crime scene. *See* CA4 App.513, 549. In fact, proper ballistics testing revealed that some of the casings were fired from a different gun. CA4 App.547. *Second*, the State failed to disclose and provide disciplinary files for Officer Davis, a primary State witness in Stephens's case, that contained substantial derogatory information that was material and disclosable under *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See* CA4 App.242. Those materials were not disclosed until 2012, during Stephens's postconviction proceedings. *See* CA4 App.242. The State's constitutional missteps—particularly the knowing misrepresentations by the State's ballistic expert—should not be permitted to continue to harm Stephens.

Not only was the State's conduct egregious, but the State has refused to remedy, and is indeed now litigating against a full remedy for, those known constitutional errors. Strikingly, although the State knew that Kopera had falsified his credentials since 2007, the State did not retest the ballistics involved in the Wicomico case on its own accord. Instead, the State retested the ballistics evidence in Stephens's case in 2013, and only after being prompted to do so when Stephens's new counsel pursued postconviction relief for the Wicomico convictions. *See* CA4 App.234-235. As noted, that retesting discovered that—contrary to Kopera's testimony—some of the .380 casings at the

Wicomico crime scene were fired from a gun *not traceable to Stephens*. *See* CA4 App.547 (results of ballistics expert Torin Suber's examination). As a result, ballistics evidence that had been highly incriminating was rendered far less probative.

That the State waited for long-ago-sentenced defendants like Stephens to recognize that their case was one of the hundreds of "Kopera cases" and to take up the issue themselves through the postconviction process—even though, of course, many defendants lose access to meaningful counsel after a sentence is imposed—is exceptional in its own right and worthy of this Court's review.

C. Finally, this Court's review is necessary and appropriate to safeguard critically important rights afforded to criminal defendants by our Constitution. Stephens's unconstitutional sentence and conviction circumvent constitutional protections that are foundational to our criminal justice system. As detailed above, Stephens's conviction and life-without-parole sentence violates his due process rights, his Sixth Amendment right to effective counsel, and his right to testify in his own defense. This Court has consistently and repeatedly recognized the significance of these rights and acted to protect them. *See, e.g.*, *Martinez* v. *Ryan* , 566 U.S. 1, 12 (2012) (right to effective counsel "is a bedrock principle" and "the foundation for our adversary system"); *Rock*, 483 U.S. at 50 (the right to testify "advances both the 'detection of guilt' and 'the protection of innocence'"); *Ferguson* v. *Georgia*, 365 U.S. 570, 582 (1961) ("above all others [the defendant] may be in a position to meet the prosecution's case"); *In re Oliver*, 333 U.S. 257, 273 (1948) ("an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, given the clarity of the Fourth Circuit's errors, particularly in denying a COA, the Court may wish to consider summary reversal.

Respectfully submitted.

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