No. 20-5570

IN THE
SUPREME COURT OF THE UNTED STATES

RICHARD BERNARD MOORE,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections, MICHAEL STEPHAN, Warden of Broad River Correctional Institution,

Respondents.

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

BRIEF OF RESPONDENTS

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

*WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

**counsel of record*

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Constitutional Provisions

Statutes

PETITIONER'S QUESTION PRESENTED

In determining whether a claim has been fairly presented to, and "adjudicated on the merits" by, the state courts for § 2254(d) purposes, must a federal habeas court examine and compare not only the legal theory but also the factual support presented first in state court and then in federal court?

RESPONDENT'S BRIEF IN OPPOSITION

In 2001, a state court jury convicted Petitioner, Richard Bernard Moore, of murder and sentenced him to death. After a direct appeal, Moore sought state post-conviction relief ("PCR"). For years, Moore stayed in PCR proceedings, developing claims with the assistance of two statutorily qualified attorneys, funding, discovery, and expert witnesses. In one of the claims pursued, Moore argued that his trial counsel were ineffective for not adequately investigating and preparing to rebut the State's physical evidence. App. 62a. The PCR court received, but did not credit, the fact-specific expert testimony presented by Moore during the PCR hearing. App. 68a-80a. Consequently, the PCR court denied relief on the claim. An appeal netted only affirmance.

In 2014, after denial of relief in the state courts, Moore turned to the federal district court seeking habeas relief under 28 U.S.C. § 2254. Rather than attempting to meet his burden under Section 2254(d)(1), Moore sought to litigate this claim anew in federal habeas proceedings. Pursuing the same legal claim, Moore asserted the claim was really defaulted because original PCR counsel were ineffective for not supporting it with the evidence Moore freshly prepared for the district court action. He then relied on *Martinez v. Ryan*, 566 U.S. 1 (2012) to excuse the "default." The District Court rejected Moore's theory, applied appropriate deference, and denied relief. Moore appealed. After briefing and oral argument, the Fourth Circuit denied relief finding the district court correctly applied the restrictions of 28 U.S.C. § 2254. The Court of Appeals correctly held that since Moore's new evidence "fails to change

the heart of the claim and merely strengthens the evidence presented in the state PCR hearing," the deference due under Section 2254 applied. App. 17a.

Moore now turns to this Court alleging the Fourth Circuit erred in not recognizing his different evidence newly offered in district court should afford him *de novo* proceedings in federal habeas. Moore has not (indeed, cannot) show any important legal reason this Court should grant review. The Fourth Circuit observed the established and correct boundaries of 28 U.S.C. § 2254 review in rejecting his claims of error. Additionally, allowing Moore to re-litigate this claim in federal habeas corpus would undermine the much needed finality of litigation, needlessly place further burdens on the federal courts and the federal system, and would allow him to end-run the Congressionally mandated deference of § 2254(d)(1), contrary to *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). This Court should deny certiorari review.

CITATIONS TO OPINIONS BELOW

The district court's September 11, 2018 order denying habeas relief is unreported, but available at 2018 WL 1430959. The order is also reproduced in the petition appendix. App. 24a-51a. The March 3, 2020 published opinion of the Fourth Circuit affirming the district court's denial of habeas corpus relief, is reported at 952 F.3d 174, and is similarly reproduced in the petition appendix. App. 1a-22a. The state court order denying post-conviction relief is unreported, but has been included in the petition appendix. App. 52a-152a.

JURISDICTION

The Fourth Circuit's opinion affirming the denial of habeas relief was entered March 3, 2020. Moore's timely petition for rehearing was denied on March 27, 2020. Moore invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

This case also involves portions of 28 U.S.C. § 2254, which provides:

> (b) (1) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). And, 28 U.S.C. § 2254(d):

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

STATEMENT OF THE CASE

A. Facts of the murder.

Moore went to George Gibson's Whitney, South Carolina residence, between 8:00 and 10:00 p.m. on September 15th, and asked Gibson to get him some crack cocaine. Gibson knew Moore but declined because Moore did not have any money and Gibson would not give Moore crack on credit. The unemployed Moore told Gibson he was going to work and would return the following morning. He then left. JA 2672-74.[1] The Supreme Court of South Carolina summarized the State's evidence surrounding the murder as follows:

> The charges in this case stem from the September 16, 1999, armed robbery of Nikki's, a convenience store on Highway 221 in Spartanburg. According to Terry Hadden, an eyewitness, Moore walked into Nikki's at approximately 3:00a.m. and walked toward the cooler. Hadden was playing a video poker machine, which he did routinely after working his second shift job. Hadden heard Jamie Mahoney, the store clerk, yell, "What the hell do you think you're doing?" Hadden turned from the poker machine to see Moore holding both of Mahoney's hands with one of his hands. Moore turned towards Hadden, pointed a gun at him, and told him not to move. Moore shot at Hadden, and Hadden fell to the floor and pretended to be dead. After several more shots were fired, Hadden heard the doorbell to the store ring. He heard Moore's pickup truck and saw him drive off on Highway 221. Hadden got up and saw Mahoney lying face down, with a gun about two inches from his hand; he then called 911. Mahoney died within minutes from a gunshot wound through his heart. A money bag with $1408.00 was stolen from the store.
>
> Shortly after the incident, Deputy Bobby Rollins patrolled the vicinity looking for the perpetrator of the crime. Approximately one and one-half miles from the convenience store, Deputy Rollins took a right onto Hillside drive, where he heard a loud bang, the sound of Moore's truck backing into a telephone pole. He turned his lights and saw Moore sitting in the back of a pickup truck bleeding profusely from his left arm.

---

1 The designation "JA" refers to the Joint Appendix filed in the court of appeals.

> As Deputy Rollins ordered him to the ground, Moore advised him, "I did it. I did it. I give up. I give up." A blood covered money bag was recovered from the front seat of Moore's pick-up truck. The murder weapon, a .45 caliber automatic pistol, was found on a nearby highway shortly before daylight.

State v. Moore, 593 S.E.2d 608, 609-10 (S.C. 2004).

So, Moore had chosen to drive back to Gibson's house to buy crack after the murder, rather than seek treatment for his gunshot wound at a nearby hospital. He discarded the .45 caliber handgun with his blood on it along the way. JA 2674-76; 2688-91. Following his arrest, he was transported to the hospital and told the either EMS personnel or the emergency room nurse that he had used alcohol and cocaine that day. JA 2802-04.

B. Procedural History.

A jury trial was held October 16-22, 2001 on charges of murder, armed robbery, possession of a firearm during the commission of a violent crime, and assault with intent to kill (AWIK). The jury convicted Moore as charged. JA 1489-3039; 3197. Following a separate capital sentencing proceeding, the same jury sentenced him to death.[2] The South Carolina Supreme Court affirmed his conviction and death sentence on direct appeal. *State v. Moore*, 593 S.E.2d 608 (S.C. 2004).

---

[2] The jury found three statutory aggravating circumstances: the murder was committed while in the commission of robbery while armed with a deadly weapon; Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and Moore had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1)(e) & (3)-(4). He was sentenced to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery. JA 3041-3195.

Moore's primary claims in subsequent state PCR proceedings were that trial counsel were ineffective for not adequately investigating and preparing to rebut the State's physical evidence, and that counsel were ineffective for not adequately investigating and presenting an adequate case in mitigation. App. 61a-62a.[3] The PCR judge denied both claims on the merits, finding neither deficient performance nor prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). App. 68a-80a; 135a-144a. Moore appealed, but the South Carolina Supreme Court denied his petition for a writ of certiorari. JA 4573. It also denied his petition for rehearing. JA 4634-35. Moore subsequently presented both claims in a Petition for Writ of Certiorari filed in this Court, which was denied on June 29, 2015. *Moore v. South Carolina*, 135 S.Ct. 2892 (2015).

Moore raised the physical-evidence ineffectiveness claim as Ground One in his August 14, 2014 Petition for Writ of Habeas. JA 40-42. The magistrate judge filed a Report and Recommendation, recommending that his claim be reviewed under § 2254(d)(1). JA 1208-29. The district court agreed. It adopted the report and recommendation, granted in part and denied in part Respondents' motion to strike, granted Respondents' summary judgment motion and denied Moore's motions for an evidentiary hearing and for a stay. JA 1364-91. Moore's timely Motion to Alter or

---

[3] Trial counsel's experienced mitigation investigator, Drucie Glass, is married to John H. Blume, Esquire, one of Moore's current attorneys. See App. 137a, JA 181-83. Ironically, counsel also spoke to Mr. Blume on several occasions before and during trial. JA 181.

Amend was denied on May 10, 2018. The district court also denied a certificate of appealability. App. 24a-51a.

Moore appealed, but the Fourth Circuit filed an opinion affirming denial of relief on March 3, 2020. App. 1a-21a. The Fourth Circuit found Moore had presented his claim to the state court. App. 13a-14a. The court observed that Moore's physical-evidence claim "was presented in substantially identical terms to the state court. And the legal arguments made remain substantially the same." App. 14a. Relying on this Court's decision in *Vasquez v. Hillery*, 474 U.S. 254, 250 (1986), it found that "so long as 'the prisoner has presented the substance of his claim to the state courts,' the presentation of additional facts does not mean that the claim was not fairly presented" and that "[w]hen new evidence only elaborates on the evidence presented in state court, the claim is not fundamentally altered into a new, and unexhausted, claim." App. 14a-15a.

The court observed that it had rejected a similar argument in *Gray v. Zook*, 806 F.3d 783 (4th Cir. 2015), *cert. denied*, 137 S.Ct. 84 (2016), *reh'g denied*, 137 S.Ct. 459 (2016), and *cert. denied*, 137 S.Ct. 84 (2016), where the court held that, "even while new evidence 'strengthened the claim,' it did not 'fundamentally alter[ ]' the substance of the claim." App. 15a. The court distinguished its decision in *Wise v. Warden*, 839 F.2d 1030, 1033 (4th Cir. 1988) (App. 15a n. 8) (quoting *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983)), and found, "Without a change to the nature of the claim, the type or quantum of evidence supporting it did not fundamentally alter the

claim," thus, the habeas claim "was not new but merely an elaboration on the claim presented to the state court." App. 15a-16a. See also App. 16a-17a.

REASONS WHY CERTIORARI SHOULD BE DENIED

There is no compelling reason to consider Moore's claim. At bottom, the Fourth Circuit opinion reflects an ordinary application of deference under 28 U.S.C. § 2254. Moore's argument to escape that deference lacks substance and is wholly inconsistent with the Congressional limitations this Court has repeatedly safeguarded in its recent habeas jurisprudence.

I. Petitioner unpersuasively argues for an extension of equitable principles expressly limited by this Court in Section 2254 cases resting on a theory expressed in one dissent.

Petitioner's question presented is predicated on Justice Breyer's Statement respecting the denial of certiorari in *Gallow v. Cooper*, 570 U.S. 933 (2013) (statement of Breyer, J., joined by Sotomayor, J., respecting the denial of certiorari). Justice Breyer reasoned that there is substantively little difference between failing to raise a claim at all because of the ineffective assistance of collateral counsel, such as in *Trevino v. Thaler*, 569 U.S. 413 (2013) and presenting a claim but not supporting it with admissible evidence. *Id.* He explained that:

> A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim.

Id.

Accordingly, he found "the Fifth Circuit should not necessarily have found" that *Pinholster* barred its consideration of the petitioner's evidence. *Id.* While Justice Sotomayor joined in this statement, a majority of this Court has never so held.

This Court "has rigorously insisted that [a denial of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950). Thus, Moore's reliance on the statement does not provide sufficient reason to grant certiorari. This Court's recent controlling precedent supports denial of the petition.

II. This case does not merit review to resolve whether or not pre-*Martinez* rules of fair presentation apply after *Pinholster* because the Fourth Circuit properly found *Martinez* did not allow a petitioner to present new evidence for the first time in federal habeas corpus that merely buttresses an identical claim that PCR counsel fairly presented with admissible evidence and sound argument, but which the state courts rejected on the merits. Rather, such claims are reviewed under § 2254(d)(1).

Nor is this case a proper one to for the Court to resolve whether or not pre-*Martinez v. Ryan*, 566 U.S. 1 (2012) rules of fair presentation apply after *Pinholster*. The Fourth Circuit properly found *Martinez*'s "narrow" exception to the general rule of procedural default did not allow Moore to present new evidence for the first time in federal habeas corpus where, as here, that evidence merely buttresses an identical claim that PCR counsel fairly presented with admissible evidence and argument but which the state courts rejected on the merits.

Moore concedes his original PCR counsel presented and obtained an adverse ruling on the claim trial counsel were constitutionally ineffective for failing to adequately investigate and prepare a rebuttal to the State's physical evidence. App. 62a. His assertion this intensely fact-specific claim was procedurally defaulted by original PCR counsel's ineffectiveness in not presenting any admissible evidence to support it necessarily ignores that original PCR counsel presented admissible evidence and argument to support the claim and that the state courts rejected it on the merits. Thus, the Fourth Circuit properly determined that his physical-evidence ineffectiveness claim was subject to the deferential review under § 2254(d)(1) because this claim was fairly presented and rejected on the merits in state PCR. See App. 13a-19a. The new evidence Petitioner relies upon "fails to change the heart of the claim and merely strengthens the evidence presented in the state PCR hearing." App. 17a. *See also Pinholster*, 563 U.S. at 187 n. 11.[4]

A. The State's physical evidence at trial.

In addition to Mr. Hadden's eyewitness testimony, officers investigating the crime scene found the victim lying in the kitchen floor. He was deceased, and his right arm was bent at such a peculiar angle that it was clearly broken. In addition

---

[4] The district court reached this same conclusion. App. 37a-39a. Also, Moore's attack on the sufficiency of PCR counsel's presentation of the physical-evidence ineffectiveness claim is ironic given that his new evidence cannot overcome the state PCR judge's credibility and other factual findings that are supported by the state court record. See § 2254(d)(2). Indeed, one of his two new affidavits lacks credibility because the affiant, a crime scene reconstruction expert, made contrary representations to trial counsel who retained him specifically because of his expertise that area and relied on his conclusions in forming their trial strategy.

to finding evidence of the victim's blood, Moore's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. A meat cleaver that did not belong to Nikki's Speed Shop, State's Ex. 83, was found at the victim's feet with Moore's blood on it. Also, officers found six shell casings, two lead bullet cores, two fired bullets that had been fired by the .45 semi-automatic, and several fragments that were consistent with having been fired by the .45. JA 2697-2719; 2731-47; 2777-79; 2790-95; 2847-58; 2886-2906.

SLED Agent Kenneth Whitler, a forensic firearms examiner, examined "a Charter Arm's .44 Special Caliber Revolver" (State's Ex. 1), "a New England Firearms .32 H & R Magnum Revolver" (State's Ex. 2), and a .45 caliber semi-automatic pistol (State's Ex. 3). He explained that neither the .44 revolver nor the .32 revolver eject shells when the shot was fired, but the .45 pistol ejects the cartridge case every time a shot is fired. He also examined an unfired .45 caliber bullet (State's Ex. 4), six .45 caliber shell casings that had been recovered from the scene (State's Exs. 5-10), two lead bullet cores (State's Ex. 12 and State's Ex. 13), fired bullets (State's Exs. 14-15), a fired copper jacket bullet fragment recovered from the wall above the number five video poker machine (State's Ex. 20), a fired bullet jacket fragment (State's Ex. 21), "a bullet jacket fragment that has been fired" (State's Ex. 22), and a fired bullet jacket fragment that was recovered from the victim's arm at autopsy (State's Ex. 97). JA 2847-51.

Agent Whitler concluded that State's Ex. 20 "could have been fired by" State's Ex. 3, the .45 caliber pistol, but not by the other two weapons. He explained that "its

rifling characteristics were sufficient that, although I couldn't identify it as being fired by the .45 caliber pistol, it does have the same rifling characteristics as the Exhibit Three pistol produces." He further opined that State's Ex. 97 could not have been fired by either of the revolvers, but it could have been fired by the .45 caliber pistol. JA 2850-53; 2856-57.

He testified that State's Ex. 12 was a fired bullet core that was consistent with being a .44 caliber bullet core, State's Ex. 13 was "a bullet core" that was "most consistent with being a .45 caliber jacket bullet core," State's Exs. 14-15 were "two fired jacketed bullets" that were "consistent with being .45 caliber bullets," and State's Exs. 21 and 22 were "fired bullet jacket fragments ... consistent with being .44 caliber jackets," which he determined were part of the same jacket. JA 2853-55.

The .44 revolver holds five bullets when fully loaded. Also, he "received four unfired .44 Special cartridges and one fired cartridge case." While he could not opine that State's Exs. 14-15 were fired by State's Ex. 3 because of the damage to the jacket fragments, "the rifling characteristics that are on these bullets are sufficient to enable me to say they were not fired by the other two revolvers." JA 2855-58. On redirect examination, he explained why it was impossible to determine the position of an individual firing a weapon just from where a cartridge casing landed when, as at the crime scene, there are hard surfaces and nothing to stop the cartridge's movement. JA 2873-76.

The pathologist explained that the fatal gunshot wound "passed through the lower border of the eighth rib" before going through the victim's liver, through his

stomach, diaphragm, heart and left lung. It then exited the right side of his chest. Because the victim's shirt was overlaying the wound when the shot was fired, the pathologist "could not tell for sure" if it was a contact wound. Initially, he was uncertain if stippling was present but, after reviewing photographs, opined that it was "more likely" that the gun had been fired "slightly away from the body." The victim also had a gunshot wound to his lower right arm, which broke his right arm. JA 2917-26.

A bullet fired by the victim's .44 caliber weapon went through Moore's left arm. The pathologist opined that it is possible that either there were two gunshot wounds or all of the victim's injuries could have been caused by a single gunshot if his body had been positioned in such a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and death would have occurred within six to ten minutes after receiving this wound. JA 2917-34. JA 2807-10.[5]

B. Evidence presented in PCR.

Moore's initial PCR counsel, who were statutorily qualified to represent death sentenced PCR applicants under S.C. Code Ann. § 17-27-160(B) (Supp. 2020),[6]

---

[5] Police also found an open pocketknife in Moore's truck when he was arrested (JA 2740-41; State's Ex. 86), which may or may not have been used in the robbery.

[6] § 17-27-160(B) provides:

> If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate

presented a claim that trial counsel were ineffective for not adequately investigating and preparing to rebut the State's physical evidence. App. 62a. PCR counsel's allegation was clearly that while admissible, the State's physical evidence "was easily contradicted and/or explained m a manner consistent with 'circumstances other than the guilt of the accused.' " PCR counsel further alleged that had counsel been effective, they could have Moore could have shown his jury he "acted in self-defense." *Id.* PCR counsel presented three witnesses to support this claim.

Moore testified he knew the victim from patronizing the store "two or three times a week." He allegedly went into the store to buy beer and cigarettes on the night of the incident, but the victim suggested he purchase a certain type of cigarette lighter. Moore supposedly knew there was a security camera monitoring the store

---

> in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense. .... The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment.

The South Carolina Supreme Court strictly enforces these requirements. See *Robertson v. State*, 795 S.E.2d 29, 37 (S.C. 2016) ("we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se"). Appointed counsel are "compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel. Also, capital defendants in PCR are "entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure. S.C. Code Ann. § 17-27-150(B) (Supp. 2020).

and that the victim kept a pistol in his waistband. JA 3704-07; 3744-45; 3756.[7] Allegedly, Moore "automatically responded ... and I wouldn't allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that's how I was able to get it from his hands." With Moore in possession of the .45, the victim reached behind his back, pulled out the .44 magnum and shot Moore. JA 3703-04; 3708-17; 3748-51; 3755.

Moore then retreated behind a "pillar" near the Pepsi stand. He fired three or four shots at the victim, who fell to the floor. Moore denied ever pointing the gun at Hadden, who was playing the video poker machine. He also denied that he had fired a shot from behind the counter and he only grabbed the bag of money as an afterthought, before fleeing with it to Gibson's house to secure treatment for his gunshot wound from Gibson - a man whom he knew used crack. JA 3703-04; 3708-17; 3748-51; 3755.

Moore conceded that trial counsel had explained his right to testify to him but denied counsel told him that his testimony was necessary to potentially receive a voluntary manslaughter instruction. JA 3720-21. He also admittedly elected not to testify on counsel's advice but denied not wanting to testify because of his prior record. JA 3735-36.

Paul Dorman, the crime scene technician who had processed the crime scene, testified on Moore's behalf. For purposes of the PCR hearing only, he was qualified as an expert in crime scene investigation. JA 3622-26; 2190-91. In his opinion, one

---

[7] He admitted he had been to see Gibson that morning but denied using crack.

of the shell casings found behind the counter must have come from someone firing the gun from behind the counter. JA 3626-54; 3685-92. Yet, he admitted he was not an expert in crime scene reconstruction or ballistics and Moore did not qualify him as such at the PCR merits hearing. Moreover, Dorman admitted that a firearms expert was better qualified to testify about how or why one of the fired shell casings ended up behind the counter on the floor. JA 3669-70; 3692.

Contrary to Moore's representation that PCR counsel only presented Dorman to support this claim, they also presented the testimony of a forensic pathologist, Dr. Sandra Conradi. Dr. Conradi had reviewed (1) the case notes from the trial, (2) the autopsy report and trial testimony of Dr. Wren, the forensic pathologist who conducted the autopsy, (3) Paul Dorman's trial testimony, (4) Mr. Hadden's statement, (5) "Deputy Murphy's statement at trial," (5) crime scene and autopsy photographs, (6) diagrams of the crime scene, and (7) other matters to prepare for her testimony. JA 3765-66. Based upon her review of the record, she opined that "the cause of death is a single gunshot wound to the chest with perforation of the heart ... which means bleeding into the sac around the heart causing the heart to become unable to beat." JA 3766-67.

She explained that she felt there was only one shot even though she found two wounds because of the irregularity of both wounds. "The exit wound from the chest is ... somewhat atypical for an exit wound in that it has a lot of bruising around it." Also, the "entrance wound into the arm ... should be a nice round hole surrounded by an abrasion border." She found "somewhat of an abrasion border," but opined "that

wound to the arm is caused by a tumbling bullet going into the arm and staying there after breaking the humerus, the large bone of the right upper arm." If the wound to arm was a "primary entrance wound, ... it should be a nice round hole very similar to the initial hole that went into [the victim's] chest ...." JA 3767-68.

She further opined the "the force of the bullet" would have caused the victim fall to the ground "if not immediately, very close to immediately after being shot" and that he would have "bec[o]me unconscious very quickly, and then died very quickly" from blood loss "because every time the heart beat there was more and more blood going into that sac and compressing the heart so it couldn't beat any further. So, he was probably dead ... *in the range of five to ten* [minutes] I would say." JA 3769 (emphasis added).

Dr. Conradi admitted on cross-examination that she had not spoken to the defense's forensic pathologist, Dr. McMahon. More importantly, she opined that a crime scene photograph introduced at trial showed the presence of stippling slightly above the entrance wound to the victim's chest. This indicated "a fairly close range wound due to the powder put out by the gun and, and going through the shirt and stippling his skin." Although the gun used would have to be test-fired in order to determine an exact range, she opined that this shot was from "12 to 15 inches" from the victim. JA 3771-72.

Michael Morin, Esquire, testified that he was appointed as lead counsel in this case shortly after Moore's arrest. Before his appointment in this case, he had tried between two and four noncapital murder cases. He also sat as third chair in two death

penalty trials. JA 3782-85; 3954-55. Morin was responsible for the guilt phase. To assist in the defense in the guilt phase, he retained Dr. Susan McMahon, a forensic pathologist who taught at the University of South Carolina; Donald Girndt, a crime scene investigation expert who had been a SLED investigator; and private investigator Pete Skidmore. He hired Skidmore because the Public Defender's Office did not have an investigator skilled at interviewing people. Skidmore interviewed a number of witnesses. Also, counsel and Skidmore met at the Sheriff's Department and reviewed the physical evidence. JA 3798-3801; 3805-11; 3978-81 4246-49.

Morin primarily employed Girndt

> to try and determine ... what the evidence was showing where Mr. Mahoney and Mr. Moore were at the time of the shooting. Where the bullets were going, who was holding where, who was standing where, to try to get a clear picture of ... the [State's evidence], and, ... in the event that Mr. Dorman or Mr. Clevenger were gonna present their interpretation of it, I would be able to adequately cross examine them as to where these people were standing aside from what Mr. Moore had told me."

JA 3798-3802; 3987-88. Girndt had received Dorman's report, the crime scene photos, and a video. Also, Morin had told Girndt Moore's version of what occurred. JA 3986. Morin was sure that Dr. McMahon had the autopsy report. JA 3891.

After meeting with each expert individually, Morin met with them together on August 21, 2001. Both experts opined that the fatal shot was fired from behind the counter and inside the kitchen door. Dr. McMahon's opinion was that the victim was "six to eighteen inches from gun," and she likewise noticed the presence of stippling. Morin did not want to present these opinions to the jury because they were consistent with the State's evidence and inconsistent with Moore's account. JA 3805-12; 3841;

3876-79; 3991-92. Morin was satisfied that the experts he used were competent, he did not consider the physical evidence in this case as overly-complex, and he did not see the need for employing yet another expert. JA 3877; 3881; 3889-90; 3990-91.

Morin and Moore repeatedly discussed whether Moore would testify in the guilt phase. Counsel explained that the only legitimate hope at getting jury instructions on voluntary manslaughter or self-defense was if Moore testified, but he refused to testify because of his prior record. JA 3894-97; 3978; 3992-97. So, Morin felt the best strategy was to try and discredit the State's witnesses on cross-examination. He was unable to get a manslaughter charge based on the evidence presented. JA 3992-93.

Second chair, Keith Kelly, Esquire, testified that he formerly had served in the military and had been qualified as an expert with a .45 firearm. App. 2642. Kelly concurred with the assessment that Girndt's conclusions were "very adverse to us" because "Girndt's theory of the case" dove-tailed with the State's theory and he opined that all shooting occurred behind the counter. Girndt could not be used as a witness and Kelly instructed him not to prepare a report. JA 4089-90. While Kelly was primarily responsible for the sentencing phase, the decision was made for him to cross-examine the State's ballistics expert because he has a great deal of experience with and knowledge of the use of firearms, he owns several weapons, he is ex-military, and he was qualified in the military as an expert with a .45 weapon. Strategically, he attempted to attack the ballistic expert's theory of the case, but he could not recall his precise strategy at the time of his testimony. JA 4088-89. See *Burt v. Titlow*, 571

U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' ") (quoting *Strickland*, 466 U.S. at 689).

C. The PCR judge's Order.

Rejecting Moore's claim on the merits, the PCR judge found trial counsel had conducted a reasonable investigation to confront and rebut the State's physical evidence. App. 69a-70a (citing *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)). He found that counsel had repeatedly reviewed Moore's account of the events with him. Also, counsel consulted with Dr. McMahon and Girndt, and counsel reviewed the physical evidence with them. Counsel had likewise reviewed the physical evidence with his private investigator. The PCR judge found that counsel made a reasonable decision to attack the State's evidence through cross-examination and argument in light of the experts' opinions and counsel's assessment that the physical evidence was not "overly complex from a factual standpoint." The PCR judge further found that: (1) there was overwhelming evidence of Moore's guilt and "[t]he motive for the crime was clearly robbery;" (2) Moore's PCR testimony about how the crime occurred was "not credible given the entire record in this case;" (3) counsel's testimony was credible; (4) counsel were not ineffective for failing to call a defense forensic pathologist because counsel had retained Dr. McMahon, who had given her opinion as to the autopsy findings; and (5) it was reasonable both not to present her testimony because it would have been damaging and for counsel to rely upon her findings and not seek another expert. App. 70a-76a. The PCR judge then found that

counsel were not ineffective for failing to retain and present Dr. Conradi because her opinions, which he found credible, would have supported the State's theory of the crime, which was inconsistent with Moore's account and damaging to the defense. App. 76a-77a.

The PCR judge found that Moore had not met his burden of proving counsel were ineffective for not retaining an independent crime scene expert because they had retained Mr. Girndt, who had rendered an unfavorable opinion, and because Moore had not presented such an expert at the PCR hearing, since Mr. Dorman was not a crime scene expert. App. 77a-79a. Further, the PCR judge found that counsel's cross-examination of Dorman was neither deficient nor prejudicial under *Strickland* because (1) Dorman admitted that a firearms expert was more qualified to testify how or why one of the fired shell casings ended up behind the counter on the floor, (2) the State's firearms expert testified at trial "there were a myriad of ways in which the fired shell casing found behind the counter could have ended up behind the counter, (3) Dorman's opinions were "not credible" and "speculative" because "the record show[ed] that Moore struggled with the victim and items were knocked over on the counter." So, there were "a myriad of ways that the shell casing could have ended up behind the counter and in the location it was found," and (4) "Dorman did not perform specific testing of the weapon fired in this case to determine how this specific weapon ejects shell casings, the distance this specific weapon would eject shell casings, and in what direction it would eject shell casings depending on the angle the gun was held when fired." App. 78a-80a.

Finally, the PCR judge found that:

> Even if this testimony could have been admitted, this Court finds that Moore has failed to show prejudice. *Strickland.* Given that (1) there are several other factors that could have contributed to or caused the shell casing to have ended up on the floor behind the counter; (2) Dorman's admission that the firearms examiner was qualified person to explain how the shell casing could have ended up behind the counter; (3) the firearms examiner testified it was impossible to tell how the shell casing ended up behind the counter; (4) the implausibility of Moore's version of the shooting; (5) Moore's own expert, Dr. Conradi, testified that Moore would had to have been behind the counter when he fired the fatal shot given the stippling around the victim's wound; and (6) the overwhelming evidence of Moore's guilt of these crimes, the Court finds that Moore was not prejudiced by counsel's alleged deficient performance in this regard. Moore has failed to show that had this testimony been admitted there is a reasonable probability the result of the proceeding would have been different. *Strickland.*

App. 80a.

D. The evidence offered in federal habeas proceedings.

In federal habeas proceedings, Moore has relied upon *Martinez*'s "narrow" and "limited" exception to the general rule of *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991), *see Martinez*, 566 U.S. at 5, 9, 15-16, in an obvious effort to end-run this Court's holding in *Pinholster* that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. He has also sought to improperly expand the record on this claim although it was exhausted in state PCR proceedings. Specifically, he relies upon affidavits from Ralph Robert Tressel (a "Forensic Investigator and Chief Criminal Investigator for the Cobb County, Georgia District Attorney") (JA 657-70), and Girndt (JA 671-73), as well as what is purported to be notes of trial counsel. JA 643-55. The credibility of Girndt's affidavit is dubious, at best, because his averments are inconsistent with his

representation to trial counsel that the physical evidence was consistent with the state's theory of the case. As noted, counsel employed him specifically to give an opinion of what the physical evidence showed, counsel relied upon his expert appraisal of the state's physical evidence, and the state PCR judge found counsel testified credibly about what he told them. See § 2254(d)(2).

E. Discussion.

1. PCR counsel presented evidence supporting their physical-evidence ineffectiveness claim.

This is not a case where Moore was "unable to develop the factual basis of [his] claim[] in state court through no fault of [his] own." See *Pinholster*, 563 U.S. at 206 (Sotomayor, J. dissenting). Nor did his new evidence "give[] rise to an altogether different claim." *Id.* at 213 (Sotomayor, J. dissenting). See also *id.* at 186 & n. 10 (stressing that AEDPA's statutory scheme "is designed to strongly discourage" prisoners] from "[submitting new evidence in federal court]" but acknowledging that a hypothetical posited by Justice Sotomayor in dissent "may well present a new claim"). Rather, Moore presents precisely the same claim as presented in the state court and his new evidence is premised on the same theory of the crime as heard and rejected by the PCR judge, who found no ineffectiveness in trial counsel's cross-examination of Dorman and who, alternatively found no prejudice under *Strickland* from trial counsel's failure to present a crime scene reconstruction expert. His assertion PCR counsel failed to present evidence supporting the physical-evidence ineffectiveness claim ignores important portions of the state court record, as it must for him to succeed.

His original PCR attorneys presented three witnesses to support this claim: Moore, crime scene technician Dorman, and Dr. Conradi, a respected forensic pathologist. Conspicuously absent from the Petition is any mention of Dr. Conradi or her testimony. Her testimony was not rejected based upon a lack of sufficient expertise. Instead, the PCR judge found her opinions credible and relied upon her finding regarding the presence of stippling in denying the claim. Further, Dorman gave opinions, admitted for the purpose of establishing Moore's ineffectiveness claim, that are consistent with the new evidence Moore proffered in habeas proceedings.

True, the PCR judge correctly found that Dorman was not qualified to testify as a crime scene reconstruction expert at trial, as a matter of state law. See *State v. Ellis*, 547 S.E.2d 490, 491 (S.C. 2001) (police officer who was qualified as expert in crime scene processing and fingerprint identification was not qualified to testify as expert with respect to crime scene reconstruction). Yet, the PCR judge alternatively he found no prejudice from counsel's failure to present a crime scene expert for a fundamental reason: he rejected Dorman's testimony that the cartridge casing found behind the counter must have come from someone firing the gun from behind the counter, *i.e.*, the victim, as not credible. Rather, he found credible Dr. Conradi's testimony that stippling was present.

So, the premise underlying Moore's Question Presented is fallacious, as there was a fair presentation of this claim in state court. Notwithstanding Moore's hindsight assessment of PCR counsel's presentation of the claim, *contra Strickland*, 466 U.S. at 689, PCR counsel's presentation provided the state courts with a " 'fair

opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 276-77 (1971)). Further, the state PCR judge rejected the physical-evidence ineffectiveness claim on the merits - including the factual predicate contained in Moore's "new" evidence.

The Fourth Circuit distinguished, and correctly so, its decision in *Wise*, 839 F.2d at 1033. The Fourth Circuit noted that in *Wise*, it held the "exhaustion doctrine is not satisfied where a federal habeas petitioner presents evidence which was not presented to the state court and which places his case 'in a significantly different and stronger evidentiary posture than it was when the state courts considered it.'" App. p.15a n. 8 (quoting *Brown*, 701 F.2d at 495). The court explained that the standard in *Wise* "requires 'critical' evidence that makes his claim both stronger *and* significantly different. *Id.*" App. 15a n. 8. Because there was no "change to the nature of the claim" presented by Moore, the court found "the type or quantum of evidence supporting it did not fundamentally alter the claim" and the claim presented in habeas "was not new but merely an elaboration on the claim presented to the state court." App. 15a-16a. See also App. 16a-17a.[8]

The court also specifically rejected Moore's contention "the state court's rejection of the crime-scene investigator's testimony effectively means that, in the

---

[8] For these reasons, Moore's case accords with the pre-AEDPA Ninth Circuit decision in *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1998) (per curiam), and the other cases on which he relies. There was a fair presentation of the claim in state PCR.

state PCR proceeding, Moore offered no evidence or only 'mere conjecture.' *Gray*, 806 F.3d at 799 (quoting *Winston v. Kelly*, 592 F.3d 535, 551 (4th Cir. 2010)). The court explained that:

> As the PCR-hearing record makes clear, that is not true.[10] Moore presented testimony from a crime-scene investigator and forensic pathologist, along with a description of the forensic work done by the experts retained by trial counsel. While the state PCR court did not credit Moore's evidence for a variety of reasons, it was well beyond mere conjecture.
>
> [10] The state court issued a hundred-page decision rejecting the PCR petition, and the PCR record in the appendix spans more than a thousand pages with hundreds of pages of transcripts.

App. 17a-18a.

Therefore, the Fourth Circuit properly concluded that the claim is subject to review under § 2254(d)(1). App. 19a. See also App. 15a-17a. See *Pinholster*, 563 U.S. at 187 n. 11 (""Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, we are precluded from considering it"); *Vasquez*, 474 U.S. at 259 (finding the respondent's "additional affidavits introduced no claim upon which the state courts had not passed"). *Cf.*, *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir.2014) (allowing the federal habeas court to consider new evidence that "fundamentally altered" the previously asserted claim of ineffective-assistance-of-trial-counsel and explaining that *Pinholster*'s prohibition only applies "to claims 'previously adjudicated on the merits in State court proceedings' ") (citation omitted). Also, the PCR judge's factual findings are not objectively unreasonable. See § 2254(d)(2).

The contention Moore's new evidence fundamentally altered the claim as it was presented in state court proceedings ignores that his new evidence relies, in part, on an affidavit from the crime scene expert employed by trial counsel. Indeed, his argument the claim was defaulted in state court simply reflects his refusal to accept that "there are countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, his dissatisfaction with his original PCR counsel's representation based on hindsight, *contra id.*, and his belief PCR counsel were ineffective, which is not a basis for relief. § 2254(i).

2. The Fourth Circuit's analysis of Moore's claim is consistent with the exhaustion requirement of § 2254(b), *Pinholster*, *Vasquez*, and *Martinez*.

As shown, the state court record was not "barren" as Moore suggests. Also, the Fourth Circuit's opinion affirming denial of relief hardly applied "a new, vague, and fact-blind standard for fair presentation," as Moore suggests. Instead, the court's opinion makes clear that the denial of relief is consistent with the exhaustion requirement of § 2254(b), *Pinholster* and *Martinez*. See App. 11a-15a; 19a. The court expressly recognized that § 2254(b) requires a petitioner to his claim to the state court and that "[i]f he does not, and the prisoner is barred from now raising the claim in state court," then his unexhausted claim is procedurally defaulted. App. 12a.

Further, the court recognized *Martinez*'s "narrow" exception to the general procedural default rule of *Coleman* allows a petitioner to cause for a default where his PCR counsel was constitutionally ineffective in failing to present and exhaust a claim of "ineffective assistance of trial counsel," and the State "effectively requires a

petitioner to bring that claim in state PCR proceedings rather than on direct appeal." App. 12a-13a (citing *Davila v. Davis*, 137 S.Ct. 2058, 2062-63 (2017) (citing *Martinez*, 566 U.S. 1)). However, it correctly found, as discussed, that PCR counsel made a fair presentation of the claim

Moore's assertion the court applied an "amorphous" standard in referring to "the heart of the claim" is simply quibbling over semantics, as the court expressly relied on this Court's pronouncements in *Vasquez* that "so long as 'the prisoner has presented the substance of his claim to the state courts,' the presentation of additional facts does not mean that the claim was not fairly presented," (App. 14a) (quoting *Vasquez*, 474 U.S. at 258), and that "[w]hen new evidence only elaborates on the evidence presented in state court, the claim is not fundamentally altered into a new, and unexhausted, claim." App. 14a-15a (citing *Vasquez*, 474 U.S. at 258). Rather, than an "amorphous" standard, the court's finding that Moore's new evidence "fails to change the heart of the claim and merely strengthens the evidence presented in the state PCR hearing" (App. 17a) was simply a recognition the new evidence did not substantially change the "substance of his claim" by "fundamentally alter[ing] [it] into a new, and unexhausted, claim" under *Vasquez*.[9]

III. This is a very intensely fact-specific case that was properly resolved by the lower federal courts and will impact few others than Moore.

---

[9] The court's citation to *Gray* as an analogous case further supports this construction of the challenged phrase. *Gray* did not cite *Vasquez* but it quoted *Winston*, which discussed *Vasquez* at length. See *Gray*, 806 F.3d at 799 (quoting *Winston*, 592 F.3d at 551. See also *Winston*, 592 F.3d at 549-50.

The foregoing makes unerringly clear that certiorari should be denied because Moore's is an intensely fact-specific case that was properly resolved by the lower federal courts. As such, it will affect few others than Moore. See *Wetzel v. Lambert*, 565 U.S. 520, 528 (2012) ("We do not normally consider questions of the type presented here, namely, fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (same). See also *Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").

Additionally, this case is replete with credibility and other factual findings that are uniquely suited for the PCR judge, who saw the witnesses and heard the testimony, to make. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) ("a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous," and that it must give "due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses"). See also *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire"); *Von Moltke v. Gillies*, 332 U.S. 708, 740 (1948) (Burton, J., dissenting) (the trial judge's "appraisal of the living record is entitled to proportionately more, rather than less,

reliance the further the reviewing court is removed from the scene of the trial"). As discussed, the state court factual findings are supported by the record and are not objectively unreasonable. See § 2254(d)(2).

IV. The Fourth Circuit's decision is consistent with its other prior decisions and decisions by the Fifth, Sixth, Eighth, and Eleventh Circuits applying virtually identical reasoning, and which this Court has declined to review.

In addition to the Fourth Circuit's earlier decision in *Gray*, the court's decision here is consistent with decisions by Fifth, Sixth, Eighth, and Eleventh Circuits, and this Court has denied certiorari to review each of those cases. In *Moore v. Mitchell,* 708 F.3d 760 (6th Cir. 2013), cert. denied, 571 U.S. 1047 (2013), the Sixth Circuit held that "*Pinholster* is applicable to this case because the requirements of § 2254(d)(1) are not waivable. We may not consider additional evidence not presented to the state courts on this claim." *Moore*, 708 F.3d at 784. The court refused to expand *Martinez*'s "limited" exception to the procedural default rule, and concluded that *Martinez* was inapplicable where the petitioner's claim was raised and rejected on the merits in state court. *Moore*, 708 F.3d at 785.

The court analyzed that the petitioner was

> not asking that we afford a *Martinez*-like review of a procedurally defaulted claim, but rather that we turn *Martinez* into a route to circumvent *Pinholster*. Moore's argument is not merely that *Martinez* permits us to review the merits of his claim; we already do that below, albeit through the lens of AEDPA deference, and *Martinez* is irrelevant to that analysis. Instead, he argues that we should remand to allow *factual development* of his allegation that *collateral* counsel was ineffective, and then, if collateral counsel is found ineffective on that newly developed record, permit that record to inform his ultimate claim for relief regarding whether *trial* counsel was ineffective. In other words, he wants this Court to grant him permission to obtain new facts to

> challenge the Ohio Supreme Court's rejection of his ineffective assistance of trial counsel claim. As explained above, though, *Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.

Id.

In *Lambrix v. Sec'y, Florida Dep't of Corr.*, 756 F.3d 1246, 1260-61 (11th Cir. 2014), the court held that "...the *Martinez* rule relates to excusing a *procedural default* of ineffective-trial-counsel claims in an initial § 2254 petition and does not apply to cases like Lambrix's—where ineffective-trial-counsel claims were reviewed *on the merits* in the initial § 2254 proceeding." (Emphasis in original). The court further explained that "[c]laims reviewable on the merits are, quite simply, not procedurally defaulted—nor otherwise procedurally barred." *Id.*

In *Allen v. Stephens*, 619 F. App'x 280, 290 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 1160 (2016), the Fifth Circuit rejected the petitioner's argument that "remand is required on Claim 4 under *Martinez* and *Trevino* 'in the interests of justice' because a newly discovered letter proves that Allen did not 'stonewall' counsel." The court found his argument had no "legal support because 'once a claim is considered and denied on the merits by the state habeas court,' as is the case here, '*Martinez* is inapplicable.' " (quoting *Escamilla v. Stevens*, 749 F.3d 380, 394-95 (5th Cir. 2014), *aff'd*, 602 Fed.Appx. 939 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 66 (2015), where the court employed similar reasoning in determining denying the inmate a certificate of appealability on an ineffective assistance of counsel claim). Also, in a case decided before *Martinez* and *Pinholster*, the Eighth Circuit concluded "that the district court

erred in considering evidence never presented in state court." *McGehee v. Norris*, 588 F.3d 1185, 1194 (8th Cir. 2009), *cert. denied sub nom., McGehee v. Hobbs*, 562 U.S. 1224 (2011).

V. Allowing a petitioner, such as Moore, to re-litigate his physical-evidence ineffectiveness claim in federal habeas corpus, after he has fairly presented the same claim but lost in state PCR would needlessly "impose significant costs on the federal courts," "aggravate the harm to federalism that federal habeas review necessarily causes," and frustrate the important need for finality of litigation of his convictions and sentence.

"Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez*, 566 U.S. at 9. Much like the effort to extend *Martinez* to claims of ineffective assistance of appellate counsel in *Davila*, expanding *Martinez* to permit re-litigation in federal habeas of a claim litigated on the merits in state court is not only inconsistent with *Pinholster*, it would "impose significant costs on the federal courts" and "would also aggravate the harm to federalism that federal habeas review necessarily causes." *Davila*, 137 S.Ct. at 2069-70. *Davila* explained that "[f]ederal habeas review of state convictions 'entails significant costs,' ... " 'and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority,' " *Id.* at 2070 (citations omitted). Also, federal habeas review " 'degrades the prominence of the [State] trial,' *Engle v. Isaac*, 456 U.S. 107, 127 (1982)], and it "disturbs the State's significant interest in repose for concluded litigation [and] denies society the right to punish some admitted

offenders,' [*Harrington v. Richter*, 562 U.S. 86, 103 (2011)] (internal quotation marks omitted)." *Davila*, 137 S.Ct. at 2070.

To reject Moore's claims for want of exhaustion would strain judicial resources of the federal courts even further in a criminal case that has occupied the courts since 2001. Further, "the principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). *Id. Teague* added, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' " *Id.* (Citation omitted). See also *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation"); *Ryan v. Schad*, 570 U.S. 521, 525 (2013). "And when a habeas petitioner succeeds in obtaining a new trial, the ' 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time,' ... prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (citation omitted).

The crime in this case occurred twenty-one years ago. Moore was convicted and sentenced in October 2001. Over the ensuing nineteen years, he has had direct review by the South Carolina Supreme Court, a state PCR hearing, certiorari review of the

order denying relief by the South Carolina Supreme Court and this Court, and federal habeas review by a magistrate judge, the district court and the Fourth Circuit. Further, after Respondents had made a Return and moved for summary judgment on his habeas claims (JA 76-253), Moore moved on December 4, 2015, for a stay and abeyance under *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust previously-unexhausted claims in a successive state PCR action. JA 254-345. This was two days before the statute of limitations in 28 U.S.C. 2244(d)(1) expired. Over Respondents' objection that he had no legal right to return to state PCR (JA 346-57), the magistrate judge stayed proceedings on January 13, 2016. JA 367-77. Moore's successive state PCR Application was summarily dismissed on May 11, 2017, but the stay was not lifted until October 22, 2018. JA 569-70.

Moore, who had previously received funding to fully investigate claims his federal habeas counsel asserted were procedurally defaulted, nevertheless moved for a stay pending the Court's disposition of *Ayestas v. Davis*, 138 S.Ct. 1080 (2018), on September 15, 2017. JA 957-1148. However, the district court subsequently denied his motion. App. 28.

Justice Scalia predicted in *Martinez* that:

> ... [I]n capital cases, [the majority's decision will effectively reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume. I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.

Martinez, 566 U.S. at 23 (Scalia, J., dissenting) (emphasis in original).

Moore's efforts to escape the deferential review of his claim afforded by § 2254(d)(1) and *Pinholster*, even though his collateral counsel made a fair presentation of the claim in state PCR, substantiates Justice Scalia's guarantee. The need for finality demands an end to his effort to challenge to his state court convictions and sentence. Therefore, the Court should deny certiorari. See *Teague*, 489 U.S. at 309. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring) ("There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality").

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Assistant Attorney General

By:s/ William Edgar Salter, III
WILLIAM EDGAR SALTER, III

Post Office Box 11549

Columbia, South Carolina 29211
(803) 734-6305
Attorneys for Respondents

September 28, 2020