NO. 21-938

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

BRIEF IN OPPOSITION

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****CAPITAL CASE****

QUESTION PRESENTED

Applying the *Strickland* standard to the facts of this case, did the Fourth Circuit correctly conclude that Stokes' trial counsel provided ineffective assistance by failing to reasonably investigate and present compelling mitigation evidence, and that Stokes' collateral counsel were ineffective for failing to develop and present a claim based on that ineffective assistance?

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INTRODUCTION

No one should be sentenced to death without representation by competent counsel. But as the Fourth Circuit recognized, that is what happened to Sammie Louis Stokes. In death-penalty cases like this one, this Court has consistently emphasized the importance of mitigating evidence—especially evidence about the defendant's background and upbringing—that might persuade jurors to spare the defendant's life. In Stokes' traumatic childhood, marred by abuse and extreme deprivation, any reasonably competent lawyer would have found an abundance of mitigating evidence. Yet Stokes' counsel neither investigated that evidence thoroughly nor presented any of it at sentencing. As a result, the jury heard only the worst about Stokes, a one-sided presentation with no counterbalancing mitigation evidence.

Stokes experienced as traumatic an upbringing as one can imagine. His parents were alcoholics who frequently left him and his sister unsupervised and unfed. He was physically and sexually abused. His mother lived with a man who beat her violently, often in front of the children; whipped Stokes with an electrical cord; and sexually abused Stokes' sister. The family lived in a run-down wooden shack with no running water or indoor plumbing, and Stokes and his sister sometimes had to steal food from neighbors to eat. When Stokes was nine years old, his father died suddenly on the front lawn, where Stokes saw his body. A few years later, Stokes witnessed his mother, lying intoxicated on the couch, slip into a coma and die, leaving him and his sister parentless. The

children then lived unsupervised with the same man who had abused them and battered their mother. As a teenager, Stokes began using drugs and alcohol and flunked out of school.

The jury heard *none* of that evidence at Stokes' sentencing. The State does not dispute that the evidence was readily available or that it is precisely the "kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)). But trial counsel performed only a belated, cursory investigation, and what counsel did discover, they failed to put before the jury. This abject mismanagement of Stokes' defense violated his Sixth Amendment right to the effective assistance of trial counsel. Collateral counsel were likewise ineffective when they inexplicably failed to raise that strong Sixth Amendment claim in state post-conviction proceedings, which excuses Stokes' procedural default of that claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).

The Fourth Circuit rightly concluded that Stokes deserved a first, fair chance to persuade jurors to spare his life. The State does not identify any relevant circuit split, any conflict with this Court's precedent, or any other issue that warrants this Court's review. Nor did the State preserve any argument that would justify holding this case for *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021). Accordingly, this Court should deny review and let the Fourth Circuit's well-reasoned decision stand.

STATEMENT OF THE CASE

A. Stokes' Social History

Sammie Louis Stokes was born on December 21, 1966. Growing up in Branchville, South Carolina, he faced extraordinary adversity, even by the standards of that community. He initially lived with his father and did not meet his mother until he was four years old. App. 3. When Stokes was five, his father sent him to live with his mother, where he met his sister Sara for the first time. *Id.*

Stokes' mother, Pearl, was an alcoholic who was often too drunk to care for him. *Id.*; *see also* JA2528, JA2868, JA3116. Pearl was known throughout the community as an aggressive and verbally abusive drunk. JA3118–19; *see also* JA2552, JA2558. She would sometimes pick Stokes up from elementary school drunk and take him and Sara to bars with her. App. 3; *see also* JA2570, JA2536, JA3118–19. Other times, the children were left unsupervised. App. 3. They often skipped school and sometimes stole food from neighbors just to have something to eat. *Id.* On some weekends, they stayed with their paternal grandmother, who ran a liquor house and brothel out of her home. *Id.* When Stokes was nine years old, his father died suddenly on the front lawn, where Stokes saw his body. App. 3–4.

Pearl lived with a man, Richard, whom the children regarded as a stepfather. App. 3. Like Pearl, Richard was a notorious drunk. JA2528, JA2553. He was also violent and abusive. App. 4. Richard and Pearl often fought so loudly that the neighbors could hear, and Richard beat her regularly, often in front of

the children. *Id.*; *see also* JA2552, JA2528. On one occasion, he threw Pearl to the ground and stomped on her face, breaking her jaw. App. 4; *see also* JA2558, JA3117. On another, he broke a glass liquor bottle over her head, sending her to the hospital. App. 4; *see also* JA2552.

The children, too, experienced physical and sexual abuse. Stokes received whippings with an electrical cord. App. 4. Richard also regularly had sex with Sara. *Id.*; *see also* JA2552. When Sara was as young as 13, Pearl sometimes "gave" her to men in exchange for favors. App. 4. When Stokes was 11 or 12, his babysitter sexually abused him. *Id.* By the time Stokes was 15, he had impregnated two women. *Id.*

When Stokes was 13, he saw his mother on the couch, intoxicated, as she lapsed into a coma and then died, leaving him parentless. *Id.* Stokes and his sister then lived unsupervised with Richard. *Id.* Stokes began using drugs and alcohol, and he struggled to advance in his under-resourced school, where he was held back several times before dropping out in ninth grade at age 18. *Id.*

According to the child development expert retained by Stokes' federal habeas counsel, Dr. James Garbarino, Stokes experienced an extremely traumatic childhood that impaired his future emotional regulation and social adaptation. App. 5. Applying the Centers for Disease Control and Prevention's standard for measuring childhood adversity, Dr. Garbarino found that Stokes was exposed to more childhood adversity than 999 out of 1,000 Americans. App. 5 n.1.

B. The Crime

In 1998, while completing a prison sentence for assault, Stokes was cellmates with a man named Roy Toothe. App. 5. Toothe's mother, Pattie Syphrette, wanted to gain custody of her grandchildren by putting a hit on Toothe's girlfriend, Connie Snipes. *Id.* Stokes agreed to carry out the murder for $2,000. *Id.*

On the day of the crime, Snipes agreed to accompany Stokes and his childhood friend, Norris Martin, into the woods where she thought the three of them were going to murder someone else (Doug Ferguson). App. 5–6. The plan was a ruse. Stokes and Martin each raped Snipes and then each shot her once in the head, killing her. App. 6. Her body was found several days later. *Id.*

Stokes and Martin were arrested soon afterward. *Id.* While in jail, Stokes penned a detailed letter confessing to and describing the circumstances of Snipes' murder. *Id.*; *see also* JA1439–50. In that letter he expressed remorse, stating that "God is going to punish me for my part" in the crime and that "God is going to bless [Snipes' family] and help them make it through this." JA1449.

C. The Trial

The trial court appointed Thomas Sims as Stokes' lead counsel and Virgin Johnson as second chair. App. 7. Although both were former prosecutors, they had only limited death-penalty experience and virtually no experience preparing a mitigation defense. *Id.*

Trial was bifurcated into a guilt phase and a penalty phase. The guilt phase concluded on October 31, 1999, when an Orangeburg County jury found Stokes guilty of murder, kidnapping, first-degree criminal sexual conduct, and criminal conspiracy. JA3806.

Given Stokes' confession, his conviction in the guilt phase was all but guaranteed. As a result, trial counsel's main responsibility was to prepare for the penalty phase and convince the jury not to impose a death sentence. Yet counsel waited six months before starting work on the penalty phase, and they began the mitigation investigation only six weeks before trial. App. 7; *see also* JA2507–25. They hired a receptionist as the mitigation investigator, even though she had no prior experience with mitigation investigations, and devoted only about 45 hours (of hundreds billed) to the investigation. App. 7.

That investigation, meager as it was, uncovered several red flags about Stokes' early life. App. 29 n.9. For example, the investigation revealed that Stokes' parents were both alcoholics, that Stokes and his sister were frequently left unsupervised, that Stokes' stepfather regularly abused his mother, and that Stokes had severe mood swings as a child. JA2529, JA2553–54, JA2947, JA2868–69, JA3116–19. During the penalty phase, however, trial counsel declined to present any witnesses—such as Stokes' family members, a social worker, or a psychologist—who could speak to that adversity or explain the impact it may have had on Stokes' decision-making ability. The reason for this omission, trial counsel later claimed, was their assumption that the predominantly African-

American jury would lack sympathy for Stokes' "poor upbringing" because "a lot of us had struggles coming up." App. 30 (quoting JA3524).

Instead of presenting mitigation evidence, trial counsel put on a single witness: "prison adaptability expert" James Aiken. Aiken, a retired warden, refused to meet Stokes before the trial and testified only that a prison could "manage" Stokes by using "lethal force" if necessary. App. 9–10, 133; *see also* JA1320–21. Aiken stated, chillingly, that he had "ordered inmates killed because they did not follow rules and regulations." App. 10 n.2 (quoting JA1321). But he offered no opinion that Stokes was actually capable of adapting to life in prison. The State criticized Aiken's "Alice in Wonderland" testimony in closing argument, noting that if a man is "adapting to prison, you don't have to punish him." App. 10 (quoting JA1365–66).

Meanwhile, the State presented robust aggravating evidence, calling 12 witnesses. *Id.* Norris Martin testified in graphic detail about the violence of the Snipes murder, and another witness testified about Stokes' role in the later murder of Doug Ferguson. *Id.* The State also called Stokes' ex-wife, Audrey Smith, to testify about a time when Stokes had assaulted her—an incident for which Sims had successfully prosecuted Stokes before returning to private practice. App. 75–78.

In closing argument, the State emphasized the lopsidedness of the evidence: "Have you heard one piece of evidence favorable to Sammie Stokes that maybe you should consider a life sentence?" JA1370. In response, having failed to present any evidence at

all about Stokes' childhood trauma, Stokes' counsel could only eke out a simple plea for life in light of Stokes' "remorse." JA1382.

Even without having heard any mitigating evidence, the jury apparently contemplated sparing Stokes' life. The jurors sent a note to the trial court requesting more information about the privileges Stokes would have if he spent his life in a maximum-security prison. JA1405. But after about three hours of deliberation, the jury returned a death sentence. App. 11.

Of the six statutory aggravating factors alleged by the State to establish eligibility for the death penalty, the jury found four, including that the murder was committed while in the commission of criminal sexual conduct and was committed for money. JA1390, JA1406–07. Notably, however, the jury rejected the State's allegations that Stokes tortured Snipes and murdered Ferguson as part of the same "scheme," declining to find either of the aggravating factors associated with those allegations. JA1406–07.[1]

[1] Specifically, the jury declined to find either (1) that the murder was committed while in the commission of physical torture, or (2) that two or more persons were murdered pursuant to one course of conduct. JA1406–07. The State argued below that the jury may have concluded only that Ferguson's murder was not part of the same "course of conduct" as Snipes' murder, but that is implausible. It was undisputed that Ferguson was killed to stop him from "run[ning] to the cops" about Snipes' murder, and the defense accordingly never argued that the two murders were not connected; it argued only that the State had not proven Stokes' role in Ferguson's murder. JA1359, JA1379.

Stokes' convictions and death sentence were affirmed on direct appeal. App. 69–70.

D. State Post-Conviction Proceedings

In October 2001, Stokes filed an application for post-conviction relief ("PCR") in state court. His petition included a claim for ineffective assistance based on trial counsel's failure to develop and present mitigating evidence, as well as a claim that Sims had a conflict of interest because he had prosecuted Stokes for the prior assault that the State used as aggravating evidence. App. 12; *see also* JA2887, JA3245.

The court appointed as PCR counsel Keir Weyble and Robert Lominack, who filed an amended application in May 2002 adding several additional claims. App. 12. They also deposed trial counsel and hired new experts and a new mitigation investigator, who uncovered important new evidence showing that Stokes had a traumatic childhood marked by extreme neglect, dysfunction, and abuse. *Id.*; *see also* JA2552, JA2557–58, JA2868, JA3114–19. Despite this compelling new evidence, in August 2004, PCR counsel filed another amended application dropping the mitigation claim. In its place they added an Eighth Amendment intellectual-disability claim. They ultimately abandoned that claim after Stokes was formally found competent. App. 12. But even after the intellectual-disability claim failed to pan out, PCR counsel never revisited or attempted to revive the mitigation claim, even though it is undisputed that they could have done so by filing another amended petition. *See, e.g.*, JA2918, 2992, 3262, 3371.

The PCR court denied Stokes' application in October 2010. App. 12. The South Carolina Supreme Court and this Court both denied review, and the State set an execution date. *Id.*

E. Federal Habeas Proceedings

In March 2016, Stokes filed a petition for habeas corpus in federal court. As relevant here, his petition raised three claims: (1) that trial counsel were ineffective for failing to develop and present mitigating evidence, (2) that trial counsel were ineffective for relying on Aiken as their only penalty-phase witness and failing to prepare him properly, and (3) that Sims labored under a conflict of interest that adversely affected his performance. App. 15.

Because the first two claims were not exhausted in state proceedings, the federal magistrate judge held an evidentiary hearing to determine whether there was good cause for the default under *Martinez*. App. 12–13. Stokes' trial counsel testified that their decision not to develop and present mitigation evidence was based on the fact that "there were African-Americans" on the jury who they assumed would not be sympathetic to Stokes' mitigation evidence. JA3471–72. PCR counsel, for their part, acknowledged that they had no valid reason for abandoning the mitigation claim. App. 21–22; *see also* JA2918, JA3017.

The magistrate judge's report recommended denying all relief. App. 13. Stokes filed objections to the report, and the district court overruled them. *Id.* The district court adopted the report with modifications, holding that PCR counsel did not

perform deficiently in abandoning the mitigation claim and that, in any event, Stokes had not been prejudiced by counsel's failure to present mitigation evidence. App. 116, 126. The court also denied relief on the Aiken claim and the conflict-of-interest claim. App. 13.

The Fourth Circuit reversed. The panel first concluded that "PCR counsel's failure to develop and present a claim based on trial counsel's mitigation efforts" amounted to ineffective assistance, establishing good cause for Stokes' default of that underlying claim. App. 15. While PCR counsel's investigation generated "rich leads" for mitigation evidence, the court explained, they "ignored the valuable leads they uncovered." App. 19. PCR counsel also acknowledged, in detailed testimony, that their prioritization of other claims over the mitigation claim was "uninformed and happenstance, the product of distraction, inexperience, and carelessness." App. 23–24.

Proceeding to the underlying claim, the panel concluded that trial counsel were ineffective on two grounds, either one of which would be independently sufficient for Stokes to prevail. First, trial counsel failed to conduct an adequate mitigation investigation and therefore could not make a reasonable decision about whether to present a mitigation defense. And second, even based on what trial counsel knew at the time, the decision not to present any meaningful mitigation evidence was objectively unreasonable. App. 28–30. Because that meritorious claim on its own entitled Stokes to a new sentencing, the court did not reach his other claims.

The State filed a petition for rehearing en banc. In its petition, the State tried to a revive a sweeping argument that it had adverted to in proceedings before the magistrate judge, but which it had neither included in its briefs before the Fourth Circuit panel nor mentioned at oral argument. Specifically, the State argued that 28 U.S.C. § 2254(e)(2) precluded the district court from holding an evidentiary hearing on the merits of Stokes' ineffectiveness claim. CA4 Dkt. 81-1 at 14–15. In response, Stokes pointed out that the State had forfeited the issue by not raising it before the panel. CA4 Dkt. 84 at 4–5. No judge called for a vote on the State's petition, and the petition was denied.

The Fourth Circuit denied the State's motion to stay its mandate pending the filing of a petition for certiorari. CA4 Dkt. 90. The State then applied to the Chief Justice for a stay or recall of the mandate, which the Chief Justice denied (No. 21A61). On remand, the district court ordered the State to grant Stokes a new sentencing hearing by October 15, 2022, or sentence him to life imprisonment. D.S.C. Dkt. 242. The State subsequently filed its petition for certiorari.

REASONS FOR DENYING THE PETITION

The petition should be denied because it seeks only factbound error correction. This case does not present any important question of federal law meriting this Court's review. The State does not even attempt to allege a circuit split. Nor does it identify any conflict with this Court's precedent. The only questions presented by the petition concern the application of properly stated and well-settled

principles of law to the facts of this particular case—the routine business of the lower courts.

Moreover, the decision below is entirely correct. As the Fourth Circuit held, Stokes' trial counsel were ineffective for two independent reasons: failure to conduct an adequate mitigation investigation and failure to present any mitigation evidence whatsoever. Although the State tries to frame the lack of mitigation as a "reasoned strategic decision," Pet. 28, the decision could not have been strategic because it was woefully uninformed. And even if counsel's decision-making could somehow be cast as strategic, it was objectively unreasonable. These serious errors prejudiced Stokes because, if the jury had heard the compelling mitigation evidence, there is a "reasonable probability that at least one juror would have struck a different balance" and voted to spare Stokes' life. *Wiggins*, 539 U.S. at 537.

The Fourth Circuit also correctly held that Stokes' PCR counsel were ineffective for neglecting to develop and present a mitigation-based ineffective-assistance claim in post-conviction proceedings. As PCR counsel themselves acknowledged in extensive testimony, they simply dropped the ball; they had no good reason for abandoning that powerful Sixth Amendment claim in favor of other, much weaker claims. Stokes' procedural default of the underlying claim was thus excused under *Martinez*.

Finally, there is no reason to hold this case for *Shinn v. Ramirez*, No. 20-1009 (argued Dec. 8, 2021). Although the State demonstrated that it was well aware of the *Ramirez* issue in the district court, it did not press the argument consistently, never obtained a

ruling on it, and declined to present the argument to the Fourth Circuit panel. Because the State has already forfeited the issue, a hold would be gratuitous and unwarranted.

I. The State Seeks Fact-Bound Error Correction Without Alleging a Circuit Split.

This case does not meet this Court's traditional criteria for granting certiorari. *See* S. Ct. R. 10. The State does not assert that the Fourth Circuit's decision conflicts with the decision of any other court of appeals. Nor does the State identify a conflict with any decision of this Court.

That is no surprise, because the decision below fully comports with this Court's precedent. Applying the well-established *Strickland* standard, the Fourth Circuit held that counsel's failure to adequately investigate and develop a mitigation defense based on Stokes' traumatic childhood constituted ineffective assistance. This Court has long recognized that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or emotional and mental problems may be less culpable." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

Time after time, the Court has emphasized the importance of such evidence and held that trial counsel fall short of constitutional standards of competence when they unreasonably fail to develop it and present it to the jury. *See, e.g.*, *Williams (Terry)*

v. Taylor, 529 U.S. 362, 395 (2000) (finding mitigation presentation ineffective because counsel failed to convey the defendant's "nightmarish childhood"); *Wiggins*, 539 U.S. at 536–38; *Rompilla v. Beard*, 545 U.S. 374, 392–93 (2005); *Porter*, 558 U.S. at 32 (2009); *Sears v. Upton*, 561 U.S. 945, 948 (2010) (per curiam). The Fourth Circuit's decision falls comfortably within that line of cases.

In a case like this one, involving the factbound application of settled principles of law, only an egregious error could conceivably warrant this Court's review. Yet the State fails to demonstrate any error, let alone a serious one. The Fourth Circuit's thoughtful decision was correct in both its reasoning and its result.

II. The Decision Below Is Correct.

The State's factbound attacks on the decision below are meritless. The Fourth Circuit correctly held that (1) trial counsel performed deficiently in failing to develop and present mitigating evidence; (2) PCR counsel performed deficiently in failing to raise the ineffective-assistance-of-trial-counsel claim; and (3) trial counsel's failures prejudiced Stokes.

A. The Fourth Circuit Properly Concluded That Stokes' Trial Counsel Performed Deficiently.

Trial counsel's performance is deficient when it falls "below an objective standard of reasonableness." App. 28 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). The panel found Stokes' trial counsel's performance deficient on two distinct grounds: first, counsel's "investigation was

inadequate"; and second, counsel's "decision to withhold all personal mitigation evidence was unreasonable." *Id.* The State challenges only the second ground. *See* Pet. 28–31 (arguing that counsel made a "reasoned strategic decision" but not addressing the shortcomings in counsel's investigation). Either ground is independently sufficient to justify the Fourth Circuit's conclusion, and both are well-supported.

1. Start with counsel's slipshod investigation. Given Stokes' written confession, counsel had ample notice that securing strong mitigation evidence would be important. ABA guidelines at the time advised that sentencing investigation should "begin immediately upon counsel's entry into the case and should be pursued expeditiously." App. 28–29 (quoting ABA Guidelines § 11.4.1 (1989)). But trial counsel did not begin their mitigation efforts until shortly before trial, and their inexperienced investigator started interviewing potential witnesses less than three weeks before trial (and was still conducting interviews on the day of sentencing). *See id.*; JA2527–45. Trial counsel did not personally conduct any follow-up interviews or otherwise try to develop the investigator's findings. App. 29. And they ultimately spent only 45 hours in total preparing for the penalty phase. *See* App. 28–29; JA2507–21, JA2522–25. Even though counsel had virtually no experience preparing a mitigation defense—Sims had second-chaired just one capital defense case, and Johnson had no capital experience at all, *see* JA3454–57, 3507—they consulted no experienced attorneys or mitigation experts. App. 28. Furthermore, despite red flags pointing to a troubled childhood, such as an alcoholic

mother and an abusive stepfather, trial counsel "failed to pursue the indications of extreme childhood trauma, neglect, and abuse." App. 29 n.9; *see Wiggins*, 539 U.S. at 523–25 ("[C]ounsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history"). As the Fourth Circuit concluded, "[i]n a capital murder trial where mitigating the death penalty was the central issue in the defense, such an investigation is objectively unreasonable." App. 29.

The inadequacy of trial counsel's investigation is especially evident when juxtaposed with PCR counsel's more thorough investigation, which uncovered significant additional facts. For example:

- Stokes was sexually assaulted at age 11 by his babysitter, and his sister was sexually assaulted by their stepfather.
- Stokes saw his stepfather break his mother's jaw by stomping on her face.
- As a child, Stokes was whipped with electrical cords.
- Stokes' mother would "give" his sister to men in exchange for favors.
- At age 13, Stokes witnessed his intoxicated mother lapse into a coma and die on the couch.
- Stokes' had almost no supervision as a child.
- Stokes' home had no running water and he would often steal food in order to eat.
- Stokes missed school regularly and dropped out of ninth grade at age 18.

JA2552, JA2557–58, JA2868–69, JA3114–19. If trial counsel had been aware of this heart-wrenching history, they likely would have thought more carefully about putting it before the jury. But due to their paltry investigation, they never had the opportunity to make an informed decision.

The inadequacy of trial counsel's investigation is also underscored by their testimony that they thought Stokes had simply experienced a "poor upbringing" comparable to "struggles" that "a lot of us had." App. 30 (quoting JA3524). If trial counsel had acquired anything like an adequate command of the facts of Stokes' upbringing, they would have realized that Stokes' traumatic childhood was exceptional even by the standards of Branchville, South Carolina in the 1960s and '70s. Stokes experienced more than run-of-the-mill poverty; he suffered extreme abuse, neglect, and deprivation. Indeed, interviews with people from Stokes' town confirmed that they considered his upbringing unusually difficult even for their community. *See* JA3220 ("People would talk about how the kids were treated bad and probably should be taken away"); JA3214 ("Everybody knew about Richard and Pearl's drinking habits" and that Stokes and his sister "pretty much raised themselves" and weren't "cared for as they should have been"). Not surprisingly, applying CDC criteria for measuring childhood adversity, Dr. Garbarino found that Stokes was likely exposed to more childhood adversity than 99.9% of the American population. App. 5 & n.1.

2. The Fourth Circuit also correctly held that counsel's "subsequent decision to withhold the personal mitigation evidence they did have was also

objectively unreasonable." App. 30. Given the State's robust aggravating evidence, trial counsel should have known that mitigating evidence would be critical to persuading at least one juror to spare Stokes' life. And Stokes' family members, among others, were prepared to testify. *Id.* The decision to present *no* mitigation defense whatsoever, despite substantial and readily available evidence, is an extraordinary one that demands a commensurate justification. But trial counsel's explanation for the decision does not even come close to justifying it, and the State's attempt to rescue it with after-the-fact rationalizations fares no better.

Trial counsel's own testimony shows that the decision to abandon a mitigation defense was based on little more than crude stereotypes and faulty reasoning. Johnson questioned how he could "go to a jury . . . particularly African-American" and highlight Stokes' "poor upbringing" as a reason to "overlook" the brutality of his crime. JA3524–25. This explanation, tinged by bogus racial generalizations, betrays an obvious misunderstanding of the role of mitigating evidence. *See* App. 30–33. As a more experienced capital defense attorney could have told Johnson, the point of mitigation is not to deny the severity of the defendant's crimes, but to provide context for them—to give the jury something to "humanize [the defendant] or allow [the jury] to accurately gauge his moral culpability." *Porter*, 558 U.S. at 41; *see also Williams*, 529 U.S. at 398 (explaining that "the graphic description of [the defendant's] childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability").

Trial counsel's assumption that South Carolina jurors in the 1990s, and particularly African-Americans, would be unsympathetic to a personal mitigation story was also objectively unreasonable. *See* App. 33–34. The idea that a troubled childhood can have damaging effects on a man's psyche, well into adulthood, is not an invention of the twenty-first century. Nor is it dependent on skin color. As the Fourth Circuit pointed out, 10 years before Stokes' trial, this Court referred to "the belief, *long held by this society*, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." App. 34 (quoting *Penry*, 492 U.S. at 319). Thus, even putting aside counsel's meager investigation, and "giving appropriate deference to trial counsel's strategic judgment," the Fourth Circuit correctly concluded that trial counsel's failure to present mitigation evidence was "objectively unreasonable under professional standards at the time of the representation." *Id.*

Nevertheless, the State asserts that the Fourth Circuit "egregiously erred" in finding trial counsel's performance deficient. Pet. 28. The State tries to frame counsel's decision to withhold all mitigation evidence as the product of reasoned strategy. But a poorly informed decision cannot in any meaningful sense be considered strategic. Counsel cannot be "in a position to make a reasonable strategic choice as to whether to focus on . . . the sordid details of [a defendant's] life history" when "the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 536. Here, as discussed above, trial

counsel's belated, half-baked investigation was plainly unreasonable.

Furthermore, even if counsel somehow "had a strategy," as the State insists, Pet. 29, any strategy they may have had was objectively unreasonable. The State cites two "strategic" considerations, neither of which is persuasive. First, the State notes trial counsel's "fear[]" that a South Carolina jury in 1999 would view a claim of a "bad upbringing" as "mere excuse-making." Pet. 28. As discussed above, however, this "fear" had no reasonable basis—not least because, as competent counsel would have learned, Stokes experienced much worse than just a run-of-the-mill "bad upbringing."

Second, moving beyond trial counsel's testimony and into the realm of post hoc rationalization, the State speculates that "[c]ounsel did not wish to undermine the shift of culpability to Martin." Pet. 29. But trial counsel never raised that concern, and the State cites no record evidence that this concern actually factored into counsel's decision not to present mitigation evidence. *Cf. Wiggins*, 539 U.S. at 526–27 (state's invocation of a "'strategic decision' . . . to justify counsel's limited pursuit of mitigating evidence resemble[d] more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations").

In any event, the argument makes no sense on its own terms. The State's theory appears to be that calling mitigation witnesses such as Stokes' sister would have opened the door to testimony about Stokes' childhood bullying of Martin. *See* Pet. 25; App. 44 (citing JA2529). But in South Carolina, there is no

danger of "opening the door" by presenting mitigation evidence. As PCR counsel explained, the State "doesn't have to wait for a door to be opened to put on evidence of a defendant's purported bad character" because it is free to introduce that evidence on its own. JA3301.

Here, the prosecutors showed no interest in presenting evidence about Stokes' relationship with Martin when both were children. If they had wanted to go down that road, they could easily have elicited such testimony from Martin himself or any number of other witnesses. And the impact of such testimony would have been negligible: Stokes' behavior toward Martin as a child would have been of limited probative value about their relationship as adults, and the same mitigation evidence that would have contextualized Stokes' crimes could also have helped explain any alleged mistreatment of Martin.

B. The Fourth Circuit Properly Concluded That Stokes' PCR Counsel Performed Deficiently.

The Fourth Circuit also correctly held that PCR counsel's performance was objectively unreasonable, again for two distinct reasons. *See* App. 16. First, it held that although PCR counsel's investigation improved on trial counsel's, "their investigation was nevertheless inadequate because they ignored the valuable leads they uncovered" and "did not retain an expert capable of applying their investigator's findings." App. 19–20. Second, it held that "[b]eyond the investigation's shortcomings," "PCR counsel's abandonment of the mitigation claim was objectively unreasonable." App. 22, 26; *see* App. 23–27. Again,

the State's petition ignores the first of these two grounds, either of which is independently sufficient. *See* Pet. 31–34.

1. While PCR counsel's development of mitigation evidence certainly improved on trial counsel's cursory investigation, it still fell short of professional standards. The adequacy of an investigation depends not only on the "quantum of evidence already known" but also on whether that evidence "would lead a reasonable attorney to investigate further." App. 17–18 (quoting *Wiggins*, 539 U.S. at 527). Here, despite numerous red flags calling out for a full-fledged mitigation inquiry, counsel conducted "essentially no investigation beyond [their] investigator's interviews"; did not re-interview witnesses themselves or seek out corroborating documentary evidence; and did not speak to or request files from important witnesses retained by trial counsel, including a social worker and neurologist. App. 20.

"[P]erhaps most consequentially," PCR counsel failed to "retain an expert capable of applying their investigator's findings"—someone who could take the raw materials of the investigation and translate them into powerful scientific testimony about the psychological and behavioral effects of Stokes' traumatic childhood. *Id.* Without putting that valuable raw material in the hands of an expert, the Fourth Circuit concluded, counsel failed to make the required "efforts to discover *all reasonably available* mitigating evidence." *Id.* (quoting *Wiggins*, 539 U.S. at 524). Indeed, when asked about the decision not to hire an expert, Lominack acknowledged "some degree of embarrassment" at how he handled cases "early in

[his] career" and testified that the omission reflected his lack of experience and fell short of the professional "standard of care." App. 21 (quoting JA2621).

The State's petition does not address the Fourth Circuit's conclusion that PCR counsel's mitigation investigation was inadequate, which by itself justifies the conclusion that PCR counsel provided ineffective assistance.

2. Even "[b]eyond the investigation's shortcomings," PCR counsel had no good reason for abandoning a strong mitigation-based ineffectiveness claim in favor of a bevy of meritless claims. App. 22–23. By PCR counsel's own admission, the abandonment of the mitigation claim resulted from "distract[ion]," inexperience, and carelessness rather than strategic assessment. App. 23; *see also, e.g.*, JA2918 ("I don't recall having a specific reason why we would abandon a general mitigation claim."); JA3031 ("[T]o be blunt, I'm not sure we were that thoughtful about it."). Counsel admitted that they lost sight of the mitigation claim because they became distracted by the "shiny object" of the intellectual-disability claim. JA3259. But nothing stopped them from pursuing both claims simultaneously, or at least "revisit[ing]" the mitigation claim after they abandoned the intellectual-disability claim. JA3262.

Even if PCR counsel's decision to drop the mitigation claim in favor of other claims could somehow be construed as strategic, it was objectively unreasonable because the mitigation claim was "clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *see* App. 24–25 & n.7. In their final amended application,

PCR counsel omitted the mitigation claim but raised *seven* other claims. JA1760–63. Of those seven claims, four (including the intellectual-disability claim) were so weak that counsel later abandoned them without a ruling, and two more were obviously meritless because (among other reasons) they faulted appellate counsel for failing to argue points that had not been preserved at trial. App. 25 & n.7. The weakness of these claims reinforces PCR counsel's testimony that they had no strategic reason for not pursuing the far stronger mitigation claim, which was similar to claims on which this Court had granted relief (even under the more deferential AEDPA standard) while the PCR proceedings were pending.

The State does not make any real attempt to rebut the Fourth Circuit's careful analysis. Instead, it argues that the Fourth Circuit should have deferred to the district court's finding that PCR counsel "made an intentional decision to withdraw the [mitigation] claim." Pet. 32. But whether counsel's decision to drop the claim was in some sense "intentional" is irrelevant; the question is whether they made a reasonable strategic decision based on an adequate investigation and a proper assessment of the claim's merit. As the Fourth Circuit explained, "intentionality does not guarantee reasonableness." App. 18.

In any event, deference is warranted only "[i]f the district court's account of the evidence is plausible *in light of the record viewed in its entirety*." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) (emphasis added). And as the Fourth Circuit also explained, the district court "largely ignored PCR counsel's testimony" and rested its determination on a

snippet of cross-examination testimony in which PCR counsel agreed that "'there had to be a reason'" they withdrew the mitigation claim. App. 24 n.6 (quoting JA3840–41). That snippet could not remotely bear the weight the district court placed on it. For one thing, counsel explained exactly what the "reason" was: they became "unreasonably hyper-focused on the intellectual-disability claim to the exclusion of a more general mitigation claim." JA2992; *see also* JA2918, 3259, 3358. For another, the snippet the district court cited pertained only to counsel's "reason" for dropping the mitigation claim in 2004 in favor of the intellectual-disability claim, *see* JA3376–77—not counsel's failure to revisit the mitigation claim after the intellectual-disability claim failed to pan out, which counsel admitted was neither intentional nor strategic but inadvertent. *See, e.g.*, JA2908, 3262.[2]

In short, in light of the record as a whole, it is clear beyond dispute that whatever "reason" PCR counsel may have had for not pursuing the mitigation claim—whether inattention, distraction, or inexperience—it

[2] The State's suggestion that it may have been reasonable for PCR counsel to withdraw the mitigation claim to prevent the State from accessing privileged information in trial counsel's files, Pet. 33–34, is baseless for several reasons. First, any privilege was waived when Stokes included the mitigation claim in his initial PCR application, and such waiver "cannot be whittled down by the subsequent amendment of the application." *Binney v. State*, 683 S.E.2d 478, 480 (S.C. 2009). Second, by the time PCR counsel withdrew the mitigation claim, the State had already deposed trial counsel and been afforded access to his files. *See* JA1510, 1549–50. Third, PCR counsel continued to pursue the conflict-of-interest claim, which also would have entitled the State to access trial counsel's files.

was, as PCR counsel put it, not a "real strategic reason." App. 24 (quoting JA3031). The Fourth Circuit rightly refused to defer to any contrary conclusion by the district court.

C. The Fourth Circuit Properly Applied the Prejudice Prong of the *Strickland* Standard.

1. There can be no dispute that the Fourth Circuit articulated the proper legal standard for finding prejudice. As the panel recited, a habeas petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 28 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability need not be a likelihood; it need only be "a probability sufficient to undermine confidence in the outcome." App. 35 (quoting *Strickland*, 466 U.S. at 694–95). In capital sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." App. 34–35 (quoting *Strickland*, 466 U.S. at 694–95). When the sentencer is a unanimous jury, prejudice "requires only a reasonable probability that at least one juror would have struck a different balance" when deciding whether to spare a defendant's life. App. 35 (quoting *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (per curiam)).

The Fourth Circuit correctly applied these standards to the facts of this case, which easily demonstrate *Strickland* prejudice. Stokes' life story contained an abundance of compelling mitigation

evidence, but due to counsel's serious errors, the jury heard *none* of it. As a result, the jurors heard only aggravating evidence and "nothing that would humanize [Stokes] or allow them to accurately gauge his moral culpability." *Porter*, 558 U.S. at 41. Even then, the jury apparently contemplated sparing Stokes' life, sending the court a note that asked about the privileges Stokes would have in prison. JA1405. Clearly, on this record, if trial counsel had presented a competent mitigation defense, there is at minimum "a reasonable probability" that "at least one juror" would have struck a different balance "when appraising Stokes' moral culpability and deciding on death." App. 35.

Again, the State has no real answer to this analysis. The State asserts that the "callousness" of the murder Stokes committed "sets this case apart." Pet. 17–18. But callous acts of violence are typical in death-penalty cases, which are "confined . . . to a narrow category of the most serious crimes." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). The whole point of social-history mitigation evidence is to explain how trauma, abuse, and neglect can result in such callousness.

The Fourth Circuit's analysis was consistent with—indeed, compelled by—this Court's precedent. In case after case, this Court has found prejudice due to counsel's failure to present mitigation evidence in capital sentencing proceedings, even in cases involving brutal murders and substantial aggravating evidence. For example, in *Rompilla*, the defendant stabbed a bar owner and set him on fire; the jury found (unlike here) that the murder involved torture; and

the defendant had a history of violent felonies, including rape. 545 U.S. at 377–38, 383. Yet this Court still found that it "goes without saying" that trial counsel's complete failure to present mitigating evidence of Rompilla's troubled childhood was prejudicial. *Id.* at 393; *see also Wiggins*, 539 U.S. at 514 (defendant drowned a 77-year-old woman "in the bathtub of her ransacked apartment"); *Williams*, 529 U.S. at 418 (Rehnquist, J., concurring in part and dissenting in part) (besides beating a man to death, defendant "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw" (quotation marks omitted)). Notably, in *Williams* the Court found prejudice even while applying AEDPA deference, which is "not in operation when," as here, "the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

2. The State also purports to identify three specific errors in the Fourth Circuit's prejudice analysis. Each of the State's arguments is meritless.

First, the State contends that the Fourth Circuit "misconstru[ed] South Carolina law on what aggravating evidence may be considered" by the jury. Pet. 18; *see id.* at 18–24. As an initial matter, this Court almost never grants certiorari to review a federal court's interpretation of state law. Instead, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542

U.S. 1, 16 (2004). There is no reason to depart from that custom here, where the State's argument is devoted entirely to a single footnote in the Fourth Circuit's decision. *See* App. 35 n.10.

In any event, the State mischaracterizes the footnote. The Fourth Circuit did not announce any holding about South Carolina law, let alone a rule that it was "prohibited from considering [aggravating] evidence not reflected in the jury's eligibility findings." Pet. 18. Rather, the court observed that, at the eligibility phase of Stokes' capital sentencing, the jury had specifically declined to find certain aggravating facts that the State had sought to prove—namely, that Stokes tortured Snipes or murdered Ferguson. As a result, the Fourth Circuit explained, it was unreasonable for the district court to assume that the jury had turned around and credited that very same evidence at sentencing. To be sure, the jury was permitted to consider that evidence regardless; but as the Fourth Circuit correctly recognized, the jury's refusal to find a charged aggravator demonstrates the weakness of the prosecution's case with respect to that factor.

In any event, the Fourth Circuit's prejudice analysis did not turn on this point. With or without the specific aggravating factors the jury rejected, the court readily acknowledged that "there is no doubt that the State's aggravation case was extensive" and that Stokes' crime included "horrific elements." App. 35–36 & n.10 (quotation marks omitted); *accord* Pet. 19 ("It was not as if the majority misunderstood that tremendous aggravation evidence was presented to the jury"). That much was never in dispute.

Rather, as the Fourth Circuit explained, the "prejudice analysis turns on the likely influence of dramatic mitigation evidence on a jury that heard dramatically little about the defendant." App. 38. In that context, the court sensibly concluded, "the weight of the unpresented mitigation evidence is significantly increased, enough to outweigh even the upsetting and extensive aggravating evidence." *Id.* (citing *Wiggins*, 539 U.S. at 537).

Second, the State argues that any mitigating evidence in this case would have been "double-edge[d]." Pet. 24–25. For one thing, the State says, discussing Stokes' background would have "allow[ed] the evidence of [his] domination and abuse of Martin" to undermine trial counsel's attempt to shift responsibility for the crime to Martin. Pet. 25. As discussed above, however, the argument is meritless. The mitigation evidence would not have opened the door to harmful testimony about Stokes' relationship with Martin because (1) the State could have elicited that testimony anyway, and (2) any impact of such testimony would likely have been minimal. *Cf. Sears*, 561 U.S. at 951 ("[T]hat along with this new mitigation evidence there was also some adverse evidence is unsurprising. . . . This evidence might not have made Sears any more likeable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts.").

The State also contends that evidence about Stokes' traumatic childhood would have been "double-edged" because it would have suggested that Stokes was predisposed toward violence. Pet. 25. Of course, mitigating social-history evidence is always "double-

edged" in this limited sense, because evidence offered to explain a defendant's criminality invariably underscores the defendant's dangerousness. Yet this Court has repeatedly found prejudice from counsel's failure to develop and present such evidence. And here, the jury heard plenty of other evidence of Stokes' dangerousness; what it did not hear was *any* evidence that could *explain* Stokes' violent behavior.

Third, the State claims that the Fourth Circuit "lowered the burden of proving prejudice." Pet. 26. The court did no such thing. As noted above, the Fourth Circuit carefully and accurately stated the well-established standards for evaluating *Strickland* prejudice. Ignoring all of that, the State selectively quotes a single sentence in which the court noted that "[t]he addition of just some meaningful mitigating evidence could be enough to sway one juror against death." App. 36. But as the opinion as a whole makes clear, the court did not assume that just "any" mitigating evidence would do. Pet. 26 (emphasis omitted). Rather, as this Court's precedent commands, the panel considered whether the compelling evidence here had a "reasonable probability" of swaying at least one juror to spare Stokes' life. App. 28–29, 34–35 (quoting *Strickland*, 466 U.S. at 694). And far from "speculat[ing]" on that question, Pet. 26, the Fourth Circuit issued a rigorous, well-reasoned opinion laying out in detail the basis for its conclusion.

III. The State Forfeited Any Argument That This Case Should Be Held For *Shinn v. Ramirez.*

The State concludes with a last-ditch request to hold this case pending the Court's decision in *Shinn v.*

Ramirez, No. 20-1009 (argued Dec. 8, 2021). Pet. 34–35. That case will address whether, when *Martinez* allows a federal court to reach the merits of an otherwise defaulted claim, 28 U.S.C. § 2254(e)(2) nonetheless bars the court from considering evidence outside the state-court record in ruling on the claim. Here, however, the State has clearly forfeited any argument that could be implicated by *Ramirez*. Although the State initially raised the § 2254(e)(2) argument before the magistrate judge, it never obtained a ruling on it, never presented the argument to the district judge or the Fourth Circuit panel, and did not raise it again until belatedly trying to revive it in its petition for rehearing en banc. Given the State's failure to preserve the issue, there is no justification for a hold pending *Ramirez*.

True, the State relied on § 2254(e)(2) in objecting to the "scope of the [evidentiary] hearing" held by the magistrate judge. JA2862. The State conceded that a hearing was appropriate to receive evidence relevant to whether the default could be excused under *Martinez*, but it argued that the court should *not* receive evidence relevant to the *merits* of the underlying claim. *See* D.S.C. Dkt. 159 at 4–6. As Stokes pointed out, however, the State's objection to the scope of the hearing was "unworkable practically and legally" because all the evidence that was relevant to the merits of the underlying claim was *also* relevant to establish PCR counsel's ineffectiveness and the claim's substantiality, as *Martinez* required. D.S.C. Dkt. 158 at 2. The State never rebutted that argument or identified any evidence presented at the hearing that was not relevant to the threshold *Martinez* issue.

After the hearing, the State apparently determined that the § 2254(e)(2) argument was not worth pursuing further. The magistrate's report considered evidence outside the state-court record in addressing "the merits of the underlying ineffective-assistance-of-trial-counsel claim." App. 300. In response to Stokes' objections to the report, the State did not mention § 2254(e)(2). Instead, it relied on new evidence to defend the magistrate's ruling on "the merits of the underlying claim" and urged the district court to adopt the magistrate's report in its entirety. JA3801, JA3804. The State thus never sought or obtained a ruling from the district court on the § 2254(e)(2) issue.

Worse yet, the State failed to raise the issue at all in its briefing or oral argument before the Fourth Circuit panel. The State's 100-page brief did not even cite § 2254(e)(2). In the Fourth Circuit, as elsewhere, "[a] party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (quotation marks omitted); *see also Hillman v. IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001); 16AA Wright & Miller, Federal Practice and Procedure § 3974.2 (5th ed.) ("An appellee who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited").

Not only did the State fail to cite § 2254(e)(2); its brief also affirmatively relied on evidence outside the state-court record in arguing the merits of the underlying ineffective-assistance claim. *See, e.g.*, CA4 Dkt. 55-1 at 31–56. The State expressly argued

that even if Stokes' default could be excused under *Martinez*, the Fourth Circuit should affirm on the ground that Stokes "had a full opportunity to present the merits of his claim at an evidentiary hearing" and failed to "prove his case under *Strickland*." *Id.* at 71. The State never suggested that the Fourth Circuit needed to limit itself to the state-court record in ruling on the merits of the underlying claim. *See* CA4 Dkt. 55-1. Nor did the State say a peep about § 2254(e)(2) at oral argument. CA4 Dkt. 78 (Oral Argument), *available at* https://www.ca4.uscourts.gov/OAarchive/mp3/18-0006-20210506.mp3.

The State did eventually raise the issue in its petition for rehearing en banc, but that was far too late. *See* CA4 Dkt. 81-1 at 14–15. Parties must raise issues in their panel briefing to avoid forfeiture. *See, e.g.*, *Mayfield*, 674 F.3d at 377; *Hillman*, 263 F.3d at 343. Absent an intervening change of law, the Fourth Circuit does "not consider issues raised for the first time in a petition for rehearing." *United States v. Carter*, 471 F. App'x 136, 137 (4th Cir. 2012) (per curiam). The State's rehearing petition identified no intervening change of law. Nor did the State explain why it had not only declined to pursue this argument before the panel, but had even affirmatively argued that the panel could consider new evidence in ruling on the underlying claim. Thus, as Stokes pointed out in his response to the en banc petition, the State forfeited the issue. CA4 Dkt. 84 at 13. And not a single judge called for a vote on rehearing. App. 334.

In light of this history, it is remarkable that the State's petition for certiorari does not even attempt to explain why the State's briefing in the court of appeals

did not forfeit the § 2254(e)(2) argument. Against this backdrop, holding this case for *Ramirez* would unjustly reward the State for its failure to press the issue consistently and preserve it for appeal.[3]

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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[3] Even if the State had not forfeited this argument, a ruling in favor of the petitioner in *Ramirez* would not entitle the State here to a remand with "directions to enter an order affirming the denial of relief." Pet. 35. Instead, the Fourth Circuit would need to address other issues in the first instance, including alternative grounds for relief that the panel did not reach. *See* App. 15.