No. 25-52

IN THE
Supreme Court of the United States

TERENCE CLARK, DIRECTOR, *et al.*,

Petitioners,

v.

JEREMIAH ANTOINE SWEENEY,

Respondent.

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

BRIEF IN OPPOSITION

MICHAEL CONFUSIONE
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062

JO-ANN TAMILA SAGAR
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street
Suite 2010
Boston, MA 02110

Counsel for Respondent

QUESTION PRESENTED

As a general matter, state prisoners seeking collateral relief in federal courts must show that they have exhausted available state remedies. But even from the earliest, pre-statutory articulation of the exhaustion doctrine, this Court has consistently held that exhaustion should be excused where there are "special circumstances requiring immediate action" from a federal court. *Ex parte Royall*, 117 U.S. 241, 253 (1886).

This Court continued to apply the "special circumstances" exception to the exhaustion rule following Congress's codification of the collateral-review procedures, *see, e.g.*, *Frisbie* v. *Collins*, 342 U.S. 519, 521 (1952); *Granberry* v. *Greer*, 481 U.S. 129, 136 (1987), noting that Congress had directed courts to excuse the failure to exhaust in "circumstances rendering such process ineffective to protect the rights of the prisoner," 28 U.S.C. § 2254(b) (1948); *see, e.g.*, *Frisbie*, 342 U.S. at 520-521 & n.4.

When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress made substantial changes to the collateral-review process. However, post-AEDPA, the statute governing collateral review of state convictions still directs courts to excuse the failure to exhaust where "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

The question presented is:

Whether AEDPA legislatively overruled the "special circumstances" exhaustion exception.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioners' lists of the parties to the proceeding and directly related proceedings are complete and correct.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

TERENCE CLARK, DIRECTOR, *et al.*,

Petitioners,

v.

JEREMIAH ANTOINE SWEENEY,

Respondent.

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

BRIEF IN OPPOSITION

INTRODUCTION

Maryland frames this case as raising three questions for this Court's review, but there is really only one. Maryland objects to the Fourth Circuit's consideration of an unexhausted claim pursuant to the "special circumstances" exception that this Court articulated in *Frisbie* v. *Collins*, 342 U.S. 519 (1952), and *Granberry* v. *Greer*, 481 U.S. 129 (1987). Pet. 17-23. Maryland also complains that Sweeney forfeited the unexhausted claim, Pet. 15-17, and that the unexhausted claim lacked merit, Pet. 23-31. But the gravamen of Maryland's petition is that the Fourth Circuit violated "AEDPA's constraints" when the court applied the special-circumstances exception to reach an unexhausted claim. Pet. 5.

In addressing the special-circumstances exception, Maryland attempts to recast exhaustion as a jurisdictional rule whose common-law exceptions were eliminated by Congress in AEDPA. But history, precedent, and the statutory text dispel that notion.

Start with history and precedent. This Court has long held that the exhaustion rule is prudential, not jurisdictional. *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984). And because exhaustion is not jurisdictional, courts can excuse the failure to comply with the exhaustion rule in "special circumstances"—those extraordinary breakdowns in the judicial process where strict adherence to the exhaustion rule would risk a miscarriage of justice or leave constitutional violations unremedied. *See, e.g.*, *Ex parte Royall*, 117 U.S. 241, 253 (1886); *Frisbie*, 342 U.S. at 522; *Granberry*, 481 U.S. at 135-136.

Now consider text. Congress codified the special-circumstances exception in its first attempt to put pen to paper on collateral-review procedures, directing courts to excuse the failure to exhaust in "circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b) (1948). And Congress preserved the text outlining the special-circumstances exception through multiple revisions of the collateral-review procedures. Even after AEDPA, the statutory provisions governing collateral review expressly state that exhaustion should be excused in those special "circumstances" where state remedies are "ineffective to protect the rights of the applicant." *Id.* § 2254(b)(1). Congress's choice to preserve this statutory text means that AEDPA's exhaustion exception carries the old soil of the special-circumstances exception with it.

The Fourth Circuit correctly applied AEDPA's text, as well as the history and precedent that animate it, when it applied the special-circumstances exception here. Citing *Frisbie* and *Granberry* alongside AEDPA, the Fourth Circuit concluded that an exceptional confluence of errors—a juror's unauthorized crime scene investigation, the trial court's failure to address the resulting taint, and defense counsel's inaction—together violated Sweeney's Sixth and Fourteenth Amendment rights. These breakdowns are precisely the kind of "special circumstances" that warrant excusal of the exhaustion requirement. The Fourth Circuit's approach was far from a "refusal to obey well-established federal law." Pet. 5. Its decision is the product of more than a century of precedent that Congress has repeatedly endorsed.

Even if the Fourth Circuit had erred in its application of the special-circumstances exception, that would not be a reason to grant certiorari. The Fourth Circuit's unreported, non-precedential decision regarding a little-used exception to the exhaustion rule is not a certworthy issue. Nor does this case present any genuine circuit split or unsettled question for Supreme Court review. Maryland attempts to conjure a split on whether AEDPA eliminated the special-circumstances exception. But the split is illusory. Maryland does not identify any other case in the past twenty-five years addressing—much less giving a different answer to—the exhaustion question. Indeed, the single court of appeals authority it cites is not to the contrary. Other courts of appeals recognize their discretion to excuse exhaustion in exceptional cases.

The other two questions Maryland presents are even less certworthy. They seek factbound error correction, not resolution of any generally-applicable, unsettled legal issue. Maryland asserts the Fourth Circuit violated the party-presentation principle by raising an argument Sweeney had forfeited, Pet. 15-17, but "[a]ffording federal courts leeway to consider a forfeited" issue is "appropriate" in the collateral-review context because "exhaustion doctrine *** is founded on concerns broader than those of the parties." *Wood* v. *Milyard*, 566 U.S. 463, 471-472 (2012). Maryland also argues that the Fourth Circuit's merits analysis was inconsistent with clearly established federal law, Pet. 23-31, but Maryland's quibbles with the court's searching review of the trial record and careful application of this Court's precedent are hardly worthy of certiorari.

The Court should deny the petition.

STATEMENT

A. Legal Background

1. Exhaustion Prior To AEDPA. Although federal courts have an obligation to remedy state deprivations of federal rights, state prisoners are generally required to first seek relief in the state system.

Federal courts initially applied a strict version of this exhaustion rule. *Rose* v. *Lundy*, 455 U.S. 509, 510 (1982). Under this rule, when a petitioner filed a habeas petition containing both exhausted and unexhausted claims, the district court had to dismiss the resulting "mixed petition," allowing the applicant either (1) to return to state court to exhaust his claims or (2) to amend and resubmit the petition to present only the exhausted claims to federal district court. *Id.*

This total-exhaustion rule was designed to ensure that state judicial proceedings were not disrupted and that federal courts would receive one petition from a prisoner containing only exhausted claims and a complete factual record. *Id.* at 518-520. However, the rule had some significant disadvantages, including an increased burden on the state judiciary and on the federal judiciary as judges review cases twice: once for exhaustion and again to examine the merits. *Id.* at 525, 527 (Blackmun, J., concurring in judgment).

In *Granberry* v. *Greer*, the Court acknowledged some of those disadvantages and modified the total-exhaustion rule. There, the Court held that a prisoner's failure to exhaust his state remedies is not an absolute bar to consideration of his claims. *Id.* at 131. The Court instead adopted "an intermediate approach [directing] the courts of appeals to exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* The Court explained that appellate courts should consider "comity and federalism," as well as "justice" and "judicial efficiency," when exercising discretion to consider the merits of an unexhausted claim. *Id.* at 134-136 (quoting *Ex parte Hawk*, 321 U.S. 114, 117 (1944) (per curiam)).

Granberry cited an earlier case, *Frisbie* v. *Collins*, to illustrate why discretion is necessary when courts decide whether to require exhaustion or to address the merits of a habeas petition immediately. *Granberry* relied on *Frisbie* to explain that "special circumstances"—such as the need for "prompt federal intervention" to prevent a miscarriage of justice—may

warrant bypassing the usual exhaustion rule. *Id.* at 135-136 (quoting *Frisbie*, 342 U.S. at 522). *Granberry* construed *Frisbie* as reinforcing the idea that courts are empowered to adapt the exhaustion doctrine to the unique facts of each case, particularly where rigid adherence would undermine the administration of justice. *Id.*

2. Exhaustion Under AEDPA. Nearly a decade after *Granberry*, Congress enacted AEDPA, which amended the exhaustion requirement codified at § 2254(b)(2). *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996).

AEDPA made two changes to the exhaustion requirement. First, it provided that a habeas petition may be denied on the merits, notwithstanding the failure of the applicant to exhaust state-court remedies. 28 U.S.C. § 2254(b)(2). Second, a state cannot be deemed to have waived the exhaustion requirement unless the state, through counsel, expressly waives it. *Id.* § 2254(b)(3).

But AEDPA did *not* substantively alter the language setting forth the exceptions to the exhaustion rule. The pre-AEDPA text provided that exhaustion could not be excused unless, inter alia, "there is *** the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *Id.* § 2254(b) (1995). Post-AEDPA, that language changed only cosmetically: Exhaustion is unnecessary where, inter alia, "circumstances exist that render such process ineffective to protect the rights of the applicant." *Id.* § 2254(b)(1)(B)(ii).

B. Factual Background And Procedural History

Jeremiah Sweeney was charged in connection with an April 2010 murder in Prince George's County, Maryland. Sweeney chose to proceed to a jury trial, and was tried in June 2011 before the state circuit court. During preliminary instructions, the trial court judge instructed the jurors not to conduct research or investigate the case on their own. Juror No. 4 disregarded that instruction and visited the crime scene. He shared his observations with other jurors. Instead of declaring a mistrial or adequately instructing the jury to disregard the tainted information, the court struck Juror 4 and proceeded to verdict with eleven jurors, who convicted Sweeney after brief deliberations. Sweeney was sentenced to two consecutive life terms plus thirty years, and his subsequent efforts to obtain postconviction relief in state court were unsuccessful.

1. The Trial. Maryland's case against Sweeney was built almost entirely on testimonial—rather than physical—evidence. The state never produced the murder weapon. App. 4a. A gun found in Sweeney's house was admitted into evidence, but a firearms examiner testified that it could not have been used to fire the shell casings found at the crime scene. App. 5a.

Nor did the state offer a motive for the crime that would connect Sweeney to the victim. Instead, Maryland's theory of the case was that Sweeney had gotten into an argument with a few neighbors, and then somehow accidentally shot a person who was both unconnected to the argument and standing some

seventy-five yards away from Sweeney's alleged targets. App. 4a.

The testimonial evidence was equally thin. Some witnesses claimed they had seen Sweeney with a gun, or had seen him point a weapon in the decedent's direction. But the defense contested that the witnesses could see Sweeney clearly enough to make those claims. App. 4a-5a. The shooting took place late at night, on a crowded street, with Sweeney standing almost a football field's length away from the decedent. App. 2a.

To bolster its case, Maryland offered into evidence a diagram of the crime scene. The diagram was a tool used by several of the witnesses while they were on the stand, it was published to the jury, and it was discussed by both the prosecution and the defense during closing argument. App. 4a.

2. The Juror Misconduct. Apparently finding the diagram unclear, one of the jurors visited the crime scene.

The court and the parties learned of the visit after deliberations had already begun. App. 5a. On the first day of deliberations, the judge received a note from the jury, which he then shared with the parties. App. 6a. The note said: "Juror Number 4 went to the crime scene yesterday to walk through the scene and a couple of [government] witnesses were there. Is this okay? There was no interaction." *Id.* (footnote omitted). The judge then brought the jury into the courtroom, asked Juror 4 to approach the bench, and said, "Tell me what happened." *Id.* Juror 4 explained that he "went by the scene *** to get a visual because," in his opinion, the "topographical views" offered into evidence would "not give an accurate"

representation of the crime scene. App. 6a-7a. Sweeney's trial counsel, Justin Nunzio, asked Juror 4 if the other jurors knew about his independent research. Juror 4 replied: "They do." App. 7a.

The judge, Nunzio, and state counsel then discussed the appropriate remedy. Nunzio expressed his concern that Juror 4 "can't help but tell them what he saw," and the judge agreed. App. 8a. Nunzio then asked that the entire jury be transported to the crime scene so they could get the same "actual visual" that Juror 4 now had. App. 7a, 9a-10a. The court refused that request. Instead, the court opted to attempt to cure the taint of Juror 4's improper conduct by striking Juror 4 and proceeding to verdict with the remaining eleven jurors. App. 11a-12a.

The judge never instructed the remaining eleven jurors not to consider the information that Juror 4 had shared with them, nor anything else related to the potential taint. App. 11a. Worse, for much of the time that the court and the parties considered next steps, the jurors—including Juror 4—waited together in the jury lounge, where (as the attorneys and the judge acknowledged) the jurors had likely continued to discuss the case. *Id.*

The eleven-member jury reached a verdict after deliberating for approximately one hour and fifteen minutes. Sweeney was convicted and sentenced to two consecutive terms of life imprisonment plus thirty years. App. 12a-13a.

3. State Postconviction Proceedings. After his conviction, Sweeney filed a direct appeal, but was unsuccessful. *See* App. 152a-174a; App. 13a. Sweeney then sought postconviction relief in state court.

Sweeney's pro se petition for postconviction relief argued that Nunzio was ineffective under *Strickland* v. *Washington* for several reasons, including: (1) failing to object to Juror 4 being allowed back into the deliberation room after advising the court he had visited the crime scene; (2) striking Juror 4 without Sweeney's knowledge or consent; (3) proceeding with eleven jurors without explaining to Sweeney that he had a right to twelve jurors; and (4) failing to request a mistrial. Sweeney was later appointed counsel who supplemented the petition, raising additional claims for ineffective assistance of counsel. *Id.*

After briefing was completed, the court held a postconviction review hearing. App. 14a. At the hearing, Nunzio testified that when Juror 4 notified the court that he had gone to the crime scene the night before, it "[a]bsolutely" caused him some concern because the juror "wasn't paying attention to the Court rules" and "he went outside what the Court instructed him to do." *Id.* Nunzio also admitted that he did not know what Juror 4 did at the scene, nor what the witnesses that Juror 4 saw were doing. App. 15a. And Nunzio testified that he had concerns about reducing the number of jurors needed to reach a unanimous decision of conviction. App. 16a.

The state court denied Sweeney's petition for postconviction relief. Sweeney filed an application for leave to appeal, but the Maryland intermediate appellate court summarily denied the application. App. 134a-135a. That court also denied his certiorari petition. App. 17a.

4. District Court Proceedings. Sweeney next sought relief in federal court. With appointed counsel,

Sweeney filed a § 2254 petition in the District of Maryland.

In his petition, Sweeney argued that "[b]oth the court and Petitioner's attorney *** had a legal duty to determine the extent to which" the jury had been "tainted." *Id.* Sweeney argued that his counsel and the court's combined failures forced Sweeney to "decide *** whether to waive [his] right to a twelve member jury[] without [] having the information reasonably necessary to make an informed decision," prejudicing his trial. App. 17a-18a.

The District Court denied Sweeney's petition. The District Court interpreted Sweeney's arguments about the trial judge's and Nunzio's errors as making only one claim: that Nunzio had offered "ineffective assistance of counsel for failing to object to the trial court's failure to hold a proper *Remmer* hearing." App. 118a; *see Remmer* v. *United States*, 347 U.S. 227 (1954). Although recognizing that Sweeney had made arguments about the state trial court's error, the District Court concluded that Sweeney had "failed to bring a claim, either on direct appeal or in his application for postconviction review, that the trial court deprived him of the right to an impartial jury when it did not conduct a proper *Remmer* hearing." *Id.* (footnotes omitted).

Having decided that the gravamen of Sweeney's petition was ineffective assistance of counsel, the District Court declined to grant it, reasoning that the state court's "application of *Strickland* was neither contrary to, nor an unreasonable application of, federal law." App. 123a. The court viewed Nunzio's "[f]ailure to request a mistrial" as "a tactical decision," App. 120a, and "Sweeney failed to prove that he would

not have been convicted if the decision had been made by a twelve-person jury," App. 122a.

5. Fourth Circuit Appeal. The United States Court of Appeals for the Fourth Circuit reversed and remanded. The Court's analysis proceeded in two steps.

First, the court considered what issues were properly before it on appeal. App. 19a-22a. The Fourth Circuit started with the AEDPA standard, acknowledging that, "[g]enerally speaking, 'a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.'" App. 19a (citations omitted). But the Fourth Circuit also noted there are exceptions to this general rule: "The Supreme Court has explained that *** courts may deviate" from the exhaustion rule "in special circumstances." *Id.* (quoting *Frisbie*, 342 U.S. at 521).

Applying that exception, the Fourth Circuit concluded that "[t]he special circumstances of this case, which will likely never arise again, require our consideration of an issue not cleanly articulated and exhausted by Sweeney." App. 20a (footnote omitted). The court of appeals characterized this case as "extraordinary in its significant breakdown of the judicial process." *Id.* The court highlighted three breakdowns: (1) Juror 4 disregarded court orders by conducting an unauthorized crime scene visit and sharing details with fellow jurors, (2) the trial court failed to investigate or instruct the jury regarding this misconduct, and (3) Nunzio neglected to probe the jury's impartiality or seek a *Remmer* hearing to address possible taint. App. 20a-21a. Based on this "combination of extraordinary failures from juror to

judge to attorney," which "deprived Sweeney of his constitutional rights," the Fourth Circuit concluded that the "special circumstances" exception applied. App. 21a-22a.

The Fourth Circuit acknowledged that its view of the case reached "beyond the ineffective assistance of counsel, which is how Sweeney has articulated his claim," but the court explained that its departure was both consistent with precedent and justified by the unusual record in this case. App. 21a. The Fourth Circuit cited and relied on Supreme Court caselaw providing that courts may sometimes "act[] sua sponte" to address "waiver of defenses or procedural defects." App. 19a. With respect to the record, the court observed that Sweeney actually *did* identify and expound upon errors beyond his counsel's inefficacy "throughout his various filings at the state and federal court levels," suggesting Sweeney's claim that the judge had also erred was not so much forfeited as poorly articulated. App. 21a.

Second, on the merits, the Fourth Circuit concluded that the state trial court had violated Sweeney's "right to an impartial jury and confrontation right" by "failing to adequately question Juror No. 4 and failing to inquire at all into the potential impartiality of the other eleven jurors." App. 25a-29a.

The Fourth Circuit applied this Court's jury-trial-right precedent, noting that "[i]n *Remmer* v. *United States*, the Supreme Court clearly established *** a defendant's entitlement to an evidentiary hearing to address allegations of external jury influence, and [p]ost-*Remmer* Supreme Court case law has confirmed" that this obligation rests on the trial

judge's shoulders just as much as the defendant's. App. 24a (quotation marks and citation omitted).

The Fourth Circuit then determined that the trial court had deprived Sweeney of his Sixth and Fourteenth Amendment rights by failing to conduct an evidentiary hearing on juror bias under *Remmer* v. *United States*, 347 U.S. 227 (1954). App. 29a-32a. Specifically, the court reasoned that Juror 4's unauthorized crime scene visit was an "external influence" that, under clearly established Supreme Court precedent, automatically triggers a defendant's right to an evidentiary hearing. App. 29a.

Next, the court held that the trial court violated "Sweeney's right to a fair trial" by failing to "mitigate or cure" the jury's potential taint. App. 32a-37a. Even after learning of Juror 4's misconduct, the judge allowed him to return to the jury lounge with the other eleven jurors, creating an environment where further contamination was likely. App. 33a-34a. The trial court's failure to take any meaningful steps to mitigate the risk of taint fundamentally undermined the integrity of the judicial process and deprived Sweeney of his constitutional right to a fair and impartial trial.

Finally, the court ruled that Sweeney's attorney rendered ineffective assistance by failing to inquire sufficiently into the jury's potential prejudice and then choosing to proceed, uninformed, with an eleven-member jury. App. 37a-46a. Applying *Strickland*, the court determined that Nunzio's performance fell below an objective standard of reasonableness: He inadequately questioned Juror 4, failed to probe the extent of information shared with the other jurors, did not seek further inquiry or an evidentiary hearing,

and did not consider alternatives such as a mistrial or replacing the juror. App. 38a-40a. The court determined that, as to *Strickland*'s second prong, Nunzio's failure contributed to a breakdown in the adversarial process, resulting in a conviction by a possibly prejudiced jury. App. 45a-46a. Together, the court concluded, these errors "infected the entire judicial process and Sweeney's right to a fair trial," requiring a new trial. App. 48a-52a.

Judge Quattlebaum dissented, taking issue with the majority's application of *Frisbie* and *Granberry*. App. 53a-108a.

Maryland petitioned for rehearing en banc. The Fourth Circuit denied that request. App. 175a.

Maryland also sought a stay of the Fourth Circuit's mandate pending its petition for certiorari from this Court. The Fourth Circuit denied that as well. App. 131a.

Maryland asked this Court to stay the Fourth Circuit's mandate and requested an immediate administrative stay. This Court denied the application. Maryland then filed its petition.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE FOR DECIDING WHETHER AEDPA ELIMINATED THE "SPECIAL CIRCUMSTANCES" EXCEPTION.

The exhaustion rule is nonjurisdictional and subject to certain exceptions, including the special-circumstances exception. Congress preserved the special-circumstances exception in AEDPA. The Fourth Circuit correctly applied this exception, concluding extraordinary failures in the judicial

process warranted federal intervention despite non-exhaustion. There is no meaningful circuit split on whether AEDPA eliminated the special-circumstances exception, making this case a poor vehicle for Supreme Court review.

A. The Fourth Circuit Resolved The Question Presented Correctly.

1. The exhaustion rule is nonjurisdictional and is subject to exceptions.

"[T]he exhaustion rule *** is not jurisdictional." *Strickland*, 466 U.S. at 684. Instead, exhaustion is a prudential rule "grounded in principles of comity." *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989). It is "not rigid and inflexible," *Frisbie*, 342 U.S. at 521, but can give way to "exceptional circumstances of peculiar urgency," *Rose*, 455 U.S. at 515 (citation omitted), or "good cause for [a] petitioner's failure to exhaust," *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005).

Because exhaustion is not jurisdictional, from the earliest, pre-statutory articulation of the exhaustion doctrine, this Court has emphasized that exhaustion can "be subordinated to any special circumstances requiring immediate action." *Ex parte Royall*, 117 U.S. at 253; *see Ex parte Frederich*, 149 U.S. 70, 76-78 (1893); *Whitten* v. *Tomlinson*, 160 U.S. 231, 240-242 (1895); *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17 (1925); *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). This exception applies when "a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred," *Granberry*, 481 U.S. at 135; as well as where there is "a conflict between state and federal authorities on a question of law involving concerns of large importance affecting

their respective jurisdictions," *Bowen*, 306 U.S. at 27; and in "cases of urgency, involving the authority and operations of the general government," or "the obligations of this country to or its relations with foreign nations," *Ex parte Royall*, 117 U.S. at 251; *see Kennedy*, 269 U.S. at 18-19.

The name for the "special circumstances" exception has evolved over time. The Court has, at times, referred to "unusual circumstances" and "exceptional circumstances of peculiar urgency" in explaining when exhaustion may be excused. *See, e.g.*, *Granberry*, 481 U.S. at 134, 136; *Rose*, 455 U.S. at 515; *Braden* v. *30th Jud. Cir. Ct. of Kentucky*, 410 U.S. 484, 489 (1973); *Frisbie*, 342 U.S. at 521; *Thomas* v. *Arizona*, 356 U.S. 390, 393 n.1 (1958); *Ex parte Hawk*, 321 U.S. at 116-117. But by whatever name the Court has called it, the Court has always insisted that exhaustion is a nonjurisdictional rule that can yield to the needs of a particular case.

2. Congress codified the special-circumstances exception in 1948, and retained that exception in AEDPA.

When Congress codified the federal right to collateral review of state convictions in 1948, Congress also codified the special-circumstances exception, explaining in the provision governing exhaustion that the failure to exhaust should be excused where "there is *** the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b) (1948).

The statutory reference to imprecisely-defined, special "circumstances" in which exhaustion may be excused incorporated this Court's caselaw discussing

"special circumstances." Indeed, in "codify[ing] the exhaustion doctrine," Congress stated that "this new section is declaratory of existing law," and "cit[ed] *Ex parte Hawk* as correctly stating the principle of exhaustion." *Rose*, 455 U.S. at 516 & n.8. This Court's decision in *Ex parte Hawk*, in turn, acknowledged the special-circumstances exception to the exhaustion rule. *See* 321 U.S. at 118.

When Congress enacted AEDPA and its reforms to the collateral-review procedures, Congress left the special-circumstances exception intact. Post-AEDPA, the exhaustion rule still directs courts to excuse the failure to exhaust where "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," such as the special-circumstances exception, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). In other words, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) (brackets and citation omitted). AEDPA's text—alongside Congress's decision to leave the exhaustion exceptions unchanged—confirms that it incorporated the "old soil" of this Court's special-circumstances caselaw.

Congress's decision to retain the special-circumstances exception—even while it made substantial changes to the surrounding provisions—further bolsters the conclusion that AEDPA did not override the special-circumstances exception. For example, AEDPA permits a habeas petition to be denied on the merits, regardless of the applicant's failure to exhaust state-court remedies. 28 U.S.C. § 2254(b)(2). Additionally, AEDPA requires that any waiver of the exhaustion requirement be made expressly and through counsel. *Id.* § 2254(b)(3). But apart from a few non-substantive modifications, it did not touch the exceptions to exhaustion. Where Congress changes portions of a statute but retains others—here, the exceptions to exhaustion—"it is generally presumed that Congress acts intentionally and purposely" in what it chooses to change or retain. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

3. The Fourth Circuit correctly applied the special-circumstances exception.

To determine whether special circumstances exist—warranting an excusal of non-exhaustion—courts should conduct a particularized "factual appraisal," weighing "the interests of justice" alongside "comity and federalism." *Granberry*, 481 U.S. at 134-136 (quoting *Frisbie*, 342 U.S. at 521). The Fourth Circuit made exactly that determination here.

The Fourth Circuit explained that "[t]he special circumstances of this case, which will likely never arise again, require[d]" its intervention. App. 20a (footnote omitted). The court then detailed the fact-specific "special circumstances" at issue in this case, underscoring the "significant breakdown of the

judicial process" that occurred. *Id.* Specifically, it described how (1) Juror 4 ignored the court's orders by "taking an unauthorized visit to the crime scene the night before deliberations began," and then potentially tainted the jury by telling the other jurors about his visit; (2) the trial court failed to inquire into Juror 4's visit or what he told the other jurors, spoke to none of the other jurors about Juror 4's misconduct, and gave no instruction to the remaining jurors not to consider what Juror 4 had said; and (3) Nunzio did not sufficiently inquire into the jury's impartiality and failed to request a hearing under *Remmer* to probe any jury taint. App. 20a-21a. Together, this "combination of extraordinary failures from juror to judge to attorney" warranted "prompt federal intervention." App. 22a (quoting *Frisbie*, 342 U.S. at 522).

Maryland contends that the Fourth Circuit misapplied the special-circumstances exception for five reasons. But Maryland's scatter-shot attack still misses it target.

First, Maryland argues (at 21) that unlike here, "*Frisbie* and *Granberry* involved a party's waiver of the exhaustion requirement." But that unremarkable fact played no role in *Frisbie*'s recognition of a special-circumstances exception. 342 U.S. at 521-522. The Court in *Frisbie* merely observed offhand that the district court's "[f]ailure to discuss the availability of state relief may have been due to the fact that the state did not raise the question." *Id.* at 521. And the Court noted that, regardless of any waiver, "[t]he Court of Appeals *did* expressly consider the question of exhaustion of state remedies." *Id.* (emphasis added). Lower courts, too, understand the special-circumstances exception can apply irrespective of a

party's waiver. *E.g.*, *Chitwood* v. *Dowd*, 889 F.2d 781, 785 (8th Cir. 1989) (finding "special circumstances sufficient to excuse complete exhaustion of state remedies" even though the state argued "[the petitioner] failed to exhaust state remedies").

Second, Maryland contends (at 20-21) that AEDPA overrode the special-circumstances exception. But Congress preserved the relevant text. *See supra* pp. 18-19. Maryland attempts to bolster its argument with case law, but the only Supreme Court case Maryland points to in support of its assertion that AEDPA overruled the special-circumstances exception is *Banks* v. *Dretke*, 540 U.S. 668 (2004). *Banks*'s statement that *Granberry* predated AEDPA, 540 U.S. at 705, is not a holding that *Granberry* is no longer good law. Preceding AEDPA is not the same thing as being overruled by it. And this Court has relied on *Granberry* in later cases; although Maryland cites this Court's decision in *Wood* v. *Milyard* elsewhere in its petition, it fails to mention that *Wood* cited *Granberry* with approval. *See* 566 U.S. at 471 (applying *Granberry* to explain that appellate courts may consider a "non-exhaustion defense that the State failed to raise in the district court"). *Granberry* remains good law.

Third, Maryland asserts (at 22) that *Frisbie*'s exception is "exceedingly narrow." But narrow does not mean nonexistent. The Court in *Granberry* made clear that courts "should determine whether the interests of comity and federalism," as well as "the interests of justice," would "be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the

petitioner's claim." 481 U.S. at 134-136. That is far from a statement that *Frisbie* and *Granberry* are limited to their facts, and it's a standard the Fourth Circuit had no trouble applying to the exceptional facts here. App. 19a.

Fourth, Maryland complains (at 22) that "no urgency warranted" the Fourth Circuit's intervention. But the excusal of exhaustion rests more on "judicial efficiency" than urgency. *Granberry*, 481 U.S. at 135. That urgency is not central to the special-circumstances analysis is confirmed by other courts' applications of the exception. *E.g.*, *Chitwood*, 889 F.2d at 784-785.

Fifth and finally, Maryland resorts (at 23) to pointing out that *Frisbie* said the special-circumstances determination should be "largely left to the trial courts." That argument refutes itself: Just because *Frisbie* said trial courts are "largely" entrusted with determining whether exhaustion should be excused does not mean the courts of appeals cannot also make that determination. *E.g.*, *United States ex rel. Gray* v. *Director, Dep't of Corr., Ill.*, 721 F.2d 586, 598 (7th Cir. 1983). Indeed, *Granberry* recognized that it is "appropriate for the court[s] of appeals to take a fresh look at" excusing exhaustion in certain circumstances. 481 U.S. at 134.

B. The Split Regarding The Special-Circumstances Exception Is Illusory.

Maryland cites only one court of appeals decision purporting to hold that the special-circumstances exception "did not survive the AEDPA amendments to the federal habeas corpus statute." *Lambert* v. *Blackwell*, 134 F.3d 506, 515 n.20 (3d Cir. 1997). But that citation is to a footnote in the Third Circuit's

opinion in *Lambert*, in which the court remarked that it "agree[d] with the Commonwealth's analysis of *Frisbie*." *Id.* The text of the opinion, by contrast, observes that *Frisbie* "reiterated the general rule that the presence of special circumstances will excuse non-exhaustion." *Id.* at 516.

Thus, notwithstanding the cursory footnote in *Lambert* to which Maryland cites, the Third Circuit recognizes that, under *Granberry*, federal courts can excuse exhaustion under "special circumstances." *Christy* v. *Horn*, 115 F.3d 201, 207 (3d Cir. 1997). Indeed, *Lambert* itself acknowledged the validity of the special-circumstances exception. *See* 134 F.3d at 516 (applying *Christy* to explain that "in rare cases exceptional circumstances of peculiar urgency may exist which permit a federal court to entertain an unexhausted claim" (citation omitted)). So the shallow, 1-1 circuit split that Maryland alleges is really no split at all.

Maryland cites no other court of appeals case for the proposition that AEDPA eliminated the special-circumstances exception. Nor could it: The other circuits to consider this question—to the extent they can even be characterized as considering the question—did so only obliquely (and always in a footnote), and did not hold that AEDPA overrode the special-circumstances exception. *E.g.*, *D'Ambrosio* v. *Bagley*, 527 F.3d 489, 497 n.5 (6th Cir. 2008) (merely "question[ing]" the reasoning of *Granberry* "in light of AEDPA"); *Abuzaid* v. *Mattox*, 726 F.3d 311, 322 n.8 (2d Cir. 2013); *Demarest* v. *Price*, 130 F.3d 922, 934 n.5 (10th Cir. 1997).

C. This Case Is A Poor Vehicle For Reconsideration Of The Special-Circumstances Exception.

Even if this Court could set aside the facts that the Fourth Circuit answered the question presented correctly, and that the split is illusory, this case would still be a poor vehicle for further review. Maryland itself offers several such reasons. Those arguments—including Maryland's position that *Frisbie* and *Granberry* are inapplicable here, Pet. 21-23—are wrong, for the reasons explained *supra* pp. 20-22. But if they are right, then they render this case an unsuitable vehicle for reconsidering the special-circumstances exception. *See St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943) (per curiam) (the Court "is without power to *** give advisory opinions").

II. MARYLAND'S OTHER OBJECTIONS TO THE FOURTH CIRCUIT'S DECISION ARE NOT CERTWORTHY.

The other "questions" advanced by the petition request factbound error correction that do not implicate unsettled areas of law or reveal any confusion within existing doctrine. They amount to little more than an invitation for this Court to engage in case-specific fact review, which is "rarely" something that warrants certiorari. Sup. Ct. R. 10. The Fourth Circuit properly exercised its discretion to raise the special-circumstances exception *sua sponte*, and Maryland's argument to the contrary rests on a misunderstanding of the distinction between waiver and forfeiture in federal habeas review. Moreover, the Fourth Circuit properly applied the exception here to facilitate the interests of justice in light of this case's unique factual circumstances.

A. The Fourth Circuit Did Not Violate The Party-Presentation Principle.

Maryland argues from the flawed premise that the Fourth Circuit lacked the authority to raise the special-circumstances exception on its own motion because Sweeney had not raised the issue before the district court. Pet. 15-17. That misunderstands the difference between waiver and forfeiture. Waiver is the intentional relinquishment of a known right, while forfeiture is merely the failure to preserve an issue for further review. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (citations and quotations omitted).

This distinction unravels Maryland's argument. The courts of appeals retain wide latitude to resurrect a forfeited argument when (as here) circumstances warrant it, whereas waiver forecloses that option. *See Wood*, 566 U.S. at 473; *Day* v. *McDonough*, 547 U.S. 198, 202 (2006); *Granberry*, 481 U.S. at 132-136. As this Court's cases illustrate, the discretion to resurrect forfeited issues has particular force in the collateral-review setting, where AEDPA charges courts of appeals with additional authority to consider the merits of a petition in connection with the decision to permit appellate review. Here, the Fourth Circuit acted well within its discretion in raising the special-circumstances exception on its own motion.

1. Courts of appeals have the authority—including in federal habeas review—to raise a forfeited issue.

The distinction between waiver and forfeiture is not semantic. If a party waives an issue, appellate review generally is foreclosed. *See, e.g.*, *Wood*, 566 U.S. at 466, 470-471 & nn.4-5 ("A court is not at liberty *** to

bypass, override, or excuse a State's deliberate waiver of a limitations defense."). But if there has not been an intelligent waiver, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735.

This Court has emphasized the importance of the waiver/forfeiture distinction in the context of collateral review. *E.g.*, *Wood*, 566 U.S. at 473; *Day*, 547 U.S. at 202; *Granberry*, 481 U.S. at 132-136. *Granberry* illustrates the point. The district court there had dismissed the habeas petition on the merits, but on appeal, the State contended, for the first time, that the petitioner had failed to exhaust state remedies. *Granberry*, 481 U.S. at 130. The Seventh Circuit nevertheless considered the exhaustion defense and dismissed the petition on that ground. *See id.* This Court affirmed, declining to deem the State's failure to preserve the issue "a procedural default precluding the State from raising the issue on appeal." *Id.* at 131. Yet it also declined to "treat nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court" in every case. *Id.* The Court instead adopted an "intermediate approach" under which the "appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 131, 133.

Granberry is consistent with *Olano* and other decisions that have clarified the distinction between intelligent waiver and forfeiture. The State's failure to preserve the issue before the district court did not foreclose appellate review because there had been no "absolute waiver of the claim." *Id.* at 133. In other

words, the issue had been forfeited. This critical distinction permitted the appellate court to exercise its discretion and consider the forfeited issue in service of the broader interests of justice and judicial efficiency. *See id.* at 135-136.

2. Maryland's efforts to limit appellate discretion in habeas review are unpersuasive.

Maryland's attempts to distinguish *Granberry* fall flat. *First*, *Granberry* is no outlier. *Contra* Pet. 21. This Court has consistently applied *Granberry*'s approach to forfeiture in habeas cases. *See, e.g.*, *Wood*, 566 U.S. at 473 ("declin[ing] to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense"); *Day*, 547 U.S. at 209 (similar); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) (explaining nonretroactivity "is not jurisdictional in the sense that [federal courts] *** must raise and decide the issue *sua sponte*" because "a federal court may, but need not, decline to apply *Teague* if the State does not argue it" (citations and internal quotation marks omitted)); *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (the Court "undoubtedly ha[s] the discretion to reach the State's *Teague* argument" notwithstanding "the State's omission of any *Teague* defense at the petition stage"). Like *Granberry*, these decisions confirm that the courts of appeals retain the authority to address forfeited habeas issues on appeal.

Second, the party-presentation principle operates differently in the context of collateral review. *Contra* Pet. 20-21. "While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved." *Long* v. *Wilson*,

393 F.3d 390, 402 (3d Cir. 2004). "Affording federal courts leeway to consider a forfeited" issue is "appropriate" because "exhaustion doctrine *** is founded on concerns broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries." *Wood*, 566 U.S. at 471-472. Consequently, "it is not exclusively up to the parties to decide whether habeas procedural issues should be raised or waived." *Long*, 393 F.3d at 403.

Nor did AEDPA eliminate the power of courts of appeals to excuse forfeiture on collateral review. *Contra* Pet. 17. To the contrary, AEDPA reaffirms that the party-presentation principle operates differently on collateral review. Take, for example, the "certificate of appealability" process. AEDPA requires district courts and the courts of appeals to review habeas petitions before allowing an appeal, and only applicants with colorable constitutional claims may obtain a certificate of appeal. *See* 28 U.S.C. § 2253. "The [certificate of appeal] process screens out issues unworthy of judicial time and attention" while simultaneously "ensur[ing]" that potentially meritorious claims are "assigned to merits panels." *Gonzalez* v. *Thaler*, 565 U.S. 134, 145 (2012); *see Thomas* v. *Crosby*, 371 F.3d 782, 794 (11th Cir. 2004) (Tjoflat, J., specially concurring) ("[T]he fact that [the petitioner] did not mention the §§ 2241/2254 issue in his COA petition does not bar us from exercising our discretion to rule *sua sponte* on this critical threshold issue."). AEDPA's screening procedures differ from ordinary civil litigation because AEDPA is not ordinary civil litigation. Courts of appeals' power to *sua sponte* raise threshold AEDPA issues is consistent

with the role Congress gave courts of appeals in AEDPA.

Third, the power to excuse forfeiture is not somehow limited to those excusals that operate to a prisoner's detriment. *Contra* Pet. 20. For example, this Court in *Granberry* made clear that "if *** it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted." 481 U.S. at 135. And in *Wainwright* v. *Sykes*, the Court explained that the cause-and-prejudice exception "to a state procedural waiver" permits "a federal habeas court" to "adjudicat[e] for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 433 U.S. 72, 87, 90-91 (1977); *see Engle* v. *Isaac*, 456 U.S. 107, 135 (1982) (confirming that, "[i]n appropriate cases," "the principles of comity and finality *** must yield to the imperative of correcting a fundamentally unjust incarceration"); *Reed* v. *Ross*, 468 U.S. 1, 16 (1984) (holding that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"); *Murray* v. *Carrier*, 477 U.S. 478, 488-489 (1986) (detailing what constitutes "cause" for a procedural default).

3. The Fourth Circuit did not abuse its discretion in raising the special-circumstances exception here.

The touchstone for the proper exercise of a federal court's discretion in raising an issue *sua sponte* on collateral review is "whether the administration of justice would be better served by" raising the issue *sua sponte*, or by letting the forfeiture stand. *Granberry*, 481 U.S. at 131; *see Day*, 547 U.S. at 206 (describing *Granberry* as the "pathmarking case" and applying its administration-of-justice principle). In making this assessment, courts of appeals must consider the parties' conduct, the incentives created by invoking an unpreserved issue, and the costs associated with raising the issue at a particular stage of litigation. *See Day*, 547 U.S. at 210 n.11; *Granberry*, 481 U.S. at 132.

Here, the Fourth Circuit reasonably concluded that any failure by Sweeney to exhaust his arguments regarding the trial court's constitutional errors warranted excusal because of the "interests of justice." App. 19a (quoting *Granberry*, 481 U.S. at 136). Rather than send Sweeney back to state court to exhaust his "plainly" meritorious arguments, the court properly recognized that it could "avoid unnecessary delay" and better serve judicial efficiency by correcting the "miscarriage of justice" itself. *Id.* (quoting *Granberry*, 481 U.S. at 135). That exercise of discretion comports with this Court's caselaw establishing that courts can excuse forfeiture on their own motion where justice requires.

This conclusion is bolstered by the fact that Sweeney *did* raise the arguments that Maryland complains the court invented out of whole cloth, as the opinion's

comprehensive citations to the joint appendix make clear. The problem, from Maryland's perspective, is that those arguments did not appear in Sweeney's state postconviction filings. For one thing, that isn't true, as the court's citations to Sweeney's supplemental postconviction filing reveal. *E.g.*, App. 21a-22a (citing JA435-437). Maryland does not attempt to explain why those citations are inadequate to prove that Sweeney preserved the issues. Indeed, Maryland's two-page argument on the Fourth Circuit's purported failure to adhere to the party-presentation principle is unmoored from the record. Maryland's argument wholly lacks citations to the record or briefing below. *See* Pet. 15-17.

And for another, Sweeney made those arguments in his federal habeas petition, and the Fourth Circuit relied on them in reaching its determination that Sweeney was entitled to a *Remmer* hearing and constitutionally adequate counsel. To see that is true requires reading only one page of his petition. In his petition, Sweeney argued that the "trial court acted contrary to *** clearly established law, or applied it unreasonably, for three reasons." JA24. First, because the trial court "failed to ask Juror Number 4 about the nature, the time, the duration, or the circumstances of the visit." *Id.* Second, because the trial court did not "hold a hearing to determine what Juror Number 4 had shared with the other jurors about the visit, or even how long he had spoken with the other jurors about that visit." *Id.* And third, because "the trial court still allowed Juror Number [4] to be part of the jury's deliberations for over an hour in the jury lounge even though the court had determined little to nothing about what that juror had observed during that visit." *Id.*

Those are the same arguments the court found persuasive in granting habeas relief, regardless of how Sweeney "articulated his claim." App. 21a. Maryland's accusation that the court "turn[ed] an adversarial proceeding into an inquisitorial one" is unfounded. Pet. 16; *cf.* *Jefferson* v. *Upton*, 560 U.S. 284, 289, 292 (2010) (construing a petitioner's challenge to "the state court's process" as sufficiently preserved in connection with his ineffective-assistance-of-counsel claim (emphasis omitted)).

B. The Fourth Circuit Correctly Resolved Sweeney's Claims On The Merits.

The remainder of Maryland's petition is highly specific to the facts of this case. The Court should decline Maryland's request for factbound error correction. There was no error. And even if there were, its correction would not serve the interests of judicial efficiency.

1. Maryland grapples with a straw man in arguing that clearly established law did not entitle Sweeney "to voir dire the entire jury." Pet. 27. Having concluded that the special-circumstances exception applied, the Fourth Circuit was not constrained to consider the claim as Sweeney articulated it in his state postconviction filings. Instead, the court looked to Sweeney's federal § 2254 petition, where he argued that the "trial court acted contrary to *** clearly established law, or applied it unreasonably," because it did not "hold a hearing to determine what Juror Number 4 had shared with the other jurors about the visit, or even how long he had spoken with the other jurors about that visit." JA24.

Maryland mischaracterizes Sweeney's petition as "alleg[ing] once again that his trial attorney was

ineffective for not seeking to voir dire the entire jury before agreeing to strike Juror 4 and continuing with the remaining eleven jurors." Pet. 11. But what Sweeney sought—and the Fourth Circuit determined he was entitled to, App. 29a-32a—was precisely the evidentiary "hearing to determine whether the incident complained of was harmful to the petitioner" that *Remmer* clearly established. 347 U.S. at 230. The court did not err by resting its analysis on the very Supreme Court case that Maryland acknowledges would entitle Sweeney to an evidentiary hearing.

2. Maryland does not separately take issue with the court's ineffective-assistance-of-counsel analysis, except to say that "Sweeney also failed to demonstrate that his attorney was ineffective under state law." Pet. 29. But that argument is premised on the inapplicability of the special-circumstances exception. The petition's one-paragraph analysis (at 29-30) focuses solely on the state-law claim that Sweeney raised in his state postconviction filing. It does not grapple with the court's well-supported conclusion under *Strickland* that Nunzio's failure to "reasonably investigate Juror No. 4's taint [and] the potential taint of the remaining eleven jurors," and "his decision that further investigation was unnecessary" were all objectively unreasonable. App. 38a. Nor does it confront the court's conclusion that Nunzio's deficient performance caused "a breakdown of the adversarial process." App. 46a. The petition provides no reason to disturb the court's determination that Nunzio provided ineffective assistance of counsel.

III. THE EXTRAORDINARY RELIEF OF SUMMARY REVERSAL WOULD BE INAPPROPRIATE HERE.

Summary reversal is an "extraordinary" form of judicial relief, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 512-513 (2001) (Stevens, J., dissenting), reserved for rare circumstances where a lower court's decision is patently unmoored from well-established law and the error is clear, egregious, and indisputable, *see Eaton* v. *City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). This Court has consistently emphasized that summary reversal is appropriate only where the proper disposition is so "obvious[]" that full briefing and oral argument would offer no benefit, and where the interest in judicial economy is matched by the manifest need to correct a "fundamental erro[r]." *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari) (citation omitted).

Application of those standards shows that this case is not an appropriate candidate for summary reversal. The Fourth Circuit applied this Court's precedent. Maryland's attempt to find error in that action is misguided. Additionally, Maryland's concern that the court considered arguments Sweeney did not advance is overblown. The record shows that Sweeney raised the arguments on which the court relied in his filings. The court did not resolve this case based on arguments never presented by the parties; rather, the issues it considered permeated the underlying proceedings. And to the extent the court erred, it did so only on factbound questions that do not implicate broader legal questions.

Moreover, a summary reversal in this case is unnecessary to convey the message that Maryland asks this Court to deliver. Maryland has now sought summary reversal of two decisions authored by Judge Gregory in quick succession, following this Court's summary reversal of a Judge Gregory-authored opinion in *Goldey* v. *Fields*, 606 U.S. 942 (2025) (per curiam). *See, e.g.*, Pet. 5; Petition at 36 n.12, *Klein* v. *Martin*, No. 25-51 (U.S. filed July 11, 2025). To the extent any recalibration is needed, *Goldey* offers that guidance.

But issuing a second summary reversal of the same court and the same judge—before that court and that jurist has had an opportunity to learn from and apply this Court's guidance—speaks with a deafening volume. Summary reversal should not serve as a mechanism to register repeated disagreement with the reasoning of a particular judge. That would exceed what is proportional and necessary to correct any perceived error. And it would undermine respect for the judicial process and the value of careful appellate review. Judicial review should not become a tool for targeting an individual jurist.

Maryland can, of course, seek certiorari on a question that implicates broader legal issues, such as whether AEDPA legislatively overruled the special-circumstances exception. But that is not what Maryland seeks. Maryland does not want this Court to grapple with the continuing vitality of exhaustion exceptions post-AEDPA. Maryland does not want this Court to elaborate on the rules of waiver and forfeiture in the context of collateral review. Instead, Maryland has asked only for a summary reversal. This Court should deny that request. The

extraordinary relief of summary reversal is not justified here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

MICHAEL CONFUSIONE
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062

JO-ANN TAMILA SAGAR
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street
Suite 2010
Boston, MA 02110

Counsel for Respondent

OCTOBER 2025