No. 20-975

In the
Supreme Court of the United States

FREDDIE EUGENE OWENS,
Petitioner,

v.

BRYAN P. STIRLING, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; AND LYDELL CHESTNUT, DEPUTY WARDEN OF BROAD RIVER CORRECTIONAL INSTITUTION SECURE FACILITY
Respondents.

On Appeal from the United States District Court for the District of South Carolina

BRIEF IN OPPOSITION

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1. What is the standard to be used by federal courts of appeals for determining whether the underlying constitutional claim is "substantial" under *Martinez,* and how does it relate to the determination that a petitioner has met the requirements to obtain a COA, under 28 U.S.C. § 2253 (c) and as described by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003)?

2. Under the *Martinez* standard, is it proper for courts of appeals determining the substantial quality of the underlying constitution claim to rely on imbalanced consideration of the record, including ignoring evidence in the record in support of a petitioner's underlying constitutional claim – as happened in Mr. Owen's case?

RESPONDENTS' COUNTERSTATMENT OF ISSUES ON APPEAL

1. Did this Court intend its carefully crafted narrow exception in *Martinez v. Ryan* to circumvent full appellate review and mandate an automatic default to a full evidentiary hearing anytime a court of appeals initially finds a basis to grant a certificate of appealability?

2. Did this Court intend its carefully crafted narrow exception in *Martinez v. Ryan* to displace all statutory restrictions imposed by 28 U.S.C. § 2254 in review of the established state court record, or the type

of evidence or claim that may be developed in federal habeas when the factual basis has not been developed?

LIST OF PARTIES

Respondents agree with Petitioner Owens that the caption generally reflects the parties to the proceeding; however, on or about July 11, 2019, Death Row inmates were relocated to Broad River Correctional Institution from Kirkland Correctional Institution. Pursuant to Supreme Court Rule 35(3), Respondents have listed Lydell Chestnut, Deputy Warden of Broad River Road Correctional Secure Facility, as the correct party warden in this matter.

STATEMENT OF RELATED PROCEEDINGS

Respondents identify the following related proceedings:

Owens v. Stirling, 967 F.3d 396 (4th Cir. 2020)(appeal from district court);

Owens v. Stirling, No. 0:16-CV-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018) (order granting motion for summary judgment and denying habeas petition);

Owens v. Stirling, No. 0:16-CV-2512-TLW-PJG, 2018 WL 3104276 (D.S.C. Jan. 12, 2018) (report and recommendation);

State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(direct appeal action affirming death sentence).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

BRIEF IN OPPOSITION

Now nearing the end of federal habeas review of his state conviction and sentence of death, Owens claims a technical entitlement to a reset of his federal habeas action. Owens presented a defaulted, never before raised claim of ineffective assistance of trial counsel in the district court. The district court rejected Owen's argument that *Martinez v. Ryan,* 566 U.S. 1 (2012) would allow him to excuse the default, finding, on the strength of the established state court record, that the offered claim was not substantial. Owens sought an appeal, and the Fourth Circuit granted a certificate of appealability after a preliminary review of his brief. Owens argues because the Fourth Circuit granted a certificate to review his *Martinez* argument that he automatically met the required showing that his ineffective-assistance-of-counsel claim is substantial. From there, Owens concludes he must be afforded an evidentiary hearing in district court. His logic is flawed and his conclusion unsound.

First, Owens seeks additional proceedings on semantics not merit. Had the Fourth Circuit simply modified its certificate after full briefing and review, which it could do, Owens would have no argument. Even so, he leaves this Court with a stark and unpalatable choice: to categorically expand *Martinez* relief, or categorically deny appeal on *Martinez* issues. Neither course is warranted nor defendable in equity or fairness.

Second, the AEDPA restrictions still control. *Martinez* is an equitable rule meant to be narrow. It did not guarantee a hearing. It did not lift all AEDPA

restrictions, nor set aside the rules for Section 2254 cases. 28 U.S.C. § 2254 (e)(1) still requires a federal court to presume relevant fact-findings to be correct, and 28 U.S.C. § 2254 (e)(2) still limits factual development for the first time in habeas to claims affecting the finding of guilt. Rule 7, *Rules Governing Section 2254 Cases in the United States District Courts* continues to allow for submission of affidavits and other materials, and Rule 8 of those same rules still provides that material submitted under Rule 7 along with the state court records must be reviewed "to determine whether an evidentiary hearing is warranted." Owens seeks to avoid all of these requirements and provisions and cut to the chase of an evidentiary hearing – a path not created by *Martinez* or the AEDPA.

Third, Owens's position fails factually. To make his complaint that he did not have a fair opportunity to present his claim in district court, he fails to acknowledge the proceedings offered in the district court. The district court allowed time and funding for investigation, and allowed Owens to submit affidavits in support of his argument to excuse the default. However, his state court record – which necessarily followed him into federal court – could not be ignored. Owens's assertion that the lower federal courts made an "imbalanced" review and "ignor[ed]" evidence, (see Petition at 25, 32, and 33), is rebuffed by the record itself – no interpretation needed. The district court did not abuse its discretion in denying further proceedings in an evidentiary hearing. Owens's further argument that third sentencing counsel (and their experts), and collateral counsel (and their experts), failed to

recognize the need to develop specific neuroimaging evidence of "brain damage" in light of Owens's medical history was not deficient performance but the result of well-informed counsel (and their experts) choosing a different direction. Owens's "red flag" argument is more "red herring" than flag. He parses and isolates a note in a single administrative prison institutional movement document for support that a telling reference to seizure activity and treatment was missed. However, the state court record shows that trial counsel, and, critically, trial counsel's experts, relied on the actual, full medical records that unquestionably debunk that theory.

At any rate, Owens shows no basis to allow him to secure a district court evidentiary hearing by virtue of being granted full appellate proceedings. The petition should be denied.

CITATIONS TO OPINIONS BELOW

The district court's May 29, 2018 order denying habeas relief is unreported, but available at 2018 WL 2410641 (D.S.C. May 29, 2018), and is reproduced in the petition appendix. (App. 58-168). The district court's November 1, 2018 order denying Owens's Rule 59(e) motion is unreported, but available at 2018 WL 5720445 (D.S.C. Nov. 1, 2018). The July 22, 2020, published opinion of the Fourth Circuit affirming the district court's denial of habeas corpus relief is reported at 967 F.3d 396 (4th Cir. 2020). Like the district court order, the Fourth Circuit opinion is similarly reproduced in the petition appendix. (App. 1-56).

JURISDICTION

The Fourth Circuit entered its opinion affirming the denial of habeas relief on July 22, 2020. The Court of Appeals denied Owens's timely petition for rehearing on August 18, 2020. (App. 57). In light of this Court's COVID order extending the time for filing, the petition was timely filed on January 15, 2020. Owens invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). (Petition at 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Owens asserts this case involves the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Owens also asserts that the Eighth Amendment cruel and unusual punishment prohibition, as applied to the states through the Fourteenth Amendment, is also involved, along with the certificate of appealability provisions found in 28 U.S.C. § 2253(c). (Petition at 1-2).

Respondents assert this case additionally involves portions of 28 U.S.C. § 2254 and the *Rules Governing Section 2254 Cases in the United States District Courts*, including:

28 U.S.C. § 2254 (e)(1), which provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

> determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
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> And 28 U.S.C. § 2254 (e)(2), which provides:
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
> …
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; ***and***
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, ***no reasonable factfinder would have found the applicant guilty of the underlying offense***.

(emphasis added).

And Rule 7(a) and (b), *Rules Governing Section 2254 Cases in the United States District Courts*:

> **(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials

> relating to the petition. The judge may require that these materials be authenticated.
>
> **(b) Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

And Rule (8)(a), *Rules Governing Section 2254 Cases in the United States District Courts*:

> (a) **Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

STATEMENT OF THE CASE

A. Introduction.

Owens's mental health and function was investigated and considered at all ***three*** of his sentencing proceedings. Trial counsel had the information from the two prior investigations and sentencing proceedings in preparation for the third. In particular, trial counsel had similar imaging evidence available from the ***second*** sentencing, but strategically chose to present a less controversial defense supported by the work of qualified, experienced, and knowledgeable experts. The following state court history was before the district court and Fourth Circuit.

B. State Court Proceedings.

Owens was convicted and sentenced to death three times in the South Carolina courts for the November 1, 1997 murder of Ms. Irene Graves. Ms. Graves was shot and killed during an armed robbery of the convenience store where she worked. Owens was indicted for murder, armed robbery, use of a firearm in the commission of a violent crime, and criminal conspiracy.

Owens's first proceeding was a jury trial in February 1999. Owens was represented by John M. Rollins, Jr. and Karl B. Allen. On February 15, 1999, the jury convicted as charged. *State v. Owens* (*Owens I*), 552 S.E.2d 745, 753 (S.C. 2001). Sentencing proceedings did not begin until February 17, 1999. *Id.* In the interim, Owens brutally killed a fellow inmate at the detention center, Christopher Lee, and gave a detailed confession which was admitted in the sentencing proceedings. *Id.,* at 754-55. The Supreme Court of South Carolina reversed and ordered a new sentencing proceeding finding "defense counsel had little, if any, meaningful opportunity to investigate the circumstances surrounding Lee's death," and the failure to grant a continuance was error. *Id.,* at 759.

In his second sentencing proceeding, Owens was represented by new counsel, Alex Kinlaw, Jr. and Steve W. Sumner. Owens waived jury sentencing, opting for a bench trial. He was again sentenced to death on February 14, 2003. The Supreme Court of South Carolina again reversed sentencing in the direct appeal, finding that the trial judge had erred in his colloquy with Owens regarding waiver of the right to

jury sentencing. *State v. Owens* (*Owens II*), 607 S.E.2d 78, 80 (S.C. 2004).

Owens returned to circuit court for resentencing, and again received different counsel, Everett P. Godfrey Jr., and Kenneth C. Gibson. Owens this time chose a jury for resentencing.

Counsel, armed with the prior investigations, and keenly aware of what had not worked in prior sentencing proceedings, charted their own course with their own experts freshly reviewing Owens's background and mental status. (J.A. 2147-48). Counsel faced a record with overwhelming aggravation, i.e, the circumstances of Ms. Graves's murder, the separate torture murder of Lee, Owens's criminal record and his significant number of major prison incidents that included stabbings and assaults on prison guards, staff, and inmates, but counsel saw the separate murder as particularly harmful to their case. (See also J.A. 2147, "the elephant in the room that you could never get rid of was the homicide at the jail. It was going to come in. There was no possible way I could keep it out. That is a bad fact case."). Even so, counsel crafted a theory and presented a robust mitigation case. Counsel "set about trying to find some way to distinguish Freddie from the first two cases," and decided to place emphasis on background, and Owens's request for treatment to calm his anger and violent tendencies. (J.A. 2147-49). In essence, counsel wished to present who "Freddie Owens was then as opposed to […who…] Freddie Owens is now or in the process of now." (J.A. 2149).

The re-sentencing proceeding began in November 2006. Counsel presented a biopsychosocial presentation

through social worker and professor Marjorie Hammock who chronicled Owens's life and family history, patterns of violence and his risk factors. (J.A. 1542-60).

Counsel also presented Owens's third grade teacher, Fain Maag, who testified that Owens was small in stature and endured playground bullying, which she tried to stop; that he had learning difficulties which she actively helped him to overcome; and, that she had even visited his home where she observed a lack of food. She related that Owens was encouraged to violence, sometimes locked out of his home and told to fight. She testified she tried to help Owens. (J.A. 1562-65).

Counsel presented Dr. Thomas Cobb, a forensic psychiatrist, who testified that he treated Owens in the South Carolina Department of Corrections and diagnosed him with impulse control disorder and anxiety disorder. (J.A. 1592-93). He testified Owens had asked for help, which Dr. Cobb found "interesting" the fact that Owens "could recognize that he had some difficulties and wanted to have those treated." (J.A. 1588). Dr. Cobb opined that Owens had calmed as a result of medication and he predicted Owens would continue to improve and do well in a prison environment with continued treatment and as a natural part of getting older. (J.A. 1595-96).

Counsel also called forensic psychiatrist Dr. Donna Schwartz-Watts, who had evaluated "[o]ver seventy" capital defendants at the time of Owens's resentencing. (J.A. 1608). She testified that she made a comprehensive evaluation including review of records

from the crime, medical treatment history, juvenile and adult incarceration records, local hospital records, and also consulted with prior doctors and others to aid in her assessment, and also interviewed Owens for approximately "ten hours" over "three separate occasions." (J.A. 1609-10). She also requested a neuropsychological evaluation. (J.A. 1611). Ultimately, she diagnosed Owens with chronic depression, attention deficit disorder, and antisocial personality disorder. (J.A. 1626-30).

Counsel also presented neuropsychologist Dr. Tora Brawley. She explained "a neuropsychologist looks at brain behavior relationships," and that her role was to administer "a battery of testing," and "perform a clinical interview." (J.A. 1573). She further explained that "where an MRI gives you a picture of the brain, this battery of tests that I do tell you how the different areas of the brain are functioning, how they are working." (J.A. 1573).[1] She testified she was brought in by Dr. Schwartz-Watts to complete an evaluation.

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1 Dr. Brawley confirmed that she did "a full battery of tests," a clinical interview, and records review in this case, and noted even speaking with Ms. Maag, Owens's former teacher. (See J.A. 1574-80). While Owens is correct that she described her role as "limited," (see Petition at 5), his context is wrong. The limited role she described was the neuropsychological workup she was asked to perform: "What I was about to say is my scope was very limited. In this proceeding, in this evaluation, I was asked to look at his brain function, you know, present and past too." (J.A. 1580). (See also J.A. 1583, "I'm just a small part, and Dr. Watts takes my results and everything else and puts it together and goes from there."; J.A. 2403-04, responding "correct" to the characterization of her "primary role" being to "present the findings from the neuropsych battery.").

(J.A. 1574). She opined that "there are some select areas of deficit in Mr. Owens['s] brain and he does have a history of lifelong problems with brain function and also psychiatric issues." (J.A. 1581). She noted that his IQ had improved over the years and observed "that he has been self-teaching, you know, vocabulary, general knowledge. He's been doing a lot of reading and bettering himself and it actually shows on his IQ scores." (J.A. 1576). When asked if she found anything "that rises to the level of any mental illness or brain malfunction[,]" she responded, "[n]ot from a neuropsychological standpoint." (J.A. 1583).

At the conclusion of the proceedings, the jury returned a sentence of death, which was upheld on direct appeal. *State v. Owens* (*Owens III*), 664 S.E.2d 80 (S.C. 2008), *cert. denied,* 129 S.Ct. 1004 (2009).

C. State Post-Conviction Relief Proceedings.

On January 29, 2009, Owens began a post-conviction relief (PCR) action. Keir Weyble and Emily Paavola were appointed to represented Owens. [2] After

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2 The Fourth Circuit noted that Mr. Weybe worked at Cornell Law School, and had previously "worked on Owens's petition for certiorari," and also noted co-counsel's ties to Cornell as a fellow in its Death Penalty Project. *Owens*, 967 F.3d at 408. This underscores the heightened qualification requirements imposed by South Carolina for representation of indigent capital defendants. South Carolina provides for the appointment of two attorneys, "at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings,

case development and an evidentiary hearing, relief was denied on February 13, 2013. (J.A. 3683-3713). PCR counsel did not raise a failure-to-pursue-neuroimaging claim. The PCR focus was largely on failure to effectively present mitigation based on trauma and risk factors during the developmental period. (See J.A. 3348-84 and 3409). Owens did assert, however, that his trial counsel was ineffective in failing to present Dr. Jim Evans, who had testified in a prior sentencing, based on a form of neuroimaging, that Owens had "brain dysfunction and difficulties with attention and impulse control." (J.A. 1977). The state court found reasonable counsel's decision to not present Dr. Evans based on credibility and reliability issues with his testing. (J.A. 3702).

Owens's petition for a writ of certiorari filed in the Supreme Court of South Carolina was denied on June 17, 2015, and his petition for rehearing was denied on July 23, 2015.

D. District Court Federal Habeas Proceedings.

Owens then entered federal district court on a motion to stay execution and appoint counsel filed July 27, 2015. John Delgado and Hank Ehlies represented Owens in the federal proceedings. Counsel filed a petition on July 11, 2016, which they amended on September 8, 2016. Owens also filed a motion to stay the action in order to return to state court to attempt to

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or (2) capital trial experience and capital PCR training or education." *Robertson v. State*, 795 S.E.2d 29, 36 (S.C. 2016); *see also* S.C. Code Ann. § 17-27-160 (B). The State also provides funding for experts and/or other hearing preparation needs.

exhaust certain claims in a successive collateral action. Respondents objected, asserting the successive action would be procedurally barred from review on the merits under state rules. On October 18, 2016, the Magistrate, over objection, stayed the action. (ECF No. 124).

E. Attempted Successive Post-Conviction Relief Action and Lifting of Stay.

The successive state action was dismissed as untimely and improperly successive by Order filed April 10, 2017. The federal court lifted the stay on April 27, 2017, (ECF No. 146), and federal proceedings resumed.

F. Resumption of District Court Habeas Proceedings.

Several claims were raised, but the one at issue here was presented through Ground Seven. Owens "claim[ed] that sentencing counsel were ineffective for "failing to investigate, develop and present objective and scientific evidence of structural and functional brain damage resulting from early childhood trauma" which "materially limit[s]" Owens's "ability to make informed decisions, learn from past behavior, and control impulses...." (J.A. 4021). Owens presented, and the court accepted, two new reports in support of his claim, a neuroimaging analysis by Dr. Ruben Gur, Ph.D., and a "neuropsychological review and evaluation" by Dr. Stacey Wood, Ph.D. (J.A. 5360-61 and 5384). The magistrate reviewed the entirety of the state court record – including specifically how the defense fit together in sentencing with the findings of

Dr. Cobb, Dr. Schwartz-Watts and Dr. Brawley – to conclude:

> …Owens has failed to show that sentencing counsel's investigation was unreasonable, as the record shows that sentencing counsel investigated Owens's mental health and brain function, and they employed multiple experts to help them do so. There are no indications that any of those experts advised sentencing counsel to obtain neuroimaging, and the conclusion of sentencing counsel's retained neuropsychologist was that Owens did not have any significant brain dysfunction.

(J.A. 5364-65). Further, the magistrate found "Dr. Wood's claim that Owens was diagnosed with a seizure disorder is highly questionable when viewed with the remainder of the record before th[e] court." (J.A. 5365 n. 24). Dr. Wood's report did not specify where in "prison records" he "was diagnosed with a seizure disorder," but the magistrate noted that the Depakote prescription she referenced was to stabilize mood. (J.A. 5365 n. 24). Further, the magistrate observed that "[m]ultiple medical professionals examined Owens and his medical records in preparation for the third sentencing proceeding, and none of them indicated that Owens had a history of a seizure disorder." (J.A. 5365 at 24).

Additionally, the magistrate observed that Dr. Evans's prior imaging was available to counsel: "sentencing counsel had at their disposal very similar evidence to that which Owens now asserts sentencing counsel should have pursued further—they had results

from a form of neuroimaging that showed brain abnormalities and a neuropsychologist who could attribute some of Owens's behavioral characteristics to those abnormalities." (J.A. 5367-68).

The district court accepted the recommendation, concurring with the conclusion counsel followed a sound strategy. (J.A. 5792). The court observed counsel "presented the testimony of three mental health experts—Drs. Cobb, Brawley, and Schwartz-Watts—who evaluated [Owens] and could testify regarding his past, present, and future." (J.A. 5792). And further, "[n]othing in the record indicates that any of these experts advised counsel to obtain neuroimaging, and Dr. Brawley's evaluation resulted in her concluding that Owens did not have any significant brain dysfunction." (J.A. 5792). The district court also reasoned that counsel "had in their possession evidence very similar to what Owens now says they should have obtained" which was the prior evidence from Dr. Evans. (J.A. 5793). But "sentencing counsel made a strategic decision to not use that evidence and instead pursue a different mitigation angle, which is a decision that is entitled to great deference." (J.A. 5793). The district court concluded "the underlying ineffective assistance claim for this ground fails on the merits and Owens therefore cannot rely on *Martinez* to overcome the procedural default." *Id.*

The district court also denied Owens's request for an evidentiary hearing to further expand the record, noting the court did accept and consider his affidavits. Moreover, in ruling on the Respondents' motion for summary judgment, the court noted it had viewed the

assertions in the light most favorable to Owens. (J.A. 5811-12). The court rejected Owens's argument that his presentation by affidavit did not reflect "a complete statement of the evidence to be developed during an evidentiary hearing" as cause for a hearing. (J.A. 5812 n.22). The district court – questioning whether a petitioner could claim his own affidavits to be insufficient as a basis to seek an evidentiary hearing, nevertheless found the affidavits submitted were sufficient for evaluation of the claim. (J.A. 5812 n. 22). Also in the note, the court reasoned, as to the fairness to Owens in the evaluation of his submissions, that "an evidentiary hearing could only have weakened his petition" by subjecting his witnesses to cross-examination that could "have called into question their opinions and factual statements." (J.A. 5812 n. 22).

G. Fourth Circuit Court of Appeals Review.

Without full briefing and consideration, the Fourth Circuit granted a certificate of appealability on the defaulted claim. (USCA4 Appeal: 18-8, Doc. 32). Briefing by Respondents followed as well as oral argument. (USCA4 Appeal: 18-8, Doc. 32 and Doc. 53).

In its published opinion, the Court of Appeals considered whether its decision to grant of a certificate of appealability would bind the panel to find the *Martinez* claim had "some merit." The Fourth Circuit resolved they had authority to reconsider the appellate issue after allowing full briefing and argument: "whether framed as rescinding the COA … or simply denying the claim under *Martinez*, our ability to reconsider the issue leads to the same result." *Owens,* 967 F.3d at 425. It found nothing in *Martinez* to

"suggest[]" a ruling means "cause is predetermined as soon as a COA is granted." *Id.,* at 426.

After review, the panel concluded that (1) trial counsel was not deficient, and (2) that trial counsel (and by extension their mental health experts) did not miss any "red flags" to seek neuroimaging. *Id.,* 426-27. The panel resolved that counsel investigated and relied on "their own team of experts—including a neuropsychologist, forensic psychiatrist, and clinical social worker—to take that information, find more of it, and independently assess Owens's mental condition." *Id.,* at 426-27. The panel concluded that Owens could not show "that reasonable jurists could debate whether such a thorough investigation of his mental condition fell short of an objective standard of reasonableness." *Id.,* at 427. The panel reasoned that "[n]ot only did counsel take extensive measures to investigate Owens's behavioral cognition for mitigating evidence, their mental health experts reached conclusions that belied the need for comprehensive neuroimaging—which *no* expert suggested during Owens's case until his federal habeas proceedings." *Id.* (emphasis in original).

The Fourth Circuit also considered Owens's argument that counsel missed a "red flag" that should have prompted "the need to obtain neuroimaging or otherwise further investigate for evidence of structural and functional brain damage," but found the argument lacking. The argument centered on a prescription for Depakote, but "the record belies the premise that Owens's treatment with Depakote at Lieber was indicative of seizure activity. *Id.*, at 427. The panel

reviewed Dr. Wood's report which asserted "neuroimaging 'should have at the very least been considered,' J.A. 4203, due to the 'history of seizure disorders' indicated by Owens's 'treatment with Depakote,' J.A. 4202." *Id.* However, Owens's treating physician "Dr. Cobb testified himself in Owens's third sentencing trial [that] he had prescribed Depakote (in combination with Risperdal) only to help stabilize Owens's moods and 'slow [his] brain down.' J.A. 1594–95." *Id.* In short, the record did not give rise to a "red flag" as Owens suggested. *Id.*

Finally, like the district court, the Fourth Circuit acknowledged that the defense had the comparable Evans evidence, but wished to "take a more conservative approach to the neurological mitigating evidence." *Id.,* at 428. The court referenced sentencing counsel Godfrey's testimony that "avant-garde diagnostic techniques wouldn't play in front of a local Greenville jury," and also that counsel "was aware that any evidence of brain damage … might well do more harm than good for Owens's mitigation case, because it would bespeak his inability to become less violent." *Id.* The state court had found that strategy – challenged in state collateral proceedings but abandoned in habeas – was "professionally reasonable." *Id.*

Owens petitioned for rehearing, providing with his petition a one page, administrative form for institution to institution movement from July 2006 that indicated a "history" of seizures and a "referral" listing "seizure" as proof that the court unreasonably viewed the whole of the state record in making its determination. (USCA4 Appeal: 18-8 Doc. 59-1). He did not claim the

page was a part of the record before the district court, and did not claim that it was part of the Joint Appendix. Further, he did not actually claim there really was a seizure history in any of the extensive medical records reviewed by the sentencing phase experts, rather he argued:

> Owens, of course, did not claim, nor did Drs. Wood or Brawley require, that there be "a diagnosis of seizure disorder in [Owens's] records." There was, however, a history of seizures reported in Respondents' record of Owen's medical history.

(USCA4 Appeal: 18-8, Doc. 59-1 at 9). He admitted Dr. Wood's report reflected an assertion, "Mr. Owens has a history of seizure disorders, for which he received treatment with Depakote…." (USCA4 Appeal: 18-8, Doc. 59-1 at 9). The petition was denied on August 18, 2020. (App. at 57).

STATEMENT OF FACTS

Owens killed Irene Graves while committing an armed robbery of a convenience store with Andre Golden. Ms. Graves was shot for not being able to open the safe. The only money taken was $37.29 from the register. *Owens*, 967 F.3d at 404. In the direct appeal from the first trial, the Supreme Court of South Carolina set out more specific facts of the crimes and evidence adduced at trial:

> During trial, the State introduced the Speedway security video which recorded the robbery and shooting. The video reveals two individuals entered the store. One individual shot Graves.

> Golden admitted he was one of the Speedway robbers and claimed appellant was his accomplice. He testified appellant shot Graves in the head after she stated she could not open the safe. No forensic evidence connected appellant to the crime scene.
>
> Nakeo Vance testified he, Golden, appellant, and Lester Young planned to rob the Speedway and, simultaneously, a nearby Waffle House. Golden and appellant robbed the Speedway. Vance and Young went to the Waffle House but did not carry out the robbery. After the Speedway shooting and robbery, Vance testified appellant admitted he shot the store clerk.
>
> Appellant's girlfriend testified appellant told her he had robbed a store and shot the clerk.
>
> Detective Wood and Investigator Willis testified appellant initially gave a written statement denying involvement in the Speedway robbery and shooting. According to both witnesses, appellant later admitted he shot Graves.
>
> Appellant maintained he was at home in bed at the time of the Speedway robbery and shooting.

552 S.E.2d at 750.

That opinion also incorporated the graphic confession to Owens's murder of a cellmate while awaiting sentencing. In his confession, Owens indicated that Christopher Lee began to taunt him for being convicted. Owens stated he "hit him in the eye," and when he fell, Owens began to pummel him. Owens

then stabbed him in the eye with a pen, and "tried to stab him in his chest, but the pen would not go in" so he "stabbed him in his throat." Owens then choked him with a sheet, continued to beat him, began to "pound[] his head against the floor," then "stomped his head and body," "burned him around the eye and on the left side of his hair," and "rammed his head into the wall." Lee was still "moaning and breathing" so Owens attacked again and "rammed the pen up his right nostril," "closed his left nostril," and began choking him again. When Owens "finally thought he was dead," Owens tossed the body on a bed, covered it, and "went to sleep." *Id.,* 755.

REASONS WHY CERTIORARI SHOULD BE DENIED

Plainly contrary to Owens's argument, *Martinez* does not guarantee an evidentiary hearing in district court; much less could *Martinez* guarantee a petitioner hearing by default merely by being granted an opportunity for appellate review. It would be impossible to accept his position without grossly expanding the scope of *Martinez* – action this Court has solidly refused to take in other contexts.

I. This Court's *Martinez* exception requirement that a petitioner show a substantial claim does not carry a guarantee of a hearing. In fact, this Court set out that a state may rely on the facts of record as one reason the exception would not be over-burdensome and intrusive to the states.

In *Martinez*, this Court set out that "the doctrine of procedural default" is "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. *See also Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) ("The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine."). However, the Court carved out a narrow, equitable exception: a petitioner could show cause to excuse the default if he could show a "substantial" claim of ineffective-assistance-of-trial-counsel was not raised due to ineffective assistance of collateral counsel or lack of counsel. *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).[3] The Court also provided, in balancing the equities, that a state, which should ordinarily be able to rely on the procedural default doctrine, could rely on the record:

> The holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent

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3 A petitioner also must show the state procedure funnels such claims into collateral proceedings making the collateral proceedings the first opportunity to present the claim. 569 U.S. at 423. South Carolina has that structure and that is not at issue.

> default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.,* it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

Martinez, 566 U.S. at 15–16. There was no guarantee of an evidentiary hearing. In fact, this Court emphasized in *Davila* that part of the Court's support for establishing the "narrow exception" in the first place was "the belief that its narrow exception was unlikely to impose significant systemic costs." *Davila,* 137 S. Ct. at 2068.

And, while true that the Court incorporated the *Strickland*[4] test into review of collateral counsel's performance, 566 U.S. at 14, this does not lead to a presumption that an evidentiary hearing is necessary in all cases. *Strickland* itself established this fact as to Sixth Amendment ineffective assistance claims. *Strickland,* 466 U.S. at 700 ("the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing" and noting "[t]he state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing."). Consequently, there is no requirement of a hearing for the *Martinez* equitable exception based on

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4 *Strickland v. Washington*, 466 U.S. 668, 687 (984) (establishing a petitioner claiming ineffective assistance of counsel in violation of the Sixth Amendment must show deficient performance and prejudice).

the Court having incorporated the *Strickland* test into a non-constitutional context.

Suggestion to the contrary leads to troubling inconsistency and would grossly expand *Martinez* to ensure hearings in every case, especially every capital case. This offends the very essence of AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996) – to avoid the undeniable, universally recognized, unreasonable delays *in capital cases*. *See, e.g., Woodford v. Garceau,* 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"). Owens actually proves the point. Here, Owens attempts to use the grant of appellate review as a basis for a hearing not otherwise warranted or allowed. He seeks an end-run, avoiding his duty to show full cause to excuse a default and avoiding the ordinary limitations on evidentiary hearings. That route should be denied.

A. The Fourth Circuit correctly found the substantial claim requirement may overlap in theory with the certificate of appealability standard, but the opportunity granted differs. The certificate is a preliminary determination to grant jurisdiction to review. It is the gateway to appellate review, not a default to an evidentiary hearing.

Owens's conclusion that the initial certificate grant guarantees additional proceedings in district court runs counter to logic and established appellate principles. It is well-settled that review for a certificate is not a

full review of the issue. *See Buck v. Davis*, 137 S.Ct. 759, 773 (2017) (the COA determination is made "***without 'full consideration*** of the factual or legal bases adduced in support of the claims.' ") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)) (emphasis added). This Court has recognized that appellate courts consider the certificate issue a "threshold inquiry." *Slack v. McDaniel,* 529 U.S. 473, 485 (2000). The Fourth Circuit, unlike Owens, was not swayed by the label on the denial of relief – whether reconsideration of certificate or opinion. *Owens,* 967 F.3d at 425-26. This makes sense. After all, the issue is whether there is actual recourse in the law. The state deserved to be heard, as well. *Martinez* guaranteed that right to respond, even setting out how a state may respond. *Martinez,* 566 U.S. at 15–16. Owens cannot circumvent that right secured by the very precedent upon which he relies. The Court of Appeals restriction of review to the appellant's preliminary brief is clear. Under its Local Rule 22(a), the Fourth Circuit only allows a preliminary brief for consideration. It expressly notes that it will "neither require nor authorize a brief from" a responding party. Local Rule 22(a)(1)(B).

Further, nothing prohibits the appellate court from revisiting the certificate. Local Rule 22(a)(2)(B) allows the certificate to be expanded, but also provides, if so expanded, "the clerk shall enter a Final Briefing Order, specifying the issue or issues" to be considered. So, again, there is opportunity for response. But critically, this shows the Court of Appeals has authority to define its jurisdiction to consider the merits.

Further still, Owens's position smacks of windfall which this Court does not condone. *See, e.g., Lafler v. Cooper,* 566 U.S. 156, 170 (2012) ("a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution") (internal citation omitted). If the full review allowed when jurisdiction attaches shows a factual or legal issue not previously noted or revealed in the preliminary brief *submitted by the appellant*, the Court of Appeals should not be bound to grant a windfall. The Eighth Circuit, in similar circumstances, reasoned that it appeared "inconsistent" for an appellant to request review for his procedural default arguments, then contend he has proved his case by fiat. *Dansby v. Hobbs*, 766 F.3d 809, 840 n. 4 (8th Cir. 2014). It resolved that if the appellant was correct "that the issuance of a COA must mean the constitutional claim is substantial," then, the court's decision to deny relief should be "construed as the revocation of the COA as to those claims." *Id.* The Fourth Circuit similarly followed this logical path. Owens cannot win by fiat what he is not entitled to under the law. Further, Owens is incorrect that only an evidentiary hearing is the only sufficient method to make a *Martinez* showing. Again, there are already rules in place, and they were appropriately followed here.

B. An evidentiary hearing is not the only mechanism for receiving new evidence in district court. The Rules Governing Section 2254 Cases already provide a method to submit materials in support of a *Martinez* argument. Here, the District Court of South Carolina allowed Owens to present new material through affidavits.

As a practical matter, a *Martinez* argument is generally premised at least on some facts outside the state court record. Consequently, some new facts may be received for the limited purpose of showing excuse to avoid the default. But that does not mean an evidentiary hearing is warranted. And to be clear, the expansion of the record at issue, by documents or by hearing, is tied to showing cause to excuse the default, not proof of the underlying claim. *See Fielder v. Stevenson,* 2013 WL 593657, *3 (D.S.C. Feb. 14, 2013) (district court noted that although § 2254(e)(2) "sets limits on a petitioner's ability to expand the record in a federal habeas proceeding[,] ... courts have held that § 2254(e)(2) does not ... constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults.") (*citing Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002); *Buckman v. Hall*, 2009 WL 204403 (D. Or. Jan. 23, 2009)). *See also Runningeagle v. Ryan*, 825 F.3d 970 (9th Cir. 2016) (finding district court granted petitioner's motion to expand the record on question of *Martinez* cause to excuse his default and accepted "a number of exhibits" but denied a hearing when the documents "fully presented the relevant facts")

(quoting *Williams v. Woodford*, 384 F.3d 567, 591 (9th Cir. 2004)).

Not only do the rules allow document submissions, Owens was allowed to submit affidavits in his case. He obtained affidavits for his federal action and they were accepted and considered. Rather than being denied the safety of *Martinez*, Owens was allow to rely on its largesse. He is not entitled to more.

Further, the habeas rules explicitly favor a more stepped approach before granting a hearing. Rule 7 of the *Rules Governing Section 2254 Cases in the United States District Courts* provides for expansion of the record "[i]f the petition is not dismissed," and specifically, that "[a]ffidavits may be considered as part of the record." Further, Rule 8(a) directs that the court consider "any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Whether an evidentiary hearing is necessary and/or warranted for factual development remains a discretionary decision. Here, the district court did not deny a hearing without exercising its discretion. It denied a hearing because, even taking his allegations as true, Owens failed to show a substantial claim in light of the entirety of the record.

C. 28 U.S.C. § 2254(e) limits development of facts to claim involving innocence when it is determined that the petitioner failed to demonstrate diligence.

Evidentiary hearings to develop facts in habeas actions are restricted by the limitations in 28 U.S.C. § 2254(e). Even if one considers that a hearing may be

held to further explore cause to excuse the default, *see Fielder, supra*, development of facts for the underlying claim may be limited by § 2254(e)(2).

This Court has previously held collateral "[c]ounsel's failure to investigate" where "a diligent attorney would have done more," satisfies "the opening clause of § 2254(e)(2)." *Williams v. Taylor,* 529 U.S. 420 (2000). With the first portion of the section applicable, the statutory provisions then limit a petitioner to facts and claims that go to guilt, not sentencing. *Id. See also* § 2254 (e)(2)(B). It is not clear that *Martinez* changed that determination.[5] In *Martinez*, this Court considered a claim that could have met this exception: "Martinez claimed his trial counsel had been ineffective for failing to challenge the prosecution's evidence" including a failure challenge "expert testimony explaining the victim's recantations" or other evidence concerning guilt. *Martinez,* 566 U.S. at 7. It would not be inconsistent with *Martinez* or its core logic to find the restriction still applicable. *Accord Davila*, 137 S. Ct. at 2069 ("If a prisoner can establish ineffective assistance of trial counsel under *Martinez,* he ordinarily is entitled to a new trial."). Owens presents a sentencing issue. Owens cannot meet this limitation if the limitation applies. *See generally Cullen v. Pinholster,* 563 U.S. 170, 185 (2011) ("Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an

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5 In *Ayestas v. Davis,* 138 S.Ct. 1080, 1095 (2018), this Court declined to consider the argument that an evidentiary hearing was "*never*" available for an underlying claim when that argument was not raised below. (emphasis in original).

evidentiary hearing."). It is unlikely that § 2254 (e)(2)(B) can be considered merely superfluous. And again, it is not absolute. § 2254 still allows a petitioner a hearing on issues that meet that limitation, i.e., that go to guilt. But here, the question could be determined by limited expansion via affidavits. In review, the claim of ineffective assistance simply could not be substantial based on the already developed state record.

D. Owens's demand for additional habeas proceedings "aggravate[s] the harm to federalism that federal habeas review necessarily causes,"[6] and frustrates the important need for finality.

"[T]he 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). *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("Finality in the criminal law is an end which must always be kept in plain view."); *Ryan v. Schad*, 570 U.S. 521, 525 (2013) (recognizing again a state's interest in finality of its criminal convictions).

The crime in this case occurred in November 1997. Over the years, Owens has had three sentencing proceedings, direct review by the South Carolina Supreme Court, a state PCR hearing and appeal, and

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6 *Davila*, 137 S. Ct. at 2069–70.

federal habeas review by a magistrate judge, the district court and the Fourth Circuit. Further, he even obtained a stay in federal habeas to pursue a second application that was clearly untimely and improperly successive. *Martinez* should not be used to allow unnecessary and time-consuming additional proceedings. 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).

Owens brings Justice Scalia's guarantee to fruition. To keep balance, this Court should not allow *Martinez* to be expanded in scope or practice.

At any rate, there is little doubt that Owens has been afforded ample opportunity to fairly contest his convictions and sentence both in state and federal courts. Finality must be reached at some point. Owens is at that point.

II. Owens's claims lack a factual basis. The state court records show there is no merit to his argument that counsel missed "red flags" to prompt the need for further development of neuroimaging evidence.

Though Owens claims support in the equitable exception in *Martinez*, there is little equitable about allowing additional proceedings here. The state court record in this particular case supports that Owens failed to show trial counsel's investigation was anything other than reasonable. The record shows counsel retained and relied upon three well-qualified mental health experts. Nothing suggests that neuroimaging – and specifically neuroimaging from Dr. Gur[7] – must be obtained to ensure effective representation. Further, the record contains relevant state court findings that, by statute, must be presumed correct. 28 U.S.C. § 2254(e)(1). It is relevant for this issue to consider the finding that counsel strategically and reasonably chose not to present the expert from a prior proceeding with similar information.

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7 Dr. Gur has appeared in a handful of South Carolina cases. His methodology has been questioned where there was testimony that it was not recognized as standard neuropsychological testing, and where control group variations changed the results. *See, for example, Bixby v. Stirling*, No. 4:17-CV-954-BHH, 2020 WL 1527061, at *10 (D.S.C. Mar. 31, 2020).

A. The state court record establishes that counsel and his experts were aware of imaging evidence from Dr. Evans, but did not wish to present Dr. Evans for specific credibility and reliability concerns. The state court not only found the strategy reasonable, Owens did not contest the reasonableness of the finding in his habeas petition.

Dr. Evans, a neuropsychologist, testified at the second sentencing proceeding regarding Owens's brain dysfunction and relied on a type of imaging. In PCR, Owens's asserted counsel should have presented the known evidence of "brain dysfunction" and other difficulties. (J.A. 1977). Counsel did not want to present the same information that had been unsuccessful in two prior sentencing proceedings, and strove to create a new theory of mitigation. (J.A. 2147). Counsel testified Dr. Schwartz-Watts recommended Dr. Brawley to give neuropsychological testing as Dr. Brawley is more "conservative in her opinions." She testified Dr. Evans's findings had been attacked in previous capital cases, and a QEEG is not a study generally accepted. (JA 2381-83). The state court found that to be sound strategy. (J.A.3702). Owens sidestepped that defeated claim in arguing that counsel did not have a different kind of imaging – a kind not requested by his experts. But again, his state court record follows him. Owens cannot show deficient performance because counsel relied upon and called in sentencing three psychiatric/psychological experts who did not indicate neuroimaging was necessary or even desirable.

Further, though Owens promises to show prejudice for his claim in future proceedings, (see Petition, 13-14 at n. 2), that misses the point. Prejudice must flow from deficiency. *Strickland, supra.* Owens's suggestion that the deficiency is clear, (see Petition p. 28), lacks force. At issue is the sentencing proceeding in November 2006, and the PCR action that spanned 2009 to 2013. In 2011, one of Owens's collateral counsel co-authored a law review article which outlines and details the pros and cons of pursuing neuroimaging, resolving that whether to "utilize neuroimaging in preparation for the penalty phase of a capital trial does not have a one-size-fits-all answer." John H. Blume & Emily C. Paavola, *Life, Death, and Neuroimaging: The Advantages and Disadvantages of the Defense's Use of Neuroimages in Capital Cases-Lessons from the Front*, 62 MERCER L. REV. 909, 930-31 (2011). *See also Stone v. State,* 798 S.E.2d 561, 576 (S.C. 2017) (finding the ABA "*Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, on which Stone consistently relies in this appeal, do not require neuropsychological testing and neuroimaging in every case."). By necessity, it can only be reasonable to conclude PCR counsel was keenly aware of the possibility, but not necessity, of neuroimaging, along with its dangers. And, counsel at sentencing was under no duty to search out and find specific experts such as Dr. Gur or Dr. Wood. The defense experts relied upon were credentialed, qualified and knowledgeable. There is no basis for finding *Strickland* deficient performance.

B. The medical records reviewed by trial counsel's experts are a superior source to determine whether Owens had been diagnosed, treated, or had a history of seizures, and those records do not support such diagnosis or treatment. Thus, there could be no missed "red flag" based on the failure to discover a history that did not exist.

Owens complains a "history of seizures" was a "red flag" that was missed in the investigation. (Petition at 30). The lower federal courts have rightly rejected that assertion. There was never a diagnosis of a seizure disorder in his records. This is critical in assessing Owens's argument. It strains logic to rest a "red flag" argument on a mistaken belief. Moreover, Owens does not claim that he ever attempted to rely in district court on the one-page document he submitted in his *petition for rehearing* in the Court of Appeals. If it shows critical "proof," it is late coming. But, at the end of the day, it cannot be critical, as he can show no actual diagnosis or treatment in his medical records that counsel or the experts missed. The note Owens relies upon is not a medical record for diagnosis or treatment. Rather, the note (which was not made until July 2006), is a "medical clearance for transfer" for movement from Lieber Correctional Institution to Perry Correctional Institution (a facility that is closer to the location where the resentencing proceeding would be held). Dr. Schwartz-Watts, after careful consideration of the actual medical records prior to and through incarceration, did not find any diagnosis, treatment or reported history of seizures, seizure

diagnosis, or care or treatment for seizures. (See J.A. 1609-10). A medical history is not created by error in institutional movement records, and reliance on that raises concerns as to credibility, accuracy and/or adequacy of the opinion. It is inexplicable why Owens seeks to rely on this isolated, unadorned notation of a history and/or treatment for seizures, when no other evidence (i.e., the actual medical records and treatment testimony) supports that. It is not the district court or the Fourth Circuit that ignored the evidence.

Lastly, a word about the possibility of showing prejudice and the "elephant in the room" identified by counsel – the Lee torture murder *while waiting to be sentenced for murder*. Past brutality was definitely going to be shown. Counsel wanted to show a changed man. Proof of permanent damage could very well undermine the carefully crafted defense. Could *Strickland* prejudice be shown? Perhaps. But it is highly unlikely in these circumstances. The aggravated nature of this crime, along with evidence of another brutal murder committed, makes a prejudice showing, at best, a dot on a very distant horizon. *See Wong v. Belmontes,* 558 U.S. 15, 28 (2009) (noting evidence of a separate murder for a penalty phase being "the most powerful imaginable aggravating evidence").

CONCLUSION

For the foregoing reasons, this Court should deny certiorari. Habeas review is a vehicle to address "extreme malfunctions in the state criminal justice system." *Harrington v. Richter*, 562 U.S. 86 (2011). It is not a vehicle to create them.

Respectfully Submitted,

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