No. A_____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SAMMIE LOUIS STOKES……..……..Respondent,

CAPITAL CASE

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING THE WARDEN'S FILING OF A PETITION FOR WRIT OF CERTIORARI

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Stokes v. Stirling, 10 F.4th 236 (4th Cir. 2021)

APPLICATION

TO: THE HONORABLE JOHN G. ROBERTS, JR., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit

Pursuant to Rules 22 and 23 of the Rules of the Supreme Court, as well as 28 U.S.C. § 2101(f), Applicants Stirling and Stephan (collectively "the Warden") respectfully seek an order staying the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in *Sammie Louis Stokes v. Stirling*, No. 18-6, reported at 10 F.4th 236 (4th Cir. 2021). (Attachment 1).

INTRODUCTION

This is a capital case from South Carolina. Stokes was sentenced to death on October 31, 1999. Stokes exhausted state remedies through his direct appeal, post-conviction challenge, and post-conviction challenge appeal. He received no relief in the state courts. Stokes turned to the federal courts and sought habeas relief under 28 U.S.C. § 2254. He presented a defaulted ineffective assistance of trial counsel claim alleging trial counsel failed to investigate and present mitigation – specifically, evidence of Stokes' disadvantaged background and expert testimony on developmental risk factors. Stokes asserted reliance on *Martinez v. Ryan*, 566 U.S. 1 (2012), and alleged his well-qualified collateral counsel were ineffective in failing to pursue the claim. Collateral counsel had asserted the claim against trial counsel in state proceedings, but later intentionally withdrew it. After a rare evidentiary hearing in district court to consider the *Martinez* argument, the federal magistrate, assessing credibility and making initial findings of fact, recommended finding Stokes failed to show ineffective assistance of collateral counsel, and failed to avoid the

default. Carefully reviewing the state record, and the new federal record, and the magistrate's report, the district court determined that collateral counsel were not ineffective, and the claim was defaulted. The district court also found that the trial counsel claim would not support relief. The district court, consistent with federal law and the relevant South Carolina procedure, considered the whole of the evidence presented in resolving Stokes could not carry his burden of proof. (J.A. 3837-49). Stokes appealed.

A Fourth Circuit panel majority, over dissent, rejected the district court findings, found collateral counsel was ineffective, and concluded that the default should be excused. The majority then determined trial counsel was deficient in failing to retain an expert and present the evidence, and, discounting certain evidence in aggravation, determined Stokes was prejudiced such that he should be awarded a new sentencing proceeding. The Warden moved for rehearing en banc which was denied on September 23, 2021. (Attachment 2). The Warden moved to stay the mandate pursuant to Rule 41(d), Federal Rules of Appellate Procedure pending the anticipated filing of a petition for writ of certiorari in this Court. Stokes, while not agreeing there was a substantial issue, did not oppose the motion. On Friday, October 1, 2021, two judges voted to deny the motion, and one voted to grant the motion. (Attachment 2). The mandate will return the matter to the district court to set a schedule for the State to accomplish a new capital sentencing proceeding to

avoid the grant of the habeas petition.[1] The Warden seeks a stay of the mandate pending the filing and resolution of a petition in this Court.

The Warden consulted with opposing counsel prior to the filing of this application. The Warden is informed that Stokes opposes the application in light of the Fourth Circuit denying the Warden's request to stay the mandate. The Warden's petition is due to be filed on or before *December 22, 2021*. The Warden seeks an order to stay the mandate (or, if the mandate is issued before a ruling on this motion, to recall the mandate and stay reissuance) in order to seek review by this Court.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id. See also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.); *Baltimore City Dept. of Social Services v. Bouknight,* 488 U.S. 1301, 1303-1304 (1988) (Rehnquist, C.J.). The Warden submits application of the factors to the facts of this case supports granting a stay.

[1] The specific relief is to "remand with instructions that the district court issue the writ of habeas corpus unless the State of South Carolina grants Stokes a new sentencing hearing within a reasonable time." (Slip Op. 36).

I. There is a reasonable probability that the Court will grant *certiorari* and a fair prospect that it will reverse the Fourth Circuit majority.

The Warden submits there are several substantial questions to raise regarding the majority's grant of relief on a defaulted issue in 28 U.S.C. § 2254 review. The Warden, though, specifically brings to the Court's attention a substantial claim of particular importance that is dispositive and necessitates a reversal of the grant of relief – error in the prejudice analysis.

A. Relevant Facts for the Issue:

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; *see also* J.A. 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). The State alleged that Stokes and a co-defendant kidnapped Connie Snipes, raped her, and killed her. Attorneys Thomas Sims and Virgin Johnson (trial counsel) represented Stokes. Thomas Sims had previously served as an assistant solicitor and acting solicitor for ten years. (J.A. 1513). In that capacity, he prosecuted six or seven death penalty cases. (J.A. 1514). When Sims was appointed to represent Stokes, he had been in private practice for six years. During that time, Sims handled two more death penalty cases, one of which was tried to verdict. (J.A. 1514-15). Virgin Johnson was second chair and also a former assistant solicitor. (J.A. 1658). He had tried over fifteen felony cases. (J.A. 1658, 3507). Counsel faced not only a trial with a significantly aggravated murder at issue, but knew that, in sentencing, additional evidence of a second murder – one Stokes committed several days later to

prevent the victim (Doug Ferguson) from implicating Stokes in the first murder – would be admitted. The general facts, as summarized by the Supreme Court of South Carolina in the direct appeal opinion, are as follow:

> Stokes was hired by Patti Syphrette to kill her daughter-in-law, 21–year–old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30 pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin. The four of them then drove down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead ..."
>
> 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, 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.
>
> Snipes' body was found by a farmer on May 27th, and Martin's wallet was found in the field near it. Martin was interviewed by police the following morning, after which police went to the Orangeburg home of Pattie Syphrette's husband Poncho; by the time police arrived at the home on May 28, 1998, Stokes and Syphrette had already murdered Doug Ferguson by wrapping duct tape around his body and head, suffocating him.

State v. Stokes, 548 S.E.2d 202, 203–04 (S.C. 2001).

Stokes gave a detailed confession and admitted that, while serving another sentence in the Department of Corrections, he was hired to kill Snipes. Stokes recalled he told Syphrette he would charge $2,000, and she would have "10 months to come up with the money and the gun" as he completed his sentence. (J.A. 1438). In

May 1998, Stokes was released. That same month, he killed Snipes and also killed Doug Ferguson. (*See* J.A. 1439-50).

A jury trial was held in October of 1999. The jury found Stokes guilty of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy. After a separate, individualized sentencing proceeding, the jury assessed death was the appropriate penalty. (J.A. 1465-69). The Supreme Court of South Carolina affirmed on direct appeal review. *Stokes, supra.*

Stokes subsequently applied for post-conviction relief (PCR) in state court. Attorneys Keir Weyble and Robert Lominack were appointed to represent him. (J.A. 1752). PCR counsel filed an amended application with several grounds. In one, PCR counsel alleged ineffective assistance of trial counsel in "fail[ing] to investigate and present available mitigating evidence during the sentencing phase…." (J.A. 1495). However, PCR counsel later intentionally withdrew this allegation. (J.A. 1510, 1552-56). The state PCR court held an evidentiary hearing, and ultimately dismissed the case with prejudice. (J.A. 1752-97, 1810-32). Though Stokes appealed, he received no relief.

Stokes then turned to the federal courts. In his Section 2254 action, he alleged ineffective assistance of counsel in failing to investigate, develop, and present additional mitigating evidence at sentencing, an issue that Stokes failed to properly exhaust. Stokes asserted ineffective assistance of PCR counsel under *Martinez v. Ryan*, as an excuse for his procedural default. The federal magistrate subsequently held an evidentiary hearing to determine whether cause existed under *Martinez*, and

if so, whether the claims warranted habeas relief. (ECF 129). After hearing testimony from several witnesses, including former counsel, the magistrate recommended that the case be dismissed. (J.A. 3756). Specifically, the magistrate reasoned Stokes neither established that the underlying claims were substantial, nor that PCR counsel were deficient in failing to raise them. (J.A. 3716-55). The district court adopted the magistrate's recommendation as modified. (J.A. 3806). The district court also resolved Stokes failed to establish PCR counsel were deficient. (J.A. 3839).

On appeal, the Fourth Circuit panel majority weighed and credited the direct testimony by PCR counsel in the federal district court hearing more favorably, while the district court had weighed and credited PCR counsel's testimony from cross more favorably. Ultimately, over a vigorous dissent, the panel majority excused the default, and found trial counsel deficient. In assessing prejudice, the panel majority discounted to non-existence the evidence of mutilation in the crimes against Snipe and the evidence of the Ferguson murder because the jury did not return certain statutory aggravating circumstances. The Warden explained South Carolina was not a "weighing" state that required specific findings to be made and weighed against other findings. However, rehearing en banc was denied.

B. The Fourth Circuit panel majority misapplied *Strickland's* direction that prejudice in capital sentencing proceedings must be considered in light of the "governing legal standard," and discarded highly significant aggravating evidence supporting the death sentence (including that of a second murder to avoid detection of Stokes' involvement in the first).

The Warden underscores that the relief from a divided panel, if allowed to stand, would upset a state capital sentence that has withstood challenges from the

time it was imposed in the late 1990s. This Court has repeatedly underscored the mandate in its federal habeas jurisprudence to refrain from upsetting state criminal dispositions except in rare and extreme cases. *See, e.g., Harrington v. Richter,* 562 U.S. 86 (2011). Further, to grant relief on a defaulted claim is particularly intrusive. *See, e.g., Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) ("the doctrine of procedural default … like the federal habeas statute generally, is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges"). Here, Stokes had been denied relief on a defaulted claim by the district court after careful consideration which included consideration of additional evidence offered at an evidentiary hearing. He has only now been bestowed the possibility of resentencing by the most narrow of margins – a split panel decision from the Court of Appeals (over a strong and sound dissent). A review of the panel majority's opinion shows the opinion is neither factually nor legally sound. In particular, the Fourth Circuit egregiously erred in the *Strickland* prejudice analysis and failed to consider the evidence in the manner required by South Carolina law. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

1. The Fourth Circuit panel majority diminished the critical aggravating evidence of the circumstances of the crime by applying a weighing-state prejudice analysis contrary to the applicable South Carolina process.

The majority, noting that the jury did not return certain statutory aggravating circumstances, 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." (Slip Op. 32 n. 10). This is wrong. In South Carolina, statutory aggravating circumstances go only to eligibility, not selection. The Fourth Circuit had acknowledged this fact of state structure before in its precedent. It had previously found that South Carolina jurors are not instructed to "weigh the aggravating circumstances against the mitigating circumstances." *Middleton v. Evatt*, 77 F.3d 469 (4th Cir. 1996). Instead, juries are instructed to determine whether the State proved beyond a reasonable doubt that *at least one* statutory aggravating circumstance exists. The whole of the sentencing proceeding evidence is then considered. *See, e.g., 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"). In another recent case, though, the Fourth Circuit again departed from what is plainly South Carolina structure. In *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), the Fourth Circuit referenced that "the State only presented one aggravating *factor*" which it then construed as the "*solitary aggravating evidence*" to be "weighed against the totality of the mitigating evidence…." *Id* at 318-19. (emphasis added). That is incorrect, as well. This case now shows a troubling repeat of the recent error that increases the need for correction lest all South Carolina capital cases (or any case from a non-weighing state) be incorrectly assessed. Of note, South Carolina capital sentencing structure has not changed in

this regard. Consequently, there is no support for the change in circuit precedent regarding the controlling state structure. [2]

The Fourth Circuit, thus, committed a major error in consideration of the sentencing case – an error it then used to upset a state sentence. Regardless of statutory aggravators, the evidence of mutilation and another murder is properly considered as showing circumstances of the crime and the defendant's character – the focus in sentencing. The panel majority erroneously discarded this highly relevant record evidence.[3] Further, this is not an error isolated to the Fourth Circuit.

2. This Court set out the proper standard in *Strickland* directing that reviewing courts should use the "governing legal standard" when assessing prejudice, yet there is a prominent split in the Court of Appeals as to the application of the proper standard under which to review sentencing error from weighing and non-weighing jurisdictions. More than simple error correction in one case, this case presents a larger issue of importance regarding adherence to this Court's precedent.

The manner in which the panel majority conducted its *Strickland* prejudice analysis shows substantial error on its own and should support certiorari; however, there is more. There is a developed split in the Court of Appeals of how to properly effect the *Strickland* test in habeas review from cases arising from weighing versus

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[2] Adding additional error to its opinion, the panel majority also incorrectly shortened the actual statutory aggravating circumstance at issue. The panel majority suggested the jury did not find "that two or more persons were murdered by the defendant." (Slip. Op. 32 n. 10). The statutory aggravator is actually, "Two or more persons were murdered by the defendant *by one act or pursuant to one scheme or course of conduct*," S.C. Code Ann. § 16-3-20 (C)(a)(1)(9) (emphasis added). The majority acknowledges the murders were "days" apart and based on a concern that Mr. Ferguson knew about Ms. Snipes' murder. (Slip Op. 6). Stokes explained the same in his confession, and noted he also confronted Mr. Ferguson about a "watch and rings." (*See* J.A. 1220-25). There is a difference between the fact of two murders and the fact the murders are committed within one act or scheme. The second murder, whether within one scheme or not, could properly be considered by the jury as showing something about Stokes' character –something very negative and dangerous.

[3] This was not the only evidence showing Stokes' character. (*See* J.A. 3846-48, detailing prior convictions, assaults, threatening letters, and attacks on other inmates).

non-weighing states. *See* Sarah Gerwig-Moore, *Remedial Reading: Evaluating Federal Courts' Application of the Prejudice Standard in Capital Sentences from "Weighing" and "Non-Weighing" States,* 20 U. Pa. J. Const. L. Online 1 (2018) (identifying a split in the circuits). Again, *Strickland* requires that "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." 466 U.S. at 695. *Strickland* was a Florida case. Florida is a weighing state. Hence, this Court logically looked to factors to be found by the sentencer to weigh against each other. Florida requires findings for both mitigation and aggravation and a determination as to "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." Fla. Stat. § 921.141. South Carolina does not. *See* S.C. Code §16-3-20. This case well-demonstrates the danger of confusing the two systems. It violates the principles of habeas restraint to discard sentencing phase evidence when the state structure at issue does not allow the federal court to do so. Of major consequence to this case, the panel majority discounted tremendous aggravation – aggravation the jury would have considered. This unfairly skewed the prejudice analysis that underpins the grant of relief.

While the Warden submits the panel majority should not have excused the admittedly defaulted mitigation claim, relief could only follow if the majority found *Strickland* prejudice. The panel majority did so, but only by wrangling the most aggravating evidence out of the equation. This is wrong. Moreover, the record additionally shows error in the majority's failure to give deference to the district court's fact-findings and the clear record support for counsel's strategic decisions.

C. The Fourth Circuit majority also failed to give deference to the district court's findings regarding evidence offered to excuse the default under *Martinez v. Ryan* – a hearing that this Court may very-well find 28 U.S.C. § 2254(e) prohibits in deciding the pending case of *Shinn v. Ramirez.*

This is a rare case in which the district court sitting in habeas held a hearing and heard both from collateral and trial counsel regarding the defaulted claim. First, the Warden notes that there are substantial issues related to even holding an evidentiary hearing in such circumstances. This Court has granted Arizona's petition to consider *Martinez's* effect on 28 U.S.C. § 2254 (e)(2) in *Shinn v. Ramirez,* No. 20-1009, 2021 WL 1951793 (Cert. granted May 17, 2021). *See Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings"). Argument is scheduled for November 1, 2021. The Warden in this case objected to the hearing in district court, and maintained the objection to holding the evidentiary hearing, based on limitations in 28 U.S.C. 2254(e)(2). (See J.A. 2848-49; 2850-56; and 2862, maintaining objection).[4] This matter could very-well be affected by the Court's ruling in *Ramirez.* But if not, and the hearing should be considered properly held, then the district court, as a

[4] "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). Stokes, claiming ineffective assistance of PCR counsel, cannot meet that requirement. However, if *Martinez* is somehow read to excuse (e)(2)(A), what of (B)? This requires the petitioner to *additionally* show "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." Therefore, the provisions of (e)(2) bar new evidence for sentencing claims. At a minimum, a stand-alone issue regarding Section 2254(e) is substantial as it directly bears on the allowed scope of federal court review in Section 2254 habeas. Here, the prejudice and injury to the state criminal disposition has increased by the erroneous finding that relief is due.

first-in-time-fact-finder, was entitled to deference for its findings. This the panel majority failed to do.

The panel majority stated mere "disagreement" with the district court and rejected credibility findings made *after a hearing*. (*See* Slip Op. 19-23; J.A. 3841). 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). The panel majority failed to adhere to this limitation in review. Further, the district court's order expressly shows that the court set out a fair recitation of the relevant facts of record, and specifically considered the possible use of the offered new opinion in "explain[ing] the likely consequences of" the background mitigation. (*Compare* Slip Op. 33 *with* J.A. 3843-440). There is no basis to conclude the district court's critical findings are "clearly erroneous." *Id.* Further still, the Fourth Circuit opinion shows the panel majority failed to adhere to the deference mandated by *Strickland*.

D. Judge Quattlebaum correctly explained in his dissent that the majority failed to adhere to this Court's direction in *Strickland* to afford deference to the trial attorney actually trying the case for the capital defendant.

Attorneys make innumerable decisions in representation, taking into account variables known, unknown, predicted and/or feared. Directly echoing *Strickland*, the dissent writes, "For some issues, you can ask ten lawyers and often get ten different

decisions. Nevertheless, decisions must be made," and such "decisions, according to our precedent, merit our highest deference." (Slip Op. at 37-38). *Richter*, 562 U.S. at 105 ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one."). While the majority pays note to the principle, it does not incorporate its mandate.

The dissent correctly took the review back over twenty years to the murder and trial, and acknowledged the overwhelming evidence of guilt including a confession. The dissent acknowledged the trial level investigation and properly resolved the record shows no lack of preparation, but "strategic decision-making by trial counsel in the thick of an intense trial." (Slip Op. 51). The record shows that trial counsel, after investigation and consultation with experts,[5] resolved to "emphasize Stokes' remorse and highlight the conduct and motivation of Norris Martin, who participated in the murder." (Slip Op. 38). Counsel also cultivated a defense around Stokes' AIDS diagnosis that "was its own death sentence" at that time. (Slip Op. 38).[6] Investigation into general background mitigation was not "missed." (*See* Slip Op. 38-42, detailing background details).[7] Trial counsel retained

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[5] Of note, all the cases the panel majority relies upon as showing accepted investigation parameters occurred *after the trial* in this case. (Slip Op. 16 and 27, citing *Williams v. Taylor*, 529 U.S. 362, 391–99 (2000)). *See Ayestas v. Davis*, 933 F.3d 384 (5th Cir. 2019). The majority also misstates the precedent. It is not a Sixth Amendment duty to "present substantial mitigating evidence," but a duty to *reasonably* investigate, and, in turn, make reasonable strategic decision whether to present evidence.

[6] Stokes blocked defense counsel from presenting this defense immediately before the sentencing phase was to begin. (*See* Slip. Op. p. 41).

[7] The majority takes counsel to task for misunderstanding mitigation. (*See* Slip Op. 27-29). The majority announces "[i]f trial counsel believed the jury would not have responded well to a presentation that minimized Stokes's conduct, their duty was to find a way to convey this highly significant evidence without doing so." (Slip Op. 29). Again, this exceeds *Strickland*. 466 U.S. at 689

an expert in social work, but, admittedly, did not retain the specific type of expert the majority claims was necessary for counsel to have provided Sixth Amendment effective assistance. (*See* Slip Op. 18-19 and 28-29). That not only directly conflicts with circuit precedent (oddly, on the exact same expert), *see Owens v. Stirling*, 967 F.3d 396, 416–17 (4th Cir. 2020), but also conflicts with this Court's precedent, *Richter*, 562 U.S. at 106. Simply, not every case requires an expert for effective representation. *Id.*

The dissent further noted that counsel "drew upon their knowledge of the community where the jurors lived" as they "lived in that community too." (Slip Op. 47). Trial counsel Sims testified at the *Martinez* hearing that a trial attorney should know and observe the jury to react and/or readjust as necessary. (*See also* Slip Op. 42, quoting J.A. 3469). Trial counsel Johnson similarly testified to strategy, adding he "would not change" what they thoughtfully decided for the defense at that time. (J.A. 3524-25). The record supports a "contemplative thought process about the pros and cons of using mitigation evidence of Stokes' childhood and upbringing." (Slip Op. 44).[8] The dissent correctly gave deference to that reasoned strategic decision. The majority did not. Instead, the majority countered with establishing a new mandate –

("guarantee of the Sixth Amendment is not to improve the quality of legal representation"). At any rate, the majority quibbles about phrasing regarding "excuse" of actions. (*See* Slip Op. 27). Mitigation is a "remote" way to "reduce culpability" in sentencing (as opposed to guilt), though some even extreme background issues have shown to produce "limited" mitigation effect. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1562-65 (1998).

[8] Counsel did not abandon mitigation. It was important to have a former warden testify that "Stokes could be managed in a maximum-security environment for the rest of his life," (*see* Slip op. 44), especially in light of the fact Stokes had sliced another inmate badly while serving a separate sentence, (J.A. 1061-66). Further, the panel majority failed to acknowledge that Stokes accepted responsibility and expressed remorse. (*See* J.A. 1375-76). ("I been in trouble before but nothing like this… I'm deeply sorry that any of it ever happened and I'm also sorry for the role that I played in it."). Counsel's strategy was consistent with Stokes' own statement and remorse.

counsel's job was to make it mitigating. (Slip. Op. 29, referencing "a presentation that minimized Stokes's conduct").[9] Yet, this we know: to be effective counsel under the Sixth Amendment does not require counsel to transform facts, nor does it require counsel to actually persuade a jury that life is more appropriate then death. It requires reasonable representation. Reasonable representation was shown here.

Further, the dissent correctly relies on *Wong v. Belmontes*, 558 U.S. 15 (2009) in considering the negative that comes with the purported mitigation not presented. When the analysis is properly done, prejudice is soundly rebuffed. For one thing, here, the danger of the precise testimony the majority finds indispensable to fair sentencing was demonstrated to have a cutting, double-edge: it did not simply stop at acknowledging risk factors, but rated Stokes as more likely than the average killer to be violent. [10] The "nothing to lose" mantra loses any persuasion in light of the reality that the mitigation carried aggravation, skyrocketing future dangerousness to new heights while dampening the carefully drawn suggestion throughout the proceedings that Norris Martin was more active in the crime than his testimony would show.

Further, as referenced above, the trial counsel claim was defaulted. PCR counsel did not find this issue worthy to raise in the state PCR process. To be clear, an issue challenging the mitigation presentation was raised in the initial application

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[9] The panel majority's reach to a "make it so" position is not only far beyond the parameters of Sixth Amendment jurisprudence, it is also simply untenable. Again, the dissent addressed this, referencing the "blurry" division between "excuse" and "context" for sentencing the individual: "Even if presented in the best way by the most capable of lawyers, it seems far from unreasonable for Sims and Johnson to be concerned that the jury would not accept that distinction." (Slip Op. 49).

[10] 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 he 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).

even before PCR counsel was appointed. PCR counsel retained the issue in their first amended application filed May 6, 2002. (J.A. 1494-96). It was not until the second amended application dated August 6, 2004, and after substantial investigation, that PCR counsel intentionally withdrew the issue. (*See* J.A. 1552-56; J.A. 3837, district court's detailing counsel's securing funding for experts and investigative steps). Again, the dissent is correct, that the record shows that PCR counsel re-investigated Stokes' background, also with the help of a qualified mitigation investigator, but it was largely unhelpful as "[t]hat investigation also unearthed even more aggravating evidence against Stokes." (*See* Slip Op. 52). In fact, in further support of finding an intentional, strategic decision, on August 12, 2004, PCR counsel wrote to trial counsel advising there was no claim to prompt "waiver of the attorney-client privilege," and counsel for the State "should not be given access to any of your case files, or any other privileged information." (J.A. 2835-36). As the district court found, investigation, withdrawal, and the letter to counsel, together show good evidence of a reasonable strategic decision. (*See* J.A. 3839). The majority credits PCR counsel's direct testimony (under questing by Stokes' habeas counsel) that they should have pursued the claim, (*see* Slip Op. 19-20), but sorely missing is PCR counsel's cross-examination testimony (in response to the Warden's questioning) that conceded PCR counsel "made some sort of judgment" regarding the claim, (*see* J.A. 3840-41, Slip Op. 53 *citing* J.A. 3259). As the dissent correctly reasons, consistent with the district court, "[r]emoving an existing ground provides additional evidence of a conscious decision." (Slip Op. 54, J.A. 3839-41).

Thus, for all these reasons, the Warden submits there are substantial questions to be presented in a petition for writ of certiorari.

II. The State is likely to be irreparably harmed without the stay as the failure to stay relief would result in an immediate division of resources to simultaneous seek review in this Court while beginning preparations for resentencing for this 1990s case. On the other hand, Stokes is in no way entitled to release and remains convicted of murder and subject to capital punishment. The balance of equities favors the requested stay.

The grant of the stay would in essential measure "maintain the status quo" in a matter "which the Court is likely to hear on the merits." *Holtzman v. Schlesinger,* 414 U.S. 1304, 1310 (1973). *See also Bouknight, supra.* In contrast, the damaged principle of comity and respect for the state conviction and sentence will continue to suffer if the State is required to begin resentencing procedures before the Warden has had an opportunity to seek redress. The damage would be especially severe if this Court should reverse the Fourth Circuit. Of no little note, the case was prepared for trial and sentencing during the 1990s. The prosecution has had no need to engage in preparation for retrial/resentencing as there has been no order of relief throughout the many review levels until now. The state prosecution team is no longer available. A new prosecutor must learn the case and learn what is available for resentencing. To conditionally grant the writ while the State seeks review would force the State to begin reconstruction of this 1990's case in preparation for new proceedings some three decades later, while also simultaneously devoting resources to pursue appellate litigation. It would be most prudent to grant a brief stay to allow the Warden an opportunity to seek further review and avoid diversion of significant state resources for resentencing that may be ultimately unneeded.

On the other hand, Stokes has not avoided the state convictions and non-capital sentences. He is rightfully held in the South Carolina Department of Corrections. He cannot be released and the grant of relief does not bar imposition of the death penalty once again. The equities in the situation favor a short stay, especially where the legal issue is substantial.

CONCLUSION

For these reasons, the Court should stay the Fourth Circuit mandate pending the filing the Warden's petition in this Court on or before December 22, 2021, and through disposition of proceedings in this Court.

Respectfully submitted,

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