No. 98 – 8384

IN THE

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court.[1] The ABA is a voluntary, national membership organization of the legal profession.[2] Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, judges, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields.

Although the ABA has not taken a position on the constitutionality of the death penalty, the ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2. The ABA has made the right to effective assistance of counsel in capital cases and the preservation of the writ of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) and the ABA *Standards for Criminal Justice* (2d ed. 1980).

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures.[3] The ABA has presented testimony and written materials at congressional hearings with respect to reform of the *habeas corpus* statutes.[4] In 1989, under a grant from the State Justice Institute, an ABA task force conducted a nationwide study of death penalty *habeas corpus* practice and procedures. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement that urged legislative reform of *habeas corpus* procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates in February 1989 adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, to "amplify previously adopted Association positions

[3] *See, e.g., Resolution of the ABA House of Delegates* 112D (1982) (the ABA resolved to "support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings"); *Resolution of the ABA House of Delegates* (Feb. 1988) (resolution calling for the federal government to adopt procedures and standards for the appointment of counsel for death row inmates in federal *habeas corpus* proceedings).

[4] *See, e.g., Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of John J. Curtin, Jr., President of the ABA and of James S. Liebman, Professor of Law, Columbia University School of Law, and Member, ABA Task Force on Death Penalty Habeas Corpus); *Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

on effective assistance of counsel in capital cases." These Guidelines were intended to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *Resolution of the ABA House of Delegates* (Feb. 1989).

On February 3, 1997, the ABA House of Delegates adopted a resolution calling for each jurisdiction that imposes the death penalty to impose a moratorium on executions until the jurisdiction implemented policies and procedures – including *inter alia* adherence to the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* – to ensure that death penalty cases are administered fairly and impartially and to minimize the risk that innocent persons may be executed. *See Resolution of the ABA House of Delegates* (Feb. 1997).

This case raises important questions concerning the administration of the death penalty, the right to counsel, and the relationship between the federal and state courts in *habeas corpus* proceedings – issues that long have been and are today of vital concern to the ABA.

STATEMENT OF THE CASE

While *Amicus* adopts the Statement of the Case in the brief of Petitioner, several points merit emphasis. First, it is incontrovertible that during the sentencing phase, petitioner's trial counsel failed to investigate or present highly significant mitigating evidence. As the Virginia Supreme Court recognized: "[t]here is no doubt there was such evidence." *Williams* v. *Warden*, 487 S.E.2d 194, 198 (Va. 1997). Although this evidence was readily discoverable, petitioner's counsel neither uncovered this evidence nor presented it to the jury that was faced with the life or death decision. The mitigation evidence – described as "compelling" by the District Court and as "critical" by the state trial judge – included the following information:

- Petitioner was born at home, weighing only four pounds, to a mother who drank herself into a stupor on bootleg liquor almost daily while pregnant (Danville Circuit Ct. Op. at 19; District Ct. Op. at 21-22);

- Petitioner was borderline mentally retarded (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24);

- After petitioner's mother was imprisoned for child neglect, petitioner was placed in foster care for several years (District Ct. Op. at 22);

- After being returned to his parents' home, petitioner was beaten regularly by his father (Danville Circuit Ct. Op. at 19);

- Although petitioner was incarcerated as a juvenile and as an adult, his correctional records established that he received high commendations from prison staff for good conduct (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24);

- Two separate correctional officers stated that they were willing and available to testify to petitioner's model behavior as a prisoner and lack of propensity to violence (Danville Circuit Ct. Op. at 43; District Ct. Op. at 24); and

- A respected local accountant, who had befriended petitioner through a church ministry program, would have told the jury that he did not consider petitioner to be a violent person and that he had invited petitioner to stay in his home overnight (Danville Circuit Ct. Op. at 19-20; District Ct. Op. at 24).

Second, in light of the record, the conclusion that petitioner was not competently represented is inescapable. All four of the courts below that considered this case either specifically found that counsel's performance was substandard or assumed that counsel's conduct should be regarded as objectively unreasonable.[5] Counsel had a duty to explore every avenue leading to evidence mitigating against a death penalty, and counsel's failure to do so and to present to the jury any of this mitigating evidence falls far short of any reasonable benchmark of competent advocacy, including the minimum requirements set forth by the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), Guidelines 11.8.3, 11.8.6, and the ABA *Standards for Criminal Justice*, Standard 4-4.1. *See also* Danville Circuit Ct. Op. at 44.

Third, it is noteworthy that both of the trial courts that reviewed this case – the state trial judge (who presided over Williams' trial and sentencing, and directly observed counsel's performance and the jurors in this case) and the federal district court judge (who has over 17 years experience presiding over jury trials) – found that, in light of

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[5] *See Williams* v. *Netherland*, Case No. LP88-81 (Danville Cir. Ct. Aug. 15, 1996) at 44 ("Counsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel . . . ") ("Danville Circuit Ct. Op.") (Appendix 2 to Pet. for Writ of Certiorari); *Williams* v. *Warden*, 487 S.E.2d 194, 198 (Va. 1997) ("there was evidence in mitigation that was available but not presented at the criminal trial. There is no doubt there was such evidence; the facts really are not in dispute."); *Williams* v. *Pruett*, Civ. Act. No. 97-1527-A (E.D. Va. Apr. 7, 1998) at 34 ("The Court finds that Williams was not afforded effective representation at the sentencing stage of his trial.") ("District Ct. Op.") (Appendix 1 to Pet. for Writ of Certiorari); *Williams* v. *Taylor*, 163 F.3d 860, 867 (4th Cir. 1998) ("we will assume, without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment . . .").

the Virginia statute requiring unanimity by the jury before the death penalty can be imposed, *see* Virginia Code § 19.2 – 264.4(E), the failure of trial counsel to investigate and present this mitigation evidence prejudiced Williams during his sentencing proceeding.[6]

The Virginia Supreme Court and the Fourth Circuit diverged with the state trial court and the District Court on the issue of whether petitioner was "prejudiced" by counsel's "deficient performance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Instead of measuring prejudice under the *Strickland* standard – determining whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" – both appellate courts concluded that petitioner failed to meet a higher standard purportedly established in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) – that "the result of the proceeding was [fundamentally] unfair or unreliable." *Williams* v. *Taylor*, 163 F.3d at 867, 868; *Williams* v. *Warden*, 487 S.E.2d at 198, 200. Thus, *while recognizing* that substantial evidence in mitigation never was presented to the sentencing jury, both courts concluded that petitioner had failed to establish prejudice. *Williams* v. *Taylor*, 163 F.3d at 868; *Williams* v. *Warden*, 487 S.E.2d at 200. Moreover, the Fourth Circuit concluded that the fact that one of the jurors might have been swayed by this evidence (with the result that under Virginia law the death penalty would not have been imposed) was simply "insufficient to establish prejudice." *Williams* v. *Taylor*, 163 F.3d at 868.

[6] *See* Danville Circuit Ct. Op. at 44 ("because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase . . . Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough."); District Ct. Op. at 30 ("Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.").

The Fourth Circuit then compounded its flawed interpretation of *Strickland* by concluding that 28 U.S.C. § 2254(d)(1) relieved the federal courts of their obligation to independently review the legal or factual determinations of the state courts. *See* 163 F.3d at 865 (concluding that "*habeas* relief is authorized only when the state courts have decided . . . in a manner that reasonable jurists would all agree is unreasonable") (citing *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998)). This too was an incorrect interpretation of the law, and constitutes an unconstitutional abdication of federal judicial authority that cannot be permitted to stand.

SUMMARY OF ARGUMENT

The ABA submits this *Amicus* brief for two reasons. First, the ABA is deeply concerned that the Fourth Circuit's decision erroneously alters the "prejudice" standard formulated in *Strickland*. If not corrected, the Fourth Circuit's opinion will cause confusion among lower courts and inconsistent enforcement of the Sixth Amendment right to counsel.

Thirty-six years ago, this Court held it to be "an obvious truth" that no criminal defendant could be "assured a fair trial" without the assistance of counsel and required the states to provide an attorney to "any person haled into court, who is too poor to hire a lawyer." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Two decades later, in *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court, reinforcing *Gideon*, held that the constitutional right to counsel includes not simply a right to a lawyer, but a right to "effective representation" by that lawyer in the adversarial system. In *Strickland*, this Court adopted a two-part test: (i)

"the defendant must show that counsel's performance was deficient," *i.e.* "that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88, and (ii) "[t]he defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

If the lower court decision is allowed to stand, the "obvious truth[s]" embodied in *Gideon* and *Strickland* – truths that have become the bedrock of our criminal justice system in which the great majority of defendants are indigents represented by appointed counsel[7] – will stand on fragile ground. In the present case, the Fourth Circuit failed to adhere to the *Strickland* standard, crafting instead a new rule for evaluating prejudice based upon a misinterpretation of *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). In *Fretwell*, this Court concluded that it would constitute "a windfall" to grant a petition for habeas relief in the unusual situation where trial counsel had failed to object based upon precedent that was subsequently overruled; in those particular circumstances, the "result of the sentencing proceeding . . . was rendered neither unreliable nor fundamentally unfair." *Id.* at 366. The Virginia Supreme Court and the Fourth Circuit interpreted *Fretwell* to "clarif[y]" *Strickland* to require that for every claim of ineffective assistance of counsel, petitioner demonstrate that the result of a proceeding is "fundamentally unfair or unreliable." *Williams* v. *Taylor*, 163 F.3d at 867; *Williams* v. *Warden*, 487 S.E.2d at 198. Rather than evaluating the impact of counsel's deficient performance on the sentencing proceeding, these courts concluded that petitioner had not met this heightened standard for establishing prejudice.

[7] *See* Robert L. Spangenberg and Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9-SUM Crim. Just. 13, 14 (1994).

If permitted to stand, this unwarranted grafting of *Fretwell's* "windfall" exception onto the *Strickland* test for evaluating prejudice will seriously undermine the right to counsel. Both appellate courts reversed the grant of a writ of *habeas corpus* in this case, although both the state trial judge and an experienced District Court judge found that petitioner had not been effectively represented at the sentencing stage of his trial and that if he had been so represented there was a reasonable probability the death penalty would not have been imposed. In so doing, the Fourth Circuit and the Virginia Supreme Court have raised the bar on *Strickland* claims so high as to seriously threaten judicial enforcement of the right to effective assistance of counsel in capital cases. This result simply cannot be squared with either *Strickland* or *Gideon*.

Where – as here – counsel has access to substantial, "compelling" or "critical" mitigating evidence but unreasonably does not present that evidence in a sentencing proceeding in which jury unanimity is required to impose the death penalty, petitioner has established prejudice under *Strickland*. Numerous decisions are in accord with that conclusion. The state trial court and the District Court correctly concluded that there was a reasonable probability that but for counsel's errors, the result of the sentencing phase would have been different, and the death penalty would not have been imposed. The Fourth Circuit and the Virginia Supreme Court's requirement that petitioner must bear the additional burden of somehow further demonstrating that the proceeding was "fundamentally unfair or unreliable" is simply not supported by *Strickland*, and if generally applied, would seriously undermine the Sixth Amendment.

Second, the ABA objects to the Fourth Circuit's erroneous interpretation of the right to federal *habeas corpus* review under 28 U.S.C. § 2254(d)(1). The ABA unqualifiedly supports a strong, independent federal judiciary. The Fourth Circuit's construction of 28 U.S.C. §

2254(d)(1) – which requires *habeas* courts to defer to state court interpretations of federal law, unless the state court opinion is in "square conflict" with Supreme Court precedent or adopted an interpretation of federal law which "reasonable jurists would all agree is unreasonable" – precludes an independent review of constitutional claims in a case over which a federal court has jurisdiction. *See Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 348 (1816) ("Judges of equal learning and integrity, in different states, might differently interpret a statute . . . If there were no revising authority to control these jarring and discordant judgments . . . the public mischiefs that would attend such a state of things would truly be deplorable."). The ABA submits that the Fourth Circuit's construction of Section 2254(d)(1) cannot be squared with the federal courts' independent interpretive authority under Article III.

ARGUMENT

I. THE FOURTH CIRCUIT'S FAILURE TO APPLY THE *STRICKLAND V. WASHINGTON* TEST ENDANGERS THE CONTINUING VITALITY OF *GIDEON V. WAINWRIGHT*.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court concluded that the right to counsel in state criminal prosecutions is a fundamental right guaranteed by the Fourteenth Amendment. In the years following *Gideon*, a number of lower courts undermined the guarantee by suggesting, for a variety of reasons, that the right to counsel did not involve a right to effective counsel. Thus, some courts concluded that the right was not violated unless it was demonstrated that counsel's performance was so deficient

that the proceeding was a "farce and mockery" of justice[8] or amounted to "gross incompetence."[9]

Two decades after this Court granted Clarence Gideon's *habeas* petition, it revisited these issues. In *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984), the Court stressed that "[t]he right to counsel is the right to the effective assistance of counsel." (emphasis added.) Noting that several state courts had adamantly refused to recognize that there was a right to "reasonably effective counsel," *id.* at 683, and that this may have been because the Court had not recognized (except in dicta) that there was a right to effective counsel, the Court stated:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Id. at 685.

Strickland announced a two-part standard to guide the lower courts in resolving claims of ineffective assistance

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[8] *See, e.g., United States* v. *Baca*, 451 F.2d 1112, 1114 (10th Cir. 1971); *United States* v. *Roche*, 443 F.2d 98, 99-100 (10th Cir. 1971); *United States* v. *Cox*, 439 F.2d 86, 87-88 (9th Cir. 1971). The "farce and mockery" test – which significantly predated *Gideon, see, e.g., Diggs* v. *Welch*, 148 F.2d 667, 668 (D.C. Cir. 1945) – persisted until only months before the *Strickland* opinion was issued. *See Trapnell* v. *United States*, 725 F.2d 149, 155 (2d Cir. 1983) (last federal court of appeals to abandon "farce and mockery" test).

[9] *See, e.g., Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970); *Bruce* v. *United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967).

of counsel: (i) "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88, and (ii) "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Id.* at 694. In the fifteen years since *Strickland*, lower courts have consistently applied these two standards in order to evaluate claims of ineffective assistance of counsel.

Moreover, in the fifteen years since *Strickland*, this Court has not revisited its standards for assessing claims of ineffective assistance of counsel. Although it examined the application of the *Strickland* test in the highly unusual factual context presented by *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993), involving a claim based upon precedent that had been overruled in the intervening period between petitioner's trial and post-conviction proceedings, this Court has never announced or otherwise suggested that the *Strickland* test has been altered so as to require an additional analysis such as that invoked by the Virginia Supreme Court and the Fourth Circuit. Thus, in light of the continued vitality of the *Strickland* standards, it is all the more striking that both the state Supreme Court and the Fourth Circuit effectively jettisoned the prejudice prong in favor of *Fretwell*'s "windfall" analysis, denying relief unless "the result of the proceeding was [fundamentally] unfair or unreliable." *Williams v. Taylor*, 163 F.3d at 869. These courts erred in reaching this result.

II. PROPER APPLICATION OF THE *STRICKLAND* STANDARD TO THE FACTS OF THE PRESENT CASE REQUIRES THAT PETITIONER BE GRANTED RELIEF.

If the Court of Appeals had properly applied *Strickland*, it would have affirmed the judgment of the District Court that Williams be granted a writ of *habeas corpus*. All four lower courts either expressly found or accepted the conclusion that the failure of petitioner's counsel to investigate and present mitigating evidence at the sentencing phase of the trial constituted ineffective assistance of counsel. *See supra* note 5. This mitigation evidence, described in detail by the District Court, included testimony from (i) family members concerning petitioner's upbringing in an atmosphere of chronic abuse and neglect; (ii) psychologists concerning the petitioner's borderline mental retardation; (iii) correctional officials concerning the petitioner's model behavior as a prisoner and lack of propensity to violence; and (iv) a respected community and business leader concerning the petitioner's character and potential for rehabilitation. *See* District Ct. Op. at 21-24.

Reviewing this evidence, the state court judge who presided over petitioner's trial and sentencing specifically found that "[c]ounsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel." *See* Danville Circuit Ct. Op. at 44.[10]

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[10] The Virginia state judge also noted that the conduct of petitioner's counsel failed to meet the standards set by the ABA's *Standards for Criminal Justice*. *Id.* (quoting Standard 4-4.1 (2d Ed. 1980)). The conduct of petitioner's counsel also fell short of the "minimum requirements" established in the ABA 1989 *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guidelines 11.8.3 and 11.8.6.

The disagreement in this case reflected in the various lower court opinions is not about whether petitioner was competently represented. Manifestly, he was not. The issue is whether the Virginia Supreme Court and the Court of Appeals applied the correct standard for evaluating prejudice, and whether, if the appropriate standard were applied, petitioner would be entitled to relief. It is noteworthy that the state judge who presided over the sentencing hearing and directly observed counsel, the witnesses and – most significantly – the jurors, applied the *Strickland* test and concluded that the failure to present this evidence was clearly prejudicial under that standard. Danville Circuit Ct. Op. at 44 ("because this evidence is so crucial . . . it is prejudicial to a defendant when it is not presented"). Similarly, the District Court judge, who also applied *Strickland*, found that "had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted." District Ct. Op. at 30. The findings and conclusions of these two experienced trial judges are entitled to substantial weight. The Virginia Supreme Court and Court of Appeals erroneously rejected these rulings.

A. The Overwhelming Majority of Federal Courts Applying *Strickland* Have Repeatedly Concluded That the Failure To Investigate and Introduce Mitigating Evidence at the Sentencing Stage of a Capital Trial Is Prejudicial to the Defendant.

The Fourth Circuit and the Virginia Supreme Court's approach to evaluating the conduct of petitioner's counsel is inconsistent with numerous decisions of this Court which have affirmed the importance of mitigating evidence at the sentencing stage of a capital trial. Moreover, it is dramatically at odds with the manner in which other federal

appellate courts have approached similar instances of deficient performance. In fifteen years of application of *Strickland*, many courts have concluded that the failure to seek out or present substantial favorable mitigation evidence at the sentencing phase of a capital trial is prejudicial to the defendant. The position of the Fourth Circuit is well outside the mainstream.

First, this Court has frequently recognized the special, constitutionally impelled role of mitigating evidence in capital sentencing proceedings. As the Court has stated, in capital cases, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry* v. *Lynaugh*, 492 U.S. 302, 328 (1989) (reversing death sentence where jury was not instructed that it could consider mitigating evidence beyond enumerated factors) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) and *Eddings* v. *Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)). *See also Hitchcock* v. *Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence where jury instruction limited mitigating factors jury could consider); *Skipper* v. *South Carolina*, 476 U.S. 1, 4-8 (1986) (reversing death sentence where trial court excluded mitigating evidence as irrelevant); *Eddings*, 455 U.S. at 113-16 (reversing death sentence where sentencing judge refused to consider mitigating evidence); *Lockett*, 438 U.S. at 604-08 (plurality opinion) (reversing death sentence and striking down Ohio death penalty statute where statute limited mitigating evidence sentencing judge could consider). It is for this reason that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence" in determining whether or not to impose a death sentence. *Hitchcock*, 481 U.S. at 394 (internal quotation marks omitted).

The imposition of a death sentence on a defendant whose counsel unreasonably fails to present reliable mitigating evidence effectively circumvents this fundamental constitutional protection. *See Deutscher* v. *Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) ("The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.") (citing *California* v. *Brown*, 479 U.S. 538, 554 (1987)), *writ granted after subsequent history*, 16 F.3d 981 (9th Cir. 1994).

Second, recognizing the critical importance of mitigating evidence in the sentencing process, many lower appellate courts have ruled that counsel's failure to present such evidence is prejudicial.[11] For example, in *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir. 1989), defense counsel did not present any character evidence at the penalty phase of a sentencing hearing and instead simply begged the jury for mercy. The Seventh Circuit found that the prejudice component was clearly satisfied, stating that:

> [C]ounsel, in effect, presented no defense at the sentencing hearing. We view this failure of counsel as "a breakdown in the adversarial process that our system counts on to produce just results." On this basis alone, our confidence in the outcome is sufficiently undermined to find that Kubat was prejudiced.

[11] The Ohio Supreme Court concluded in *Ohio* v. *Johnson*, 494 N.E.2d 1061, 1063 n.4 (Ohio 1986), that the failure to investigate or present mitigation evidence was a severe enough deficiency under *Strickland* and *United States* v. *Cronic*, 466 U.S. 648 (1984), to be treated as presumptively prejudicial. *See also Blake* v. *Kemp*, 758 F.2d 523, 533 (11th Cir. 1985) (noting that it was a "very close question" whether failure to investigate or present substantial mitigation evidence should constitute presumptive prejudice under *Strickland* and *Cronic*).

Id. at 369 (internal citations omitted). Addressing a similar situation a decade later, in a case in which trial counsel had failed to investigate and present readily available mitigating evidence, the Seventh Circuit concluded that counsel's efforts during the sentencing phase were clearly deficient and prejudicial:

> With no evidence of mitigation before the jury despite irrefutable evidence of aggravating circumstances, with need to convince only one of twelve jurors to refuse to go along with a death sentence, and with no statutory or caselaw definition of mitigating circumstances that might enable us to say that the mitigating circumstances found in the investigation by [petitioner's] current lawyers are in fact irrelevant, the possibility that a case in mitigation along the lines devised by these lawyers might have saved [petitioner] from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of [petitioner's] child, possibly strangled by her mother, and the death of one of [petitioner's] brothers by shooting), as to reduce [petitioner's] moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think [petitioner] deserving of mercy.

Emerson v. *Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (internal citation omitted).

The Ninth Circuit reached a similar conclusion in *Clabourne* v. *Lewis*, 64 F.3d 1373 (9th Cir. 1995), where defense counsel failed to introduce any evidence of the defendant's history of mental illness at the sentencing phase. The court concluded that:

> [Counsel's] representation at the sentencing hearing amounted in every respect to no representation at all, and the total absence of advocacy falls outside *Strickland*'s "wide range of professionally competent assistance". . . . [The] deficient performance was decidedly prejudicial: There is a reasonable probability that, but for [counsel's] failure to pursue [the] defense diligently at the sentencing phase, the judge would have imposed a sentence other than death.

Id. at 1387 (internal citations omitted).

These views are in accord with the conclusion reached by the overwhelming majority of federal appellate courts that have addressed trial counsel's failure to present reasonably available mitigation evidence at the sentencing phase of a capital trial. Moreover, their analyses are consistent both before and after this Court's decision in *Fretwell*. In short, *Fretwell* simply is not relevant to the prejudice inquiry. *See, e.g., Austin* v. *Bell,* 126 F.3d 843, 849 (6th Cir. 1997) (concluding that defense counsel's failure to present any mitigating evidence constitutes "an abdication of advocacy," which "undermined the adversarial process"); *Hill* v. *Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994) ("[we are] unwilling to declare that, if the jury had found at least one mitigating circumstance, it would have found, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances."); *Loyd* v. *Whitley*, 977 F.2d 149, 160 (5th Cir. 1992)

("[B]ecause of counsel's inadequacy [in failing to present expert psychiatric testimony] the jury could not perform [its] function"); *Armstrong* v. *Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1987) ("The demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement [of *Strickland*]."); *Blake* v. *Kemp,* 758 F.2d 523, 535 (11th Cir. 1985) ("[W]e find it a close question whether the petitioner received any defense at all in the penalty phase.").[12]

The District Court cogently summarized the state of the record in these words:

> Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

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[12] Numerous state courts have also found prejudice when confronted with deficient performance similar to that suffered by petitioner. *See, e.g., Louisiana* v. *Sanders*, 648 So. 2d 1272, 1293 (La. 1994) ("counsel's failure to prepare at all for the penalty phase . . . resulted in advocacy for the defendant that was tepid and virtually non-existent") (internal quotation omitted); *Phillips* v. *Florida*, 608 So. 2d 778, 783 (Fla. 1992) (concluding that where defense counsel failed to present any mitigating evidence other than testimony of defendant's mother and other evidence was readily available, "but for counsel's deficient performance . . . the vote of one juror would have been different, thereby . . . resulting in a recommendation of life"); *Ohio* v. *Johnson*, 494 N.E.2d 1061, 1067 (Ohio 1986) ("Where absolutely no evidence in mitigation is offered by the defense, and no attempt is made to prevent the cumulation of impermissible aggravating factors, the defendant is exposed to an inexcusably heightened probability of receiving a sentence of death.").

District Ct. Op. at 30. This conclusion was well-grounded and should not have been disturbed by the Fourth Circuit on appeal.

B. The Virginia Supreme Court and the Court of Appeals Erred by Failing To Apply the *Strickland* Standard of Prejudice and in Holding Instead That This Court's Decision in *Lockhart* v. *Fretwell* Formulated the Standard That Is Controlling in the Present Case.

Neither the Virginia Supreme Court nor the Court of Appeals applied the *Strickland* prejudice test in the present case. Instead, these courts improperly concluded that prejudice was to be assessed under a standard formulated by this Court in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993).

The Court of Appeals determined that the *Strickland* standard was inapplicable in this case because, in its view, "the Supreme Court clarified the meaning of prejudice" in *Fretwell*. 163 F.3d at 866. The Fourth Circuit characterized the *Strickland* opinion as "focus[ing] primarily on whether 'the result of the proceeding would have been different,' " *id.*, and went on to say that *Fretwell* was "a clarification" of *Strickland* which requires the defendant "alleging prejudice [to] show that the result of the proceeding was [fundamentally] unfair or unreliable." *Id.* at 869. While the Court of Appeals spoke of *Fretwell* as a "clarification" of *Strickland*, it plainly was of the view that the "fundamentally unfair or unreliable" standard in *Fretwell* superseded *Strickland* as the controlling standard in cases involving claims of ineffective assistance of counsel. *Id.* (stating *Fretwell* is "the rule, not the exception").

The Court of Appeals and the Virginia Supreme Court erred in failing to apply *Strickland* and in following a

different standard. *Fretwell* is clearly distinguishable from the present case. Moreover, *Fretwell* did not announce a modification of *Strickland* nor the adoption of a new prejudice test to be applied as a general rule in assessing claims of ineffective assistance of counsel. Both the Fourth Circuit and the state Supreme Court wrenched language out of context in applying the *Fretwell* formula to this case.

Fretwell involved highly unusual circumstances that are markedly different from the present case. The question presented in *Fretwell*, in the words of the Court, was "whether counsel's failure to make an objection in a state criminal sentencing proceeding – an objection that would have been supported by a decision which subsequently was overruled – constitutes prejudice within the meaning" of *Strickland*. 506 U.S. at 366. Since it had been decided subsequent to Fretwell's trial that there was no legal basis for the objection, petitioner was not actually deprived of any right.[13] As made clear by both the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Stevens, the issue that divided the Court was whether counsel's performance and the prejudice issue were to be assessed by the law prevailing as of the time of trial and sentencing or alternatively, as the Court concluded, controlling precedents as of the time of the post-conviction proceedings. In her concurring opinion, Justice O'Connor emphasized that the Court was deciding a "narrow" question in the context of a highly unusual set of facts: "today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." 506 U.S. at 374 (O'Connor, J., concurring). It

[13] The lack of prejudice in such a situation is clear. If petitioner in *Fretwell* had been granted a new trial, it would have been a literal repeat of the first trial, because he would not be entitled to the objection purportedly omitted at the first trial.

was in this limited context, then, that the Court in *Fretwell* made the statement that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." 506 U.S. at 369-70.

There is, of course, no change of law issue in this case. Far from the unusual circumstances that spawned *Fretwell*, petitioner's case involves straightforward attorney error – trial counsel failed to provide the jury with compelling and substantial mitigating evidence that the jury had a right to consider in deciding whether petitioner would live or die. Indeed, there is a striking similarity between the harm done to petitioner by his attorney's deficient representation and that suffered by capital defendants who have been granted relief under a proper application of the *Strickland* test. *See, e.g., Hill* v. *Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994); *Loyd* v. *Whitley*, 977 F.2d 149, 160 (5th Cir. 1992); *Armstrong* v. *Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1988).

Moreover, there is no possibility of a windfall in this case. Williams has a constitutional right, both under the law applicable at the time of sentencing and under present law, to have all possible mitigating evidence placed before the jury considering whether he should live or die. *See, e.g., Hitchcock* v. *Dugger*, 481 U.S. 393, 394 (1987) ("the sentencer may not . . . be precluded from considering any relevant mitigating evidence" in determining whether or not to impose a death sentence). A holding that Williams' sentence was defective because of failure to present this evidence would not result in any "windfall" for him. [14]

[14] It does not appear that *Fretwell* has been inappropriately extended outside the "windfall" context. *See, e.g., Lucas* v. *O'Dea*, __ F.3d __, 1999 WL 346166 at *5-6 (6th Cir. 1999) (applying *Strickland* prejudice standard in finding ineffective assistance where counsel failed to object to jury instruction that rendered defense a nullity); *Roe* v. *Delo*, 160 F.3d 416, 418-19 (8th Cir. 1998) (applying *Strickland* prejudice standard in finding ineffective assistance where counsel failed to request review of erroneous jury instruction on elements of first-degree murder); *Baldwin* v. *Johnson*, 152 F.3d 1304, 1311, 1315-17 (5th Cir. 1998) (applying *Strickland* prejudice standard in finding counsel's failure to, *inter alia*, request change of venue and challenge prosecutor's use of peremptory strikes as racially motivated not ineffective); *Harris* v. *Warden*, 152 F.3d 430, 440 (5th Cir. 1998) (applying *Strickland* prejudice standard in finding counsel's failure to object to erroneous jury instruction deficient, but not prejudicial); *Mazzell* v. *Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (applying *Strickland* prejudice standard in finding counsel's failure to object to jury instruction not ineffective even assuming deficient performance); *United States* v. *Pedigo*, 12 F.3d 618, 622-24 (7th Cir. 1994) (applying *Strickland* prejudice standard in finding counsel's failure to make dispositive motions, object to prosecutor's leading questions, and call corroborating witnesses not ineffective).

Thus, contrary to the conclusion of the Court of Appeals, *Fretwell* did not displace the *Strickland* "rule." *See* 163 F.3d at 869. The *Fretwell* opinion nowhere states or otherwise suggests that it is announcing a modification, clarification or adoption of any new generally applicable prejudice test to assess ineffective assistance claims. The parties and *amici* in *Fretwell* did not suggest that review of the well-established *Strickland* test was at issue. And Justice O'Connor, *Strickland*'s author, did not understand *Fretwell* to have announced a sea-change in the controlling test:

> Today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The determinative question – whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694 – remains unchanged.

506 U.S. at 373 (O'Connor, J., concurring). Instead, the underlying facts of *Fretwell* make clear that the "fundamental unfairness" analysis is applicable only when necessary to prevent defendants from receiving unwarranted "windfalls."

Finally, affirming the Court of Appeals decision would demolish one of the pillars of the *Gideon* decision, namely that effective assistance of counsel is critical to the proper functioning of the adversary system. *Strickland* would be effectively overruled. The ability of courts to monitor representation in criminal cases in order to insure that defendants are competently represented would be severely compromised.

C. The Court of Appeals Erred in Concluding That Strickland Requires Petitioner To Show All Twelve Jurors Would Have Voted Against Imposition of the Death Penalty.

The Fourth Circuit also erred in construing out-of-context dicta from *Strickland* to contravene Virginia's death penalty sentencing law, which requires a unanimous jury to impose the death penalty. *See* Virginia Code § 19.2-264.4(E) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.").

Although this Court has not required unanimity by juries imposing the death penalty, the Virginia legislature has enacted such a requirement as a fundamental tenet of its sentencing scheme. In determining whether the jury's verdict was rendered fundamentally unfair, the Fourth Circuit failed to pay proper deference to Virginia's unanimous sentencing requirement. The Fourth Circuit incorrectly stated that the findings of the Danville Circuit Court and the District Court that petitioner had proffered

sufficient evidence to show that one juror may have been swayed was insufficient as a matter of law to show prejudice. *See* 163 F.3d at 868 ("that one hypothetical juror might be swayed by a particular piece of evidence is insufficient"). This conclusion is simply incorrect under Virginia's death penalty statute, which provides that the death sentence may only be imposed by a unanimous jury, and conversely, that a single juror can – honestly and conscientiously – prevent the imposition of a death sentence.

Strickland requires that in assessing prejudice, the reviewing court must assume that "the judge or jury acted according to law." *Strickland*, 466 U.S. at 694. The law in Virginia is unambiguous: only a unanimous jury can impose a death sentence. The Fourth Circuit failed to correctly apply *Strickland* in suggesting otherwise. [15]

Moreover, the Fourth Circuit's decision is in conflict with the other courts that have addressed similar statutes and properly concluded that prejudice can be established by showing the effect on one juror. *See Kubat* v. *Thieret*, 867 F.2d 351, 371 (7th Cir. 1989); *Emerson* v. *Gramley*, 91 F.3d 898, 907 (7th Cir. 1996); *Mak* v. *Blodgett*, 970 F.2d 614, 621 (9th Cir. 1992). Finally, the Fourth Circuit's opinion contravenes core principles of federalism. Subject to minimum constitutional standards set forth by this Court, states are free to provide defendants with additional safeguards in the administration of the death penalty. *See,*

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[15] The passage of *Strickland* which the Fourth Circuit cites to support this proposition (that prejudice does "not depend on the idiosyncrasies of the particular decisionmaker") is clearly taken out of context. The passage from which this quote is drawn emphasizes the need in evaluating evidence to assume that the sentencer will act "according to the law . . . [and] must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. It does not – as the Fourth Circuit suggests – require a defendant to show that the missing evidence is so powerful that it would sway all twelve jurors.

e.g., Mills v. *Maryland,* 486 U.S. 367 (1988); *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429 (1988). The Virginia legislature's requirement that the imposition of a death sentence be unanimous is one such additional safeguard sanctioned by this Court's longstanding precedent, but it was disregarded by the court below.

III. THE COURT OF APPEALS CONSTRUED 28 U.S.C. § 2254(d) IN AN UNCONSTITUTIONAL MANNER BECAUSE ARTICLE III PROHIBITS FEDERAL COURT DEFERENCE TO STATE COURT RULINGS ON FEDERAL LAW.

The Fourth Circuit's misinterpretation of the law was not limited to its analysis of *Strickland.* The court interpreted 28 U.S.C. § 2254(d)(1) in such a way as to preclude its independent review or enforcement of petitioner's Sixth Amendment right to effective counsel. The Fourth Circuit stated that "*habeas* relief is authorized only when the state courts have decided the question . . . in a manner that reasonable jurists would all agree is unreasonable." *Williams v. Taylor*, 163 F.3d at 865. *Amicus* submits that this interpretation of 28 U.S.C. § 2254(d)(1) – which requires federal courts considering *habeas* petitions to defer to state court interpretations of federal law – undermines the independence of our federal judiciary and thereby violates the most fundamental principles concerning the relationship between federal and state courts.[16]

[16] In the past, the ABA has opposed the interpretation of Section 2254(d)(1) in an unconstitutional manner – most notably in an *amicus* brief filed in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), *rev'd on unrelated grounds,* 521 U.S. 320 (1997). The ABA's *Lindh* brief contains a more complete exposition of the ABA's views on the constitutional problems raised by the Fourth Circuit's interpretation of Section 2254(d)(1).

This Court should interpret 28 U.S.C. § 2254(d)(1) in such a way to avoid the serious constitutional questions raised by the Fourth Circuit's interpretation. *See, e.g., Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question") (quoting *Gomez v. United States*, 490 U.S. 858, 864 (1989)).

A. The Judicial Power of the United States, Once Extended to a Proper Subject Matter, Must Be Exercised by Article III Courts.

Article III of the Constitution creates the "judicial Power of the United States," vests that power in the federal courts, and "extend[s]" it "to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. Const. art. III, §§ 1, 2. From the early days of the Nation, this "judicial Power" has encompassed both the authority and the obligation to declare "what the law is." *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 704-05 (1974). That fundamental principle was first articulated in *Marbury* v. *Madison*, 5 U.S. 137, 177-78 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . . This is of the very essence of judicial duty.

Martin v. *Hunter's Lessee*, 14 U.S. 304 (1816), made clear the supremacy of federal law over state law. Moreover, neither *Marbury* nor *Martin* suggested that the federal courts could discharge their constitutional duties by deferring to Congress' interpretation of the Constitution simply because

it might have been "reasonable" or not "contrary to . . . well established federal law." Rather, the federal courts are required to exercise independent judgment on the meaning of the applicable constitutional provision. *See* H. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 8-9 (1983).

This Court has rebuffed congressional efforts to intrude on its independent "judicial Power" – as it must to preserve our constitutional system. *See, e.g., Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-25 (1995); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995); *United States* v. *Klein*, 80 U.S. 128, 145-47 (1871). This also has been the view of other federal courts examining this question. *See O'Brien* v. *Dubois*, 145 F.3d 16, 21 (1st Cir. 1998) ("If . . . a federal court must 'defer' to a state court's determinations anent federal law, ADEPA may intrude impermissibly upon the federal courts' Article III power not merely to rule on cases, but to decide them") (internal citation and punctuation omitted); *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997) ("Congress lacks power . . . to require federal judges to 'defer' to the interpretations reached by state courts."). *See also Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix*, 725 F.2d 537, 544 (9th Cir. 1984) (*en banc*) ("If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law.").

Given "the duty of the judicial department to say what the law is," *Marbury*, 5 U.S. at 177, a federal court that defers to a state court's decision as to "what the law is," performs "only rubber-stamp work," *Gutierrez de Martinez*, 515 U.S. at 429, and thus does not properly exercise its "judicial Power." In deferring to state court rulings of

federal law, the federal court may "rule on cases" but it surely is not "decid[ing] them," *see Plaut*, 514 U.S. at 218, in the essential matter or reaching an independent conclusion whether the *habeas* applicant is "in custody in violation of the Constitution or laws of the United States." *See Wright* v. *West*, 505 U.S. 277, 305 (1992) ("We have always held that federal courts, even on *habeas*, have an independent obligation to say what the law is.") (O'Connor, J., concurring).

These basic Article III principles lead inexorably to the conclusion that the Fourth Circuit's interpretation of Section 2254(d)(1) which precludes federal courts from exercising independent legal judgment in "say[ing] what the [federal] law is" in a *habeas* case violates Article III. *Marbury*, 5 U.S. at 177-78. Accordingly, the opinion below should be reversed.

B. Congress Cannot Preordain the Outcome of Cases Before Article III Courts.

This Court consistently has rejected similar efforts by Congress to dictate the outcome of adjudications in Article III Courts. *See, e.g., United States* v. *Klein*, 80 U.S. 128, 146-47 (1871) ("We are directed [by the statute] to dismiss the appeal, if we find that the judgment must be affirmed . . . . Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct."); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995) ("Congress may be free to establish a compensation scheme that operates without court participation . . . . But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate. . . . . We resist ascribing to Congress an intention to place courts in this untenable position"). *See also* L. Sager, *Constitutional Limitations on*

Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 88 (1981) (Congress may not require federal courts "to participate in an adjudicatory ritual, the end result of which would be the preordained defeat of the rights of constitutional claimants"). This Court should not sanction the Fourth Circuit's attempt to do so here.

CONCLUSION

For the reasons set forth herein, the ABA respectfully requests that the Court reverse the decision below.

Respectfully Submitted,

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