No. _____

In the Supreme Court of the United States

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; and LYDELL CHESTNUT, Deputy Warden of Broad River Road Correctional Secure Facility,

Petitioners,

v.

SAMMIE LOUIS STOKES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General, State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN*
Senior Assistant Deputy Attorney General
**Counsel of Record*

MICHAEL D. ROSS
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners

**** CAPITAL CASE ****

QUESTIONS PRESENTED

Sammie Louis Stokes, while serving a prison sentence, contracted to kill Connie Snipes. When released he did just that, brutally raping her with co-defendant Norris Martin before shooting her. Several days later, Stokes murdered Doug Ferguson to ensure Ferguson would not implicate him in the Snipes murder, and also to extract revenge for stealing from Stokes. South Carolina instituted capital case proceedings for the Snipes murder. In preparation for the October 1999 trial, defense counsel secured the services of experts, including a social worker, but ultimately did not present the known evidence of a disadvantaged and difficult childhood, fearing the negative impact cross-examination may have on the defense. A jury sentenced Stokes's to death. After direct appeal, new counsel in collateral proceedings investigated Stokes' history again and initially raised, but later withdrew, a claim of ineffective assistance regarding the mitigation case. Stokes received no relief in the state courts.

In his subsequent 28 U.S.C. § 2254 habeas action, another new team of attorneys asserted the mitigation claim again and that collateral counsel was ineffective in dropping the claim. The district court, over the Warden's objection, held an evidentiary hearing on the factual basis for cause to excuse the default and the merits of the underlying claim. The district court found insufficient cause to excuse the default and no prejudice. A divided panel of the Fourth Circuit rejected the district court's findings and found both

collateral counsel and trial counsel deficient in representation. In reweighing the evidence to determine prejudice, the majority extracted from the calculus the second murder and full circumstances of the capital case murder. The majority also failed to consider any negative impact the newly offered evidence would have had. It then resolved that confidence in the result was undermined because the newly presented evidence "could be enough to sway one juror" even in light of a highly aggravated case. The majority found resentencing was warranted.

The questions presented are:

I. Did the Fourth Circuit violate basic principles of *Strickland v. Washington*, 466 U.S. 668 (1984) when it failed to reweigh the whole of the evidence in its prejudice analysis to determine if there was a reasonable probability of a different result?

II. Did the Fourth Circuit err in granting relief on a defaulted ineffective-assistance-of-trial-counsel claim when trial counsel had reasonable strategic reasons not to pursue a "bad upbringing" mitigation defense, and collateral counsel had reasonable strategic reasons not to pursue an ineffective-assistance-of-trial-counsel claim?

III. Alternatively, should this case be held pending the outcome of *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021)?

STATEMENT OF RELATED PROCEEDINGS

Stokes v. Stirling, No. 18-6 (United States Court of Appeals for the Fourth Circuit) (order denying rehearing filed on September 23, 2021; opinion reversing the district court's judgment filed on August 19, 2021).

Stokes v. Stirling, No. 1:16-cv-00845-RBH (United Stated District Court for the District of South Carolina)(order denying habeas relief and judgment entered September 28, 2018; report and recommendation issued on May 9, 2018).

Stokes v. South Carolina, Docket No. 15-9329 (Supreme Court of the United States) (order denying petition for writ of certiorari (post-conviction relief appeal) denied December 12, 2016).

Stokes v. State, Appellate Case No. 2013-000635 (Supreme Court of South Carolina)(order denying petition for writ of certiorari to review the post-conviction relief action order of dismissal filed on February 12, 2016).

Stokes v. State, C/A No. 01-CP-38-1240, (Circuit Court of South Carolina, First Judicial Circuit)(order denying Rule 59 petition filed February 19, 2013; order denying post-conviction relief, filed October 21, 2010).

State v. Stokes, Case Information No. 1999-013394 (Supreme Court of South Carolina) (opinion denying relief filed May 29, 2001; order denying petition for rehearing filed July 2, 2001).

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 10 F.4th 236 (4th Cir. 2021). (App. 1-65). The decision of the Federal District Court denying habeas relief may be found at 2018 WL 4678578 (D.S.C. Sept. 28, 2018). (App. 66-139).

JURISDICTIONAL STATEMENT

The Fourth Circuit Court of Appeals issued its opinion on August 19, 2021. (App. 1). A timely petition for rehearing en banc was denied September 23, 2021. (App. 334). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to counsel as secured by 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."

This case also involves a portion of the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), reflected in 28 U.S.C. § 2254(e)(2), specifically, the limitations on evidentiary hearings:

> (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.

INTRODUCTION

Not all evidence offered in mitigation in a capital case will actually reduce moral culpability in the eyes of a reasonable sentencer in a particular case. Nor is all evidence offered as mitigation free of negative inferences and aspects. Here, a split panel of the Fourth Circuit overturned a death sentence finding evidence of Stokes's bad upbringing was necessary to the fairness of the sentencing proceeding. The claim was defaulted, but, contrary to the district court, the panel excused the default under *Martinez v. Ryan*, 566 U.S. 1 (2012), then found trial counsel deficient and

that Stokes was prejudiced. The Fourth Circuit committed multiple errors that warrant this Court's review.

Starting with prejudice: To determine prejudice from the omission of mitigation evidence, this Court has long required a reweighing of the totality of the evidence, both the evidence from trial and from the collateral proceedings. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). The majority failed to follow that direction. First, it reduced the power of the State's case in aggravation by refusing to properly consider the evidence of a second murder and horrific circumstances of the capital-case crime. The majority created a bar to consideration of evidence that does not exist in South Carolina's whole-of-the-evidence review for sentencing. Second, it failed to take into account the downsides of introducing the bad upbringing evidence. While evidence of trauma in childhood may help explain violent behavior or engender sympathy, the majority centered on its ability to "humaniz[e]" Stokes and encourage "a more sympathetic understanding of the individual behind the aggravating evidence." (App. 32). Yet, the majority missed so much: the danger of undermining the strategy to shift blame to accomplice Norris Martin; that the newly offered evidence indicated Stokes is more likely to commit violent acts than an "average" killer, (J.A. 3192-93); and the new expert's concession that the violence may not be tied to trauma but "temperament," (J.A. 3125). The majority failed to acknowledge *any* negative.

Third, the majority diminished the substantial burden to prove a reasonable probability of a different

result by simply reasoning "some meaningful mitigation evidence" may have been enough to have made a difference "even in the face of plentiful evidence." (App. 36). As Judge Quattlebaum noted in his dissent, the majority opinion "water[ed] down the prejudice requirement to something akin to anything is possible." (App. 64). The appellate reweighing here was hopelessly mired in legal error.

The Fourth Circuit also erred in assessing performance for both trial and collateral counsel. *Strickland* affords broad protection for informed strategic decisions. The panel majority discarded that protection and improperly second-guessed counsel's judgments.

After a federal evidentiary hearing where both sets of counsel testified, the district court determined that the claim against trial counsel was defaulted because Stokes failed to show collateral counsel had been deficient in withdrawing the claim. The record showed trial counsel had investigated Stokes's background, but considered presentation of the evidence fraught with danger – cross-examination could undermine the arguments shifting blame for more egregious aspects of the crime to Martin. Trial counsel's investigation showed Stokes had dominated, used, and physically and sexually abused Martin for years. Trial counsel did not want that dominance to come out, and also considered the evidence of little benefit in a case being tried in their particular county in 1999. State collateral counsel initially asserted trial counsel error, but, after their own investigation – which uncovered additional

information confirming Stokes's domination and abuse of Martin – withdrew the claim.

Yet, the Fourth Circuit panel, without affording the deference required to federal district court fact-findings, made *de novo* review, and ignored the legal mandate to afford deference to counsel, both trial and collateral. As the dissent correctly reasoned, trial counsel was not deficient: "The absence of mitigating evidence about Stokes's upbringing and childhood was not a matter of" failure to investigate or prepare, rather "was the result of strategic decision-making by trial counsel in the thick of an intense trial." (App. 58). Such decisions are "virtually unchallengeable." *Strickland*, 466 U.S. at 691. But not in the majority's eyes.

This Court should grant review, reverse the Fourth Circuit, and, for all the reasons set out in the lengthy dissent, deny habeas relief. The case is especially important to review of South Carolina capital sentences, and, more broadly, to address fair application of *Strickland* and protect the procedural default doctrine. At the very least, the Court should hold this case pending the disposition of *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021). Most of Stokes's case is founded on a federal evidentiary hearing that should never have been held if the petition prevails in *Ramirez*.

STATEMENT OF THE CASE

This case has been in litigation since 1998. In July 1998, a South Carolina grand jury indicted Stokes with murder, kidnapping, criminal sexual conduct, and criminal conspiracy. (J.A. 1472-81; 1460-61 (re-indicted May 17, 1999)). On December 16, 1998, the State gave notice of its intent to seek the death penalty. (J.A. 1462). A trial and several layers of review followed. The basic facts of the crime and a summary of proceedings follow.

A. Facts of the Crimes

Patti Syphrette offered to pay Stokes $2000 to kill Connie Snipes, Syphrett's daughter-in-law. Stokes agreed. With Syphrette and Stokes's friend, Norris Martin, Stokes took Snipes into the woods, and raped and brutalized her with Martin. The Supreme Court of South Carolina set out the general facts of the crimes:

> According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head, [FN 3] and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out. …

> [FN 3] Martin testified that Stokes placed the gun into his (Martin's) hand and then pulled the trigger.

State v. Stokes, 548 S.E.2d 202, 203–04 (S.C. 2001). A few days later, Stokes murdered "Doug Ferguson by wrapping duct tape around his body and head, suffocating him." *Id.* Stokes had become concerned Ferguson would implicate him in the first murder, and also wanted revenge for Ferguson stealing from him. (App. 122). Not only were the details of the Ferguson murder in Stokes's confession, (App. 123), he subsequently pleaded guilty to the murder and received a life sentence. *Stokes*, 548 S.E.2d at 204.

B. Trial and Direct Appeal

Stokes was tried by a jury October 25- 29, 1999, with sentencing held October 30-31, 1999. During the guilt phase, counsel argued that Stokes had shown remorse in his statement to officers, and that Norris Martin was the killer. He asserted: "on the one hand you've got one statement that's been shown to you by Sammie Stokes and you know we've talked about five stories that you have been told by Norris Martin." (J.A. 952). He argued that Norris Martin fired the fatal shot to the back of the head. (J.A. 955-57). Counsel reminded the jury that Stokes did not come in as "a choir boy" but he volunteered the truth in one statement out of remorse. (J.A. 952). The jury returned guilty verdicts on criminal conspiracy, kidnapping, criminal sexual conduct first degree, and murder. (J.A. 990-91).

The defense was prepared to present a mitigation case centered around Stokes's AIDS diagnosis which at that time had advanced and ravaged Stokes' body. (App. 7-8 and109-10). However, Stokes, on the eve of sentencing, prohibited counsel from presenting a case based on his AIDS diagnosis. (App. 8 and 110-11; J.A. 998).

The State presented Stokes's prior violence and prison history and the details of the Snipes murder and the Ferguson murder in the sentencing phase. Defense counsel, though they had to revise their strategy, did not abandon mitigation. Counsel presented a former warden who testified, "Stokes could be managed in a maximum-security environment for the rest of his life," (App. 50), and counsel concentrated on Norris's culpability and Stokes's remorse.

Stokes, in his personal statement to the jury, accepted responsibility and expressed remorse:

> In my statement I never denied my involvement but the statement I gave was truthful and I do have a conscience, that's one of the main reasons why I gave the statement. You know, I been in trouble before but nothing like this before so I felt I had to set the record straight. But I give one statement and I give a honest one, I didn't four or five [sic], I give one. And I'm deeply sorry that any of it ever happened and I'm also sorry for the role that I played in it….

(J.A. 1375).

He continued:

> …I will forever be sorry for the role that I played in it and most of all I truly feel for the family and if I could turn back the hand of time none of this would have occurred and I wouldn't be standing before ya'll now pleading for my life. And once again, I truly would like to say that I'm sorry and wish that you could find it in your heart to forgive me for the role that I played in this ….

(J.A. 1376).

Complementing Stokes's statements, counsel argued it was Stokes's remorse and resulting confession that tied him to the crime, "[t]hat's a conscience." (J.A. 1380). Counsel asked the jury to spare Stokes's life. He admitted Stokes's prior violence, but underscored that remorse meant something, posing the question, "[w]hat cost does remorse have? … his remorse brought him to this point" and submitted a life sentence was appropriate. (J.A. 1383-84).

The trial judge, following state law, instructed the jury that it must designate the death-eligibility findings in writing. (JA 1391-93). However, if it found at least one statutory aggravating circumstance, the jury could continue to selection and consider either a life or death sentence. (JA 1395). The jury deliberated for over three hours. (J.A. 1404-06).

The trial judge had submitted six statutory aggravating circumstances, and the jury returned four: (1) the murder was committed while in the commission

of criminal sexual conduct; (2) the murder was committed while in the commission of kidnapping; (3) the defendant committed the murder for himself or another for the purpose of receiving money or a thing of monetary value; (4) the defendant caused or directed another to commit murder or committed the murder as an agent or employee of another person. (J.A. 1406-07). The two not returned were: "Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of action" and "The murder of Connie Lee Snipes was committed while in the commission of physical torture." (J.A. 1390). The jury found death was warranted. The convictions and sentence were affirmed on direct appeal.

C. State Post-Conviction Relief Action

South Carolina requires heightened qualification and the appointment of two attorneys in capital post-conviction relief (PCR) proceedings. S.C. Code § 17-27-160 (B). Attorneys Keir Weyble and Robert Lominack were appointed. Counsel filed an amended application with several grounds. One alleged trial counsel was deficient their investigation and presentation of mitigation. (App. 12, 59 and 113; J.A. 1495). Counsel later intentionally withdrew this allegation. (App. 12, 60 and 113; J.A. 1553). After litigation on other claims, relief was denied. The denial of relief was affirmed on appeal.

D. Federal Procedural History

Stokes turned to the federal courts and sought habeas relief under 28 U.S.C. § 2254. He presented the defaulted ineffective assistance claim alleging trial

counsel failed to investigate and present mitigation – specifically, evidence of Stokes' disadvantaged background and expert testimony on developmental risk factors. (App. 72, Ground Six). Stokes relied on *Martinez v. Ryan*, 566 U.S. 1 (2012), which provides that collateral counsel's deficient performance in failing to assert an ineffective-assistance-of-trial-counsel claim can serve as cause to excuse a procedural default of that claim. The federal magistrate held an evidentiary hearing, over objection, to determine whether cause existed, and if so, whether relief was warranted. After hearing testimony from several witnesses, including former trial and collateral counsel, the magistrate issued a report recommending no relief. She reasoned that Stokes neither established that the underlying claim was substantial, nor that collateral counsel were deficient. (App. 292-322).

After carefully reviewing the state record, the new federal record, and the magistrate's report, the district court determined that collateral counsel were not deficient in representation, and the claim was defaulted. (App. 108-116). The court found collateral counsel focused on the contention that Stokes was intellectually disabled and therefore exempt from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), and intentionally withdrew the ineffective assistance/ mitigation claim. (App. 116). The district court also considered whether Stokes could show *Strickland* prejudice. Noting Stokes argued very little on the matter (App. 116), the district court defined both the mitigation and aggravation evidence, then considered the evidence as a whole. In aggravation, the court noted: 1) the circumstances of the capital charge,

i.e., that it was a murder for hire; 2) the contract was accepted in prison; 3) the brutality and abuse of the victim and mutilation of the body; 4) the subsequent murder upon hearing Syphrette's concern Ferguson would "talk to the police," and additionally spurred by the belief Ferguson had stolen a "watch and rings" belonging to Stokes; 5) the fact the confession was in a handwritten letter, "replete with profanity and described the murders in a largely apathetic fashion"; 6) three prior aggravated assault offenses, two against his wife (in one, he stabbed and terrorized her, the other, he choked her into unconsciousness), and a separate charge for slicing another inmate's face with a box cutter; 7) Stokes's letter to his wife from prison in which he "indicated he was struggling with thoughts of killing her and reminded her that he would eventually get out of prison and search for her," and 8) evidence that he beat another inmate with his fists. (App. 120-25). The district court concluded "[t]he aggravating evidence in this case was overwhelming," and, even in light of the trial presentation and the background trauma evidence presented in habeas, there was no reasonable probability of a different result. (App. 125-26).

In a split decision, a Fourth Circuit panel rejected the district court findings, and found collateral counsel was deficient for not pursing the claim. Collateral counsel had investigated again, but according to the majority not enough, and "perhaps most consequentially, they did not retain an expert capable of applying their investigator's findings" to present childhood trauma and risk factors. (App. 19-20). The majority concluded that collateral counsel's testimony

that they were inexperienced and either wrong or "lazy" in not doing more rebutted the district court's conclusion that counsel's other testimony, along with the existing state court records, demonstrated a strategic withdrawal of the claim to prioritize an intellectual disability claim. (App. 22-23). The majority then determined counsel was deficient for not presenting the claim. (App. 25-26).

Having found cause under *Martinez* to excuse the default, the majority conducted a de novo assessment of whether trial counsel was ineffective under *Strickland*. The majority rejected trial counsel's case-specific, jury-specific assessment of strategy and asserted "[t]here was no reason to believe" the sentencing jury "would have been indifferent to the 'frailties of humankind' and these bedrock principles of mercy and morality." (App. 34). Turning to prejudice, the majority discounted the fullness of the district court's evaluation, and criticized the district court for including details of the Snipes murder and the evidence from the Ferguson murder. (App. 35-36). It reasoned, "[t]he addition of just some meaningful mitigating evidence could be enough to sway one juror against death, even in the fact of plentiful aggravating evidence," and surmised that since no background evidence was presented, "the unheard personal evidence is especially impactful on the prejudice calculus." (App. 36-40). Ultimately, the majority concluded Stokes was prejudiced such that he should be awarded a new sentencing proceeding. (App. 40).

Judge Quattlebaum, in lengthy dissent, underscored that *Strickland* protects counsel's discretion to make

strategic decisions. He concluded that the majority failed to afford that deference to counsel's informed strategic decisions: "In my view, the record does not come close to overcoming that required deference." (App. 40-42). He listed the trial mitigation investigation, which delved into background, noting counsel worked with experts including "an expert in social work," but were cognizant of the negatives: "[t]he witnesses who would, if asked, be able to provide mitigating evidence, also has information that was damaging to their strategy of portraying Martin as the main culprit." (App. 42-44). In particular, the defense received information reflecting: "Stokes frequently made Martin, who had been his friend since childhood, 'hustle for him,' … was violent toward Martin," "that Martin was 'very afraid of ' " Stokes, and that Stokes had "sexually abused Martin in the past." (App. 44). Judge Quattlebaum noted that trial counsel stated that the defense " 'didn't want it to come out that [Stokes] had … used [Martin] and had him doing everything.' " (App. 44). Counsel recognized that "would be harmful to Stokes' defense." (App. 46). Trial counsel made a strategic decision "that the benefits of the mitigation evidence, in this situation, were not worth the risks." (App. 53-54). The dissent observed that "over two decades later, the majority grades trial counsel's strategic decisions" and disagreed. (App. 51). In the dissent's view, the majority's decision was a *Strickland* prohibited hindsight evaluation merely "second guessing" a decision. (App. 54). The dissent viewed trial counsel's action as reasonable strategy. (App. 58).

The dissent also disagreed that Stokes had shown deficient performance by collateral counsel. The dissent

noted that in collateral counsel's "own words, they 'made some sort of judgment, explicit or implicit' in deciding" to withdraw what they considered "at the time" to be the "weaker" claim. (App. 60). "Removing an existing ground" as collateral counsel did, "provides additional evidence of a conscious decision." (App. 60). Moreover, the dissent noted that collateral counsel:

> … are experienced death penalty lawyers. One of Stokes's PCR attorneys is currently a law professor and director of death penalty litigation at a law school who transitioned to that role after working almost exclusively on post-conviction and federal habeas cases while in private practice. He was trained in the development and presentation of mitigating evidence in death penalty cases and had done this work before.

(App. 61).

Judge Quattlebaum reasoned that specific "experience is even more evidence that counsel made a strategic decision not to pursue the mitigating evidence claim." (App. 61). The dissent also took issue with the majority's reasoning based on a speculative impact on "one juror." (App. 62). While acknowledging one juror could make a difference, the dissent asserted "that does not mean we compromise our objective analysis or decline to view the evidence 'taken as a whole'" lest "we water down the prejudice analysis to something akin to anything is possible." (App. 64). The dissent, reciting the aggravating evidence including the circumstances of the Snipes murder and the Ferguson murder, concluded: "Objectively considering the facts here,

there is no basis to conclude that presenting the mitigating evidence would have had any effect on the outcome of Stokes' sentence." (App. 63-65).

The Warden's petition for rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit majority made profound errors in finding prejudice and deficient performance. On prejudice, this Court has repeatedly cautioned that appellate reweighing requires consideration of the totality of the evidence, collateral and trial. *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 20 (2009). It has also underscored that a "reasonable probability of a different result" requires a "substantial" showing, not easily met. *Shinn v. Kayer,* 141 S. Ct. 517, 523 (2020). The panel majority did not correctly conduct the appellate reweighing process as it ignored both of these settled principles. Further, the record shows collateral counsel did not perform deficiently for there to be cause to excuse for the default, and no ineffective assistance of trial counsel.

This Court rarely takes cases for simple error correction, but this is far from simple error correction. The Fourth Circuit has egregiously intruded in this state criminal matter, and review is warranted because (1) the majority "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power"; and, (2) has decided the case "in a way that conflicts with this Court's controlling precedent." Rule 10 (a) and (c), Supreme Court Rules. At the very least, because the

district court held an evidentiary hearing in violation of 28 U.S.C. § 2254(e)(2), the Court should hold this case pending the outcome of *Shinn v. Ramirez, supra.*

I. The Fourth Circuit egregiously erred in finding that Stokes was prejudiced by the failure to present additional mitigation evidence.

To be entitled to relief, *Strickland* requires a convicted defendant to show not only deficient performance, but prejudice from the deficiency. "In the capital sentencing context, the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Kayer*, 141 S. Ct. at 522–23. The "balance" is defined as "*all* the relevant evidence that the jury would have had before it" including consideration of any negative "evidence that almost certainly would have come in with" the evidence not presented. *Belmontes*, 558 U.S., at 20 (emphasis in original). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland,* 466 U.S., at 693*).* The majority's analysis violated these basic principles.

The aggravating evidence here was overwhelming. Stokes committed a murder for money, alone a significant aggravating fact, but the brutality of his acts shows a callousness and lack of respect for humanity that sets this case apart. He savagely raped

the victim and mutilated her body. He then committed a second murder to cover up the crime and for revenge. Further, the omitted evidence was double-edged and could have undermined the defense strategy. To overcome this, the Fourth Circuit majority (1) wrongly excluded critical aggravating evidence of the rape and mutilation and the second murder, misconstruing South Carolina law on what aggravating evidence may be considered; (2) did not take into account the negative consequences that would have flowed from introducing the "bad upbringing" mitigation evidence: and (3) "water[ed] down" the "reasonable probability" standard to an "anything is possible" standard.

A. In excluding consideration of Stokes's acts of rape and mutilation, and second murder, the majority failed to consider that South Carolina is a non-weighing state where jury-returned eligibility fact-findings do not limit consideration of properly admitted evidence during selection of the sentence.

Determining what constitutes the pool of evidence to review in a *Strickland* prejudice analysis should be simple – what was properly admitted at trial is a base from which subtractions or additions are made. *Belmontes, supra.* The majority altered that base by misconstruing the state capital process. The majority reasoned that it was prohibited from considering evidence not reflected in the jury's eligibility findings. This allowed the majority to reshape and diminish the State's powerful case in aggravation – the one actually

presented to the sentencing jury. In short, it considered a case for death, but not this case.

It was not as if the majority misunderstood that tremendous aggravation evidence was presented to the jury. The majority conceded that in addition to the "especially abusive" rape and mutilation of Snipes:

> [t]he jury also heard about the subsequent murder of Doug Ferguson. In the days after the Snipes murder, Syphrette feared Ferguson's knowledge of her plans to murder Snipes. Syphrette enlisted Stokes and a friend, Faith Lapp, to kidnap Ferguson. The group had bound Ferguson with duct tape when police arrived at Syphrette's home. Ferguson died of suffocation from his bindings.

(App. p. 6-7).

It also conceded the State's case was "robust." (App. 10). However, observing that the jury did not return certain eligibility factors, the majority resolved it was error for the district court to "have given weight to Stokes's alleged torture of Snipes or his role in the Ferguson murder." (App. 35-36). The majority had no legal basis to diminish the case in aggravation. That the jury did not return factually related statutory aggravating circumstances for eligibility means absolutely zero to South Carolina's whole-of-the-sentencing-evidence review. The majority lost its way in understanding what was actually before the jury because it assigned a meaning to the eligibility finding that does not exist. Part of this misunderstanding

rests with an old difference: weighing vs. non-weighing jurisdictions.

Capital jurisdictions mainly breakdown into weighing and non-weighing states. *See generally Zant v. Stephens*, 462 U.S. 862 (1983). Though subtle differences may be found, basically, in weighing states "the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors." *Brown v. Sanders*, 546 U.S. 212, 217 (2006). Non-weighing states, after death-eligibility is found, simply direct juries to consider the totality of the admitted evidence. Aggravation is not limited to the initial finding for eligibility. *Id.* This Court acknowledged the non-weighing aspect of South Carolina's structure in *Simmons v. South Carolina*: "the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." 512 U.S. 154, 162 (1994). South Carolina's structure has not changed in this regard. While this Court has said the difference is not critical in determining whether evidence from "[a]n invalid sentencing factor (whether an eligibility factor or not)" is harmful, *Sanders*, 546 U.S., at 220, this Court has not specifically addressed the danger in misconstruing state sentencing structure in determining the evidence to be reweighed under a *Strickland* analysis. The Fourth Circuit majority's opinion provides that illustration.

Here, the trial judge instructed the jury that "[i]n considering the appropriate punishment, you may consider *in addition to the aggravating circumstances and mitigating circumstances* the character of the

defendant and the circumstances of the crime." (J.A. 1396) (emphasis added). The jury was never instructed that, in making the selection determination, it was limited to considering only those aggravating factors that were eligibility findings — because that limitation does not exist in state law.

To put a fine point on it: "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Zant*, 462 U.S. at 874.[1] As long as the evidence is properly admitted, it may be considered, regardless of an eligibility finding. *Zant,* at 886. *See State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984); *see also State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987) (jurors "consider" rather than "weigh"). This makes sense since the prosecution in this case could have continued on the finding of any of the circumstances. Under the majority's logic no other evidence would have been considered "aggravating," including the circumstances of the crime, which is flatly contrary to *Zant* and *Brown* and South Carolina precedent. *See Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (aggravating evidence included second murder unrelated to statutory aggravating circumstances); *State v. Shaw*, 255 S.E.2d 799, 806 (1979) ("post-mortem abuse to [victim's] body"

[1] South Carolina's structure "was patterned" according to Georgia's structure, s*ee State v. Shaw*, 255 S.E.2d 799, 802 (1979), thus, *Zant* is particularly on point.

properly admitted to show the crime and defendant's character).[2]

The Ferguson murder and horrific details of the Snipes murder could properly be considered by the jury as the evidence was properly admitted. Further, the evidence was not slight. The district court, guided (correctly) by *Simmons,* (App. 123 n. 27), summarized just some of remarkably brutal details in the Snipes murder as presented in sentencing:

> Martin testified Snipes was screaming, crying, and moaning when [Stokes] cut her breasts, and the State's forensic pathologist testified Snipes' injuries were consistent with having been scalped, having had the nipple area cut from each breast, and having had the entire vaginal area cut out. The pathologist further testified that "[i]t definitely would have been painful" if Snipes were alive when her nipples were cut off, and that she also had incise wounds on her hands that would have been "very painful" and a stab wound on her neck that also would likely have been painful. The jury saw autopsy photographs of Snipes' mutilated and decomposed body.

(App. 121).

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[2] The majority also missed the mark factually. The jury could have reasoned the second murder was not part of "one act," or questioned the timing of all of the mutilation. At bottom, though, none of the facts were banned from consideration in selection of the penalty.

The district court also summarized the evidence heard as to the Ferguson murder:

> [Stokes] entered the room wearing latex gloves telling Ferguson he was going to teach him a lesson for having stolen his rings and watch. Syphrette said they should tie up Ferguson with duct tape. According to Lapp, Ferguson started crying while being taped up and begged [Stokes] and Syphrette not to shoot him. Ultimately, [Stokes] and Syphrette wrapped duct tape around Ferguson's entire body and head, thereby suffocating him. [Stokes] also punched Ferguson in the face and drew blood. Later that day, police arrived at Syphrette's residence to serve a warrant and found [Stokes] hiding under a bed and Ferguson's duct-taped body. To perform the autopsy, the State's pathologist had to cut layers of tape from Ferguson's body. The pathologist testified that Ferguson's face was wrapped with multiple layers of duct tape and that he was conscious during the taping and died from suffocation due to the tape covering his nose and mouth. The pathologist further testified a suffocating person unable to breath experiences a great deal of pain before passing out. The jury saw autopsy photographs of Ferguson's body both before and after the duct tape was removed.

(App. 122).

These facts show something about Stokes's character – something very negative and dangerous. The majority had no legal basis to discount them.

South Carolina has multiple capital cases pending in the federal court at this time with *Strickland* claims.[3] Because the majority opinion allows for the diminishing of the State's case in aggravation, this issue is undoubtedly important to South Carolina capital cases. All of these cases are potential victims of overreaching and erroneous federal habeas review. This alone is an extremely strong basis to grant the petition. *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020).

B. The majority failed to consider any negative impact that may attach to the proffered mitigation.

The majority advanced a belief that the newly presented evidence was powerful in itself. Yet, the precise testimony the majority finds indispensable to fair sentencing was carried a cutting, double-edge.

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[3] These cases are pending in the Fourth Circuit: *John Richard Wood*, USCA4 Appeal: 20-11; *Mikal Mahdi*, USCA4 Appeal: 19-3, split panel opinion issued December 20, 2021 affirming denial of habeas relief, dissent referencing *Stokes* (Mahdi's counsel submitted *Stokes* as additional authority by letter of August 20, 2021); *Abdiyyah Ben Alkebulanyahh (f/k/a Tyree Alphonso Roberts)*, USCA4 Appeal: 15-3; and *Steven Bixby*, USCA4 Appeal: 21-5, is still in the process of informal briefing, and may very well have ineffective assistance claims. Further, these capital cases are pending in the District Court for South Carolina: *William Dickerson*, 9:21-mc-00618-SAL-MHC; *Steven Stanko*, 1:19-3257-RMG-SVH; *Bayan Aleksey*, 5:14-3016-JMC-KDW; *Stephen Corey Bryant*, 9:16-cv-1423-DCN-MHC; *James D. Robertson*, 2:11-63-TMC-MGB; *Bobby Wayne Stone*, 2:17-cv-01221-MGL-MG; *Anthony Woods*, 5:18-00144-DCN-KDW.

First, going into background would allow the evidence of Stokes's domination and abuse of Martin to undercut the carefully drawn suggestion throughout the proceedings that Martin was more active in the crime than he admitted. The majority gives not even a nod to the fact that evidence showing Stokes dominated and abused Martin throughout their friendship would likely have been elicited on cross-examination just like trial counsel feared.

Second, Stokes's childhood development expert offered in habeas to discuss risk factors from alleged childhood deprivation and trauma, did not simply explain those factors, but found Stokes more likely than the average killer to be violent. Dr. Garbarino concluded based on his 10 point scale that an "average" risk score for a killer is around "7" while Stokes scored well-above at "9." That infers Stokes is more likely to commit violent acts. Dr. Garbarino observed, "And we certainly have a lot of evidence that he did." (J.A. 3192-93). Trial counsel testified at the *Martinez* hearing that he did not think such testimony would be helpful. (J.A. 3490). Quite so.

The Fourth Circuit majority grievously erred when it failed to acknowledge that the mitigation carried hefty aggravation, skyrocketing future dangerousness to new heights while dampening the carefully drawn suggestion throughout the proceedings that Martin was more active in the crime than his testimony would show.

C. The majority lowered the burden of proving prejudice by reasoning that "some evidence" could have made a difference regardless of the amount of aggravation.

Strickland established that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S., at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.,* at 693. The Fourth Circuit majority reasoned that since bad upbringing mitigation evidence *must* be mitigating, then it "could" have made a difference. It further reasoned that *any* "meaningful mitigation evidence could be enough to sway one juror" since "the State's aggravation case was extensive…." (App. 36). This inverts the prejudice analysis and dilutes the reasonable probability standard.

The dissent correctly called out the majority for speculative impact on "one juror." (App. 64). While acknowledging one juror could make a difference, the dissent explained "that does not mean we compromise our objective analysis or decline to view the evidence 'taken as a whole'" lest "we water down the prejudice analysis to something akin to anything is possible." (App. 64). The dissent, noting the second horrific murder within days of the first, concluded: "Objectively considering the facts here, there is no basis to conclude that presenting the mitigating evidence would have had any effect on the outcome of Stokes' sentence." (App. 63-65). The dissent is correct.

The majority tried to support its approach by insisting (App. p. 37) that this case is analogous to *Porter v. McCollum*, 558 U.S. 30 (2009). It is not. The collateral investigation in *Porter* uncovered positive character evidence to submit, and gave context to relationship dynamics. *Id.,* at 43-44. Not so here. And, as noted above, that same evidence of "childhood adversity" shows Stokes to be more dangerous than an "average" killer. The majority further suggested the evidence could "connect[] the dots" to mental issues or other circumstances, but there was no undiscovered mental issue or other circumstances to connect. The majority attempted to force its logic into this Court's precedent, but it fails to fit. All told, the majority's prejudice analysis wrongly excluded powerful evidence of aggravation and character, and relied upon a "water[ed] down" standard. Its ruling should not stand.

II. The Fourth Circuit egregiously erred in finding that trial and collateral performed deficiently.

The Fourth Circuit further misapplied this Court's precedent in finding trial and collateral counsel deficient. The dissent gave counsel the deference for strategic decisions that *Strickland* instructs. The majority did not.

A. The record does not show trial counsel performed deficiently, but instead made a reasoned strategic decision of the sort that this Court deems "virtually unchallengeable."

Counsel had tactical reasons not to present evidence of Stokes's bad upbringing. In disregarding those reasons, "[t]he Court of Appeals misapplied *Strickland* and overlooked 'the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions.'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland,* 466 U.S., at 689).

Trial counsel feared that a jury in this particular county in 1999 would view a claim of a bad upbringing as mere excuse-making for the crime. (App. 53). As the dissent noted, the majority's direction that if the jury would not find the evidence purely mitigating, counsel must simply "make it so," is "remarkabl[e]." (App. 55). "Even if presented in the best way by the most capable of lawyers, it seems far from unreasonable for [trial counsel] to be concerned that the jury would not accept" the mitigation as being

offered as a mere "excuse" for the criminal conduct. (App. 55). Indeed, this Court in *Pinholster* rejected "[t]he current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation" since it "disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it." *Id.,* at 197 (quoting *Pinholster v. Ayers,* 590 F.3d 651, 692 (2009) (Kozinski, C.J., dissenting)).[4] The Fourth Circuit majority, though, embraced that rejected position and relegated *Strickland*'s protection of counsel's independence to the backseat.

Counsel had a strategy. Counsel did not wish to undermine the shift of culpability to Martin. Yet, that was not a concern for the majority. Counsel assessed that the jury may consider the evidence an excuse. Yet, that was not a concern for the majority. Counsel made a strategic decision not to present background evidence and to take a different approach. Yet, the majority, in reviewing that decision, downplayed the defense case actually presented, ignoring the strategy to show not just incapacitation but also remorse, and to continue to shift blame to Martin. Further, the majority did not consider that the newly presented mitigation does not contain evidence of good character, like the military history in *Porter*, nor does it show context for some

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[4] That portion of the Ninth Circuit *Pinholster* dissent continues persuasively: "Not all defendants are capable of rehabilitation, and not all juries are susceptible to such a plea. Counsel, who are in the courtroom and can observe the jurors and their reactions to various witnesses (including the defendant), may have good reason for pursuing other avenues of mitigation…." 590 F.3d., at 692.

aspect of the crime as in *Porter*. 558 U.S., at 43. Nor did the majority consider that the evidence carried its own limitation and could reinforce the extent of his violent character. *See Pinholster*, 563 U.S., at 201 ("the jury might have concluded that [he] was simply beyond rehabilitation"). However, Stokes's counsel reasonably considered the available strategic options.

As Judge Quattlebaum concluded, the record shows not any type of inadvertence or inattention, but "strategic decision-making by trial counsel in the thick of an intense trial." (App. 58). Trial counsel,[5] after investigation with assistance of experts, resolved to "emphasize Stokes' remorse and highlight the conduct and motivation of Norris Martin, who participated in the murder with Stokes, with the hope that the jury would view him as 'the bad guy.' " (App. 42). The investigation "revealed risks" that would be detrimental to the defense. (App. 43). They made an

[5] Attorneys Sims and Johnson represented Stokes. Sims had previously served as an assistant solicitor, then acting solicitor, for ten years. (J.A. 1513). He prosecuted six or seven death penalty cases. (J.A. 1514). When appointed to represent Stokes, he had been in private practice for six years and had handled two more death penalty cases, one of which was tried to verdict. (J.A. 1514-15). Johnson was also a former assistant solicitor. (J.A. 1658). He had tried over fifteen felony cases. (J.A. 1658, 3507). The majority does not explain its assertion that counsel had limited experience with mitigation. (See App. 7, "The lawyers were former prosecutors with several years of experience in private practice. They had some limited death penalty experience, but little to no experience preparing a mitigation defense.").

informed strategic decision.[6] (App. 50). Further, though they still had the potential to present some background, in making the ultimate decision, they considered the jury and "drew upon their knowledge of the community where the jurors lived" as they "lived in that community too." (App. 53). The dissent correctly gave deference to that reasoned strategic decision. The majority did not. To be effective under the Sixth Amendment does not require counsel to transform facts, or actually persuade a jury that life is more appropriate then death. It requires reasonable representation. Reasonable representation was shown here.

B. The Fourth Circuit majority improperly cast aside the district court's finding that collateral counsel assessed the ineffective assistance/mitigation claim as weaker than other claims pursued.

Collateral counsel's decision not to pursue an ineffective-assistance-of-trial-counsel claim based on the absence of a bad-upbringing mitigation case was reasonable for all the reason trial counsel's decision was reasonable. The Fourth Circuit majority, however, insisted that collateral counsel did not make a tactical decision at all, but rather dropped the claim based on sheer inadvertence. In so holding, the majority failed to consider the solid record support demonstrating collateral counsel's strategic decisions. The district

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[6] Of note, all the cases the panel majority relies upon as showing accepted investigation parameters occurred *after the trial* in this case. (See App. 17, citing cases from 2000 through 2010).

court's fact-findings supported its conclusion that collateral counsel made a strategic withdrawal of the ineffective assistance/mitigation claim in state post-conviction relief proceedings. Those fact-findings were not made in clear error and should control.

It is a settled principle of law that federal appellate courts grant substantial deference to trial level fact-finding. Rule 52(a)(6), Federal Rules of Civil Procedure, directs that fact-findings "must not be set aside unless clearly erroneous." In practice, this Court has cautioned that if there are two views depending on the weight assigned, the trial court's decision should prevail. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). Appellate courts rarely make fresh findings but defer to the lower court: "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* As this Court has said, "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.,* at 575.

The district court concluded collateral counsel made an intentional decision to withdraw the claim after reinvestigating Stokes's background. (App. 113-16). While the majority criticized the district court's reference to counsel "fall[ing] on their sword for their former client" (App. 24 n. 6), the district court reasonably compared the existing state court record with collateral counsel's vague habeas testimony accepting that some error must have occurred. The

district court did not reject all the testimony, but found unpersuasive the testimony suggesting a lack of strategy. (See App. 115). In contrast, the majority considered testimony by one of the two attorneys, Lominack, that "their prioritization of their other claims was uninformed and happenstance, the product of distraction, inexperience, and carelessness" (App. 23), but did not reference Weyble's testimony on cross-examination (in response to the State's questioning) where he conceded "some sort of judgment" occurred regarding the claim. (Compare App. 23 (Fourth Circuit) with App. 114-15 (district court)). The remaining short blips of testimony relied upon by the Fourth Circuit majority similarly fail to reflect the revealing fullness of testimony. (See App. 22). As the dissent highlighted, "their testimony as a whole must be considered from counsel's perspective at that time and without the 'distorting effects of hindsight.' " (App. 60, citing *Strickland,* 466 U.S. at 689). The record supports that "collateral counsel's re-investigation of Stokes' background was largely unhelpful as it "unearthed even more aggravating evidence against Stokes." (App. 59).

In addition to testimony, the district court also relied upon record-based evidence of collateral counsel's actions. For instances, collateral counsel retained the issue in their first amended application filed May 6, 2002. It was not until the second amended application dated August 6, 2004, and after investigation, that counsel withdrew the issue. (App. 293-94). Moreover, on August 12, 2004 – less than a week after withdrawal – collateral counsel wrote to trial counsel asserting that there was no claim to prompt "waiver of the attorney-

client privilege," and that they should not open their files to the State. (App. 294). By operation of state law, waiver is tied to the allegations. *Binney v. State*, 683 S.E.2d 478, 480 (S.C. 2009) (citing S.C. Code § 17-27-130). Consequently, the action of withdrawing the claim and writing the letter indicates collateral counsel was attempting to prevent State access to related information. As the district court found, investigation, withdrawal, and the letter to counsel, together show good evidence of a reasonable strategic decision. (App. 113). The dissent also considered the testimony in conjunction with the state court record, and agreed. (App. 60). The developed record supports that collateral counsel were not deficient. Consequently, the majority erred in excusing the default.

III. Alternatively, this case be held pending the outcome of *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021).

28 U.S.C. § 2254(e)(2) prohibits a federal court from holding an evidentiary hearing if a state prisoner "has failed to develop the factual basis of a claim in State court," unless he can pass through two narrow exceptions. In *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021), this Court is currently considering the interplay of that statutory limitation and *Martinez*, specifically whether Section 2254(e) is inapplicable when a defaulted claim is excused under *Martinez*. If this Court finds the Ninth Circuit erred in finding the statute does not bar record development, that ruling affects the entirety of this petition as the evidentiary hearing should never have been heard. The hearing in this case covered both record development for cause

and record development for the underlying ineffective-assistance-of-trial-counsel claim. The record development for the underlying claim is the basis for relief. Therefore, if this Court determines in *Ramirez* that the statute prohibits the receipt of such evidence through an evidentiary hearing, it should reverse and remand here with directions to enter an order affirming the denial of relief. Moreover, if Section 2254(e)(2) applies, there can be no doubt that Stokes cannot meet its stringent requirements. He cannot satisfy the requirement of subsection (B), that "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." Stokes challenged only his sentence, not guilt.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ALAN WILSON
Attorney General, State of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN*
Senior Assistant Deputy Attorney General
**Counsel of Record*

MICHAEL D. ROSS
Assistant Attorney General

Office of the Attorney General
State of South Carolina
Capital Litigation Section
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners