APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6

[Filed March 22, 2023]

SAMMIE LOUIS STOKES,
Petitioner – Appellant,

v.

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

Appeal from the United States District Court for the District of South Carolina, at Aiken. R. Bryan Harwell, Chief District Judge. (1:16-cv-00845-RBH)

Argued: October 26, 2022 Decided: March 22, 2023

Before GREGORY, Chief Judge, HARRIS, and QUATTLEBAUM, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge

Harris joined. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Paul Alessio Mezzina, KING & SPALDING LLP, Washington, D.C., for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Diana L. Holt, DIANA L. HOLT, LLC, Columbia, South Carolina; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; Ashley C. Parrish, Joshua C. Toll, Isra J. Bhatty, Edward A. Benoit, Alexander Kazam, Nicholas Mecsas-Faxon, KING & SPALDING LLP, Washington, D.C., for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Michael D. Ross, Assistant Attorney General, J. Anthony Mabry, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

GREGORY, Chief Judge:

Sammie Louis Stokes filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising constitutional challenges to his death sentence in South Carolina state court. In 2021, we held that Stokes's death sentence was constitutionally defective because his trial counsel provided ineffective assistance during sentencing. In reaching that conclusion, we relied in part on evidence from an evidentiary hearing a magistrate judge conducted during federal habeas proceedings. Both Stokes and the State of South Carolina ("the State") asked us to consider that evidence when evaluating Stokes's ineffective-

assistance-of-counsel claims. The State appealed to the Supreme Court, which granted the State's petition for certiorari, vacated our 2021 judgment, and remanded the case to this Court for further consideration in light of its decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

In *Shinn*, the Supreme Court held that a federal habeas court may not hold an evidentiary hearing unless the restrictive conditions of 28 U.S.C. § 2254(e)(2) are satisfied. On remand, the State claims that *Shinn* requires us to revisit our prior opinion because we relied on evidence produced during the federal evidentiary hearing. However, the State forfeited this argument by choosing not to raise it during earlier proceedings before this Court, even though it was aware that § 2254(e)(2) might not permit the evidentiary hearing the magistrate judge held. We decline to exercise our discretion to excuse the State's forfeiture, which would potentially reinstate an unconstitutional death sentence and result in grave injustice. Because the State abandoned any argument that our prior opinion relied on inadmissible evidence, we reaffirm that opinion and direct the district court to order resentencing.

I.

In 1999, Stokes was convicted of murder and related charges in South Carolina state court and sentenced to death. After an unsuccessful direct appeal, Stokes filed an application for postconviction relief ("PCR") in state court. Stokes's counsel in the state PCR proceedings initially raised a Sixth Amendment ineffective-assistance-of-counsel claim based on his trial attorneys'

failure, at sentencing, to present any mitigating evidence regarding Stokes's severely traumatic childhood. However, state PCR counsel later dropped that claim and, as a result, did not exhaust it in state court. The state court ultimately denied Stokes's application for relief after finding that the other constitutional challenges he raised lacked merit. The Supreme Court of South Carolina and the U.S. Supreme Court both denied Stokes's petitions for review.

With the assistance of new counsel, Stokes then filed a habeas petition in the U.S. District Court for the District of South Carolina pursuant to 28 U.S.C. § 2254. His petition alleged multiple ineffective-assistance claims, including the claim that trial counsel failed to investigate, develop, and present personal mitigating evidence during sentencing. The State moved for summary judgment. Because Stokes had not exhausted this or other claims in state court, a magistrate judge held an evidentiary hearing in January 2018 to determine whether there was cause to excuse the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012). In states like South Carolina, where a defendant cannot raise an ineffective-assistance claim until collateral proceedings, *Martinez* authorizes federal courts to excuse a petitioner's procedural default if (1) state PCR counsel's performance was itself constitutionally deficient, and (2) the petitioner's underlying ineffectiveness-of-trial-counsel claim is "substantial." *Id.* at 14; *see also Gray v. Zook*, 806 F.3d 783, 788 (4th Cir. 2015) (explaining that *Martinez* established a "narrow exception to the general rule . . .

that errors committed by state habeas counsel do not provide cause to excuse a procedural default").

Before the hearing, the State argued that 28 U.S.C. § 2254(e)(2) did not allow the court to receive evidence related to the merits of Stokes's underlying constitutional claims. However, it agreed that the court could hear evidence that went to the excuse of default under *Martinez* (which, because of its substantiality requirement, necessarily overlaps with the underlying claim). The State reiterated this limited objection at the beginning of the evidentiary hearing. During the hearing, the magistrate judge at times described the evidence as relating to the *Martinez* issue. However, she permitted Stokes's habeas counsel to introduce lengthy testimony regarding the mitigation evidence that trial counsel could have introduced at Stokes's sentencing, including testimony from the two trial attorneys themselves.

After the evidentiary hearing, the magistrate judge issued a Report and Recommendation that recommended denying all relief. In the Report and Recommendation, the magistrate judge conducted an in-depth analysis of Stokes's ineffective-assistance-of-trial-counsel claims—relying on evidence from the hearing—and concluded that they failed. *See* J.A. 3733[1] ("Petitioner has not met his burden of showing that trial counsel were deficient, and, thus, has also failed to show that they were ineffective."); J.A. 3734 ("[E]ven if Petitioner were able to establish deficiency by trial

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

counsel, his ineffective-assistance-of-trial-counsel claim lacks merit, as he has not shown resulting prejudice for the reasons explained below."). The State "filed no objection and agree[d] with the Magistrate's Report and Recommendation." J.A. 3797. The district court also agreed with the magistrate judge's conclusions and denied Stokes relief. *See* J.A. 3849 (concluding that Stokes "fail[ed] to show *Strickland* prejudice" based on trial counsel's failure to present mitigating evidence).

Stokes then filed an appeal with this Court. During briefing and oral argument, the State never argued that § 2254(e)(2) prohibited us from considering evidence from the federal evidentiary hearing when evaluating his ineffectiveness-of-trial-counsel claims. To the contrary, the State relied heavily on the federal evidentiary hearing record and exhibits submitted during the § 2254 proceedings to argue that Stokes's claims failed on the merits. *See, e.g.*, Resp. Br. 31–32, 36–41, 48–52.

This Court vacated the district court's decision. *Stokes v. Stirling*, 10 F.4th 236, 239 (4th Cir. 2021). Starting with the *Martinez* question, we held that Stokes's state PCR counsel were ineffective because they "fail[ed] to develop and present a claim based on trial counsel's mitigation efforts." *Id.* at 245. We focused on state PCR counsel's failure to adequately investigate Stokes's traumatic personal background or retain an expert who could "screen for mental or psychological defects," even though they "knew about adversity in Stokes's background from trial counsel's cursory investigation" and "hired their own investigator, whose additional interviews generated

rich leads about Stokes's psychological, educational, and familial history." *Id.* at 247. We rejected the State's argument that state PCR counsel had abandoned the mitigation claim for strategic reasons, in part because they admitted at the federal evidentiary hearing that they had no strategic justification for not pursuing it. *Id.* at 247–49. After concluding that Stokes's underlying ineffectiveness-of-trial-counsel claim was a "substantial" one, we excused Stokes's procedural default under *Martinez*. *Id.* at 250–51.

Proceeding to the merits of Stokes's underlying claim, we held that his trial counsel provided ineffective assistance by failing to investigate, develop, and present personal mitigation evidence. *Id.* at 251. As to *Strickland*'s deficient performance prong, trial counsel failed to conduct an adequate investigation into Stokes's "extraordinarily traumatic childhood," during which he suffered chronic sexual and physical abuse and witnessed firsthand his parents' substance abuse and their subsequent deaths. *Id.* at 240; *see Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This omitted evidence was particularly important because trial counsel did not meaningfully contest Stokes's guilt, instead choosing to focus their defense on sentencing. *See Stokes*, 10 F.4th at 241. Although they "had little-to-no experience preparing a mitigation defense," they failed to consult any experienced attorneys, hired an inexperienced investigator, neglected to pursue the investigator's findings, and chose not to consult the expert witnesses they did retain about the compelling mitigating evidence. *Id.* at 251–52. In addition, trial counsel's decision to withhold what personal mitigating evidence they had collected

was objectively unreasonable. *Id.* at 252. At the federal evidentiary hearing, they testified that they decided to withhold the evidence because they believed jurors would react negatively to Stokes's life story. *See id.* at 252–53. We concluded that this rationale was objectively unreasonable, particularly considering that trial counsel failed to offer any personal mitigating evidence. *Id.* The defense's sole witness at sentencing was a retired warden and "prison adaptability expert" who had never spoken to Stokes and said nothing about the trauma Stokes experienced as a child. *See id.* at 253.

Turning to *Strickland*'s prejudice prong, we held that trial counsel's deficient performance prejudiced Stokes. *Id.* at 254–56; *see Strickland*, 466 U.S. at 694–95. While recognizing the substantial aggravating evidence, we determined there was a reasonable probability at least one juror would have voted against a death sentence had they heard the compelling mitigating evidence. *Stokes*, 10 F.4th at 256. Because trial counsel were constitutionally ineffective, we directed the district court to issue the writ of habeas corpus unless the State granted Stokes a new sentencing hearing.[2] *Id.* at 239.

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[2] On appeal, Stokes also challenged the district court's decision denying him relief on two additional ineffective-assistance claims. The first alleged that one of Stokes's trial attorneys labored under a conflict of interest because he had previously prosecuted Stokes for assaulting his ex-wife, who testified as a State witness during Stokes's capital sentencing. The other claim focused on trial counsel's decision to rely on retired warden James Aiken, a prison adaptability expert, as the defense's sole witness during sentencing. We did not reach those claims in our opinion.

The State sought rehearing en banc, which we denied. It then filed a petition for a writ of certiorari in the Supreme Court. In both its petition for a rehearing en banc and its cert. petition, the State argued that § 2254(e)(2) prohibited this Court from considering evidence from Stokes's federal evidentiary hearing when analyzing the merits of his ineffective-assistance claim. *See* Petition for Rehearing En Banc, Dkt. No. 81, at 14–15; State's Cert. Petition, *Stirling v. Stokes*, No. 21-938, 2021 WL 6102329, at **34–35 (Dec. 21, 2021).

The Supreme Court did not act on the State's petition until it decided *Shinn v. Ramirez*. In *Shinn*, it held that "under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel" unless § 2254(e)(2)'s "narrow exceptions" apply. 142 S. Ct. at 1734, 1739. This prohibits a petitioner from introducing evidence to support either their underlying constitutional claim or a *Martinez* claim that state PCR counsel were ineffective. *See id.* at 1739–40.

On May 31, 2022, the Supreme Court granted certiorari, vacated this Court's judgment, and remanded to the Fourth Circuit "for further consideration in light of *Shinn*." *Stirling v. Stokes*, 142 S. Ct. 2751, 2751 (2022). On remand, we directed the parties to file simultaneous supplemental briefs addressing two issues: (1) whether the State waived the § 2254(e)(2) argument decided in *Shinn* by failing to raise it during earlier proceedings; and (2) what

other issues this Court should consider when weighing *Shinn*'s impact on our prior decision. Those issues are before us now.

II.

We start by considering whether the State waived or forfeited the argument that § 2254(e)(2) prohibited us, in our 2021 opinion, from relying on the evidence produced during the federal evidentiary hearing.[3] We conclude that it forfeited the argument by not raising it on appeal and instead using evidence from the hearing to argue that Stokes's ineffective-assistance claims failed on the merits. Because it would produce manifest injustice for Stokes, we decline to exercise our discretion to excuse the State's forfeiture.

A.

It is well-established that "[a] party's failure to raise or discuss an issue in [its appellate] 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) (quoting *11126 Baltimore Blvd., Inc. v. Prince George's Cty., Md.*, 58 F.3d 988, 993 n.7 (4th Cir. 1995)). "Even appellees waive

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[3] Some of the precedents we quote in this opinion use "waiver" and "forfeiture" interchangeably, but the terms technically have different meanings. "Forfeiture" refers to a party's inadvertent failure to raise an argument; a court has discretion to reach a forfeited issue. *See Wood v. Milyard*, 566 U.S. 463, 471–74 & n.4 (2012). By contrast, "waiver" refers to a knowing, and intelligent decision to abandon an issue. *Id.* Unlike a forfeited issue, a court does not have discretion to reach an issue that a party has waived. *Id.*

arguments by failing to brief them." *Mironescu v. Costner*, 480 F.3d 664, 677 n.15 (4th Cir. 2007) (quoting *United States v. Ford*, 184 F.3d 556, 578 n.3 (6th Cir. 1999)); *see Hillman v. I.R.S.*, 263 F.3d 338, 343 n.6 (4th Cir. 2001). In *Hillman*, we explained that an appellee need not state the *precise relief sought* on appeal, because Federal Rule of Appellate Procedure 28(b) clearly exempts appellees from that particular requirement. 263 F.3d at 343 n.6. But we distinguished a statement of the relief sought from a "substantive legal argument" and clarified that failing to brief the latter "risk[s] . . . abandonment of [the appellee's] argument."[4] *Id.* Enforcing waiver and forfeiture rules against appellees reflects the principle that we "apply [these] rules on a consistent basis" so that they "provide a substantial measure of fairness and certainty to the litigants who appear before us." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013).

On multiple occasions, this Court has declined to address an argument that an appellee did not raise properly on appeal. In *United States v. Clay*, for example, we concluded that the appellee's "newly minted argument, made for the first time at oral argument, is waived in this appeal" because the

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[4] As our dissenting colleague recognizes, the *Hillman* majority concluded that the appellees' "failure to specify in their briefs the alternative *relief* they desired does not prevent us from granting such relief." *Id.* (emphasis added). But the majority drew a distinction between an appellee's failure to request an alternative form of relief (e.g., a remand) and an appellee's "failure to raise a substantive legal argument," explaining that only the latter would result in forfeiture. *Id.* Here, the State makes a substantive legal argument about § 2254(e)(2) that may be forfeited.

appellee failed to raise it in its brief. 627 F.3d 959, 966 n.2 (4th Cir. 2010). Similarly, in *Mironescu*, we declined to address whether the district court had violated the Suspension Clause by denying a habeas petitioner (the appellee) an opportunity to present certain claims because the petitioner did not raise the issue on appeal. *See* 480 F.3d at 677 n.15 (citing *Hillman*, 263 F.3d at 343 n.6).

So, too, here. In his opening appellate brief, Stokes cited to evidence from the federal evidentiary hearing to support his *Martinez* claim and his underlying ineffectiveness-of-trial-counsel claims. The State, in its response brief, relied heavily on evidence from that hearing to argue that the district court correctly rejected Stokes's claims on the merits. Even assuming the State preserved a § 2254(e)(2) objection in the district court—which is anything but clear[5]—it

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[5] Before the magistrate judge, the State argued only that § 2254(e)(2) prohibited new evidence of Stokes's *underlying ineffectiveness-of-trial-counsel claim*. But the magistrate judge's analysis of that claim went further than was necessary to conclude that the claim was not "substantial" for purposes of *Martinez*. *See Stokes*, 10 F.4th at 250 n.8. When assessing the underlying claim, the magistrate judge took the new evidence into account, which was exactly what the State had argued was not permitted under § 2254(e)(2). However, the State did not object to the magistrate's analysis in the district court, which suggests it was content to argue that the magistrate correctly denied Stokes relief on the merits. We have explained that "a litigant who raises an issue before the magistrate judge but fails to make a timely objection directed to that issue before the district judge is in a position similar to that of a litigant who fails to raise the issue at all prior to appeal." *Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 103 (4th Cir. 2020); *see also id.* (stating that such a failure "constitutes

abandoned that argument on appeal by inviting this Court to consider the new evidence. Courts have held that a government appellee abandons an issue by taking one position at one stage of an appeal and then asserting a contrary position at a later stage, which is exactly what the State attempted to do here. *See Steagald v. United States*, 451 U.S. 204, 208–11 (1981); *United States v. Smith*, 781 F.2d 184, 184–85 (10th Cir. 1986).

The State now claims its appellate brief discussed the evidence from the federal hearing only in relation to the *Martinez* excuse-of-default question—that is, to support its argument that Stokes's underlying ineffectiveness-of-trial-counsel claim was not "substantial." But a cursory look at the State's brief shows that its use of the evidence was not so limited. The brief cited to dozens of pages from the federal evidentiary hearing transcript in an effort to fully establish that "deficient performance and prejudice do[] not exist under *Strickland v. Washington*." Resp. Br. 31 (cleaned up); *see id.* at 31–32, 36–41, 48–50, 51–52.

Nor was it enough that the State belatedly raised the § 2254(e)(2) argument in its petition for a rehearing en banc. This Court "generally do[es] not consider issues raised for the first time in a petition for rehearing." *United States v. Carter*, 471 F. App'x 136,

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a waiver of appellate review"). Ultimately, we need not determine whether the State also forfeited the § 2254(e)(2) argument in the district court, as its failure to raise the issue on appeal is dispositive.

137 (4th Cir. 2012) (per curiam). We see no reason to depart from that rule here.

No other precedent in this Circuit requires a contrary result. In *Young v. Catoe*, we remarked that the appellees had raised an alternative ground for affirming the district court's judgment "via the unnecessary vehicle of cross-appeal." 205 F.3d 750, 762 n.12 (4th Cir. 2000). According to the State, *Young* establishes that appellees are not bound by waiver and forfeiture rules. But *Young* suggests only that the party who prevailed in the district court is not required to file a *separate cross-appeal* to preserve an argument. This does not mean that an appellee can ignore an issue in its briefing without forfeiting it.

Nor does our decision in *Mahdi v. Stirling* generally exempt appellees from waiver and forfeiture rules. 20 F.4th 846 (4th Cir. 2021). There, the state PCR court had held that a habeas petitioner waived a particular claim. *Id.* at 895. When the petitioner tried to raise the same claim in federal district court, the court rejected it on the merits without addressing his earlier waiver in state court. *Id.* On appeal, this Court relied on the petitioner's state-court waiver to affirm, even though "neither the Parties nor the district court address[ed]" it. *Id.* In the State's view, *Mahdi* shows that an appellee does not forfeit an argument (there, the petitioner's state-court waiver) by failing to raise it in the district court or on appeal. But at most, *Mahdi* is a reminder that we have discretion to affirm based on a ground that neither party addresses. It does not establish that an appellee is immune from waiver and forfeiture rules.

Finding no support in Fourth Circuit precedents, the State seeks refuge from other circuits, some of which have stated that appellees generally are "not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds." *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006); *see, e.g.*, *Ms. S. v. Reg'l Sch. Unit 72*, 916 F.3d 41, 48–49 (1st Cir. 2019). But even in those circuits, courts have discretion to enforce waiver and forfeiture rules against appellees; enforcement "depends on the particular facts of the case." *Ms. S.*, 916 F.3d at 49 (quotation marks omitted). In a similar context, our sister circuits have held that the law-of-the-case doctrine may bar appellees from raising in a successive appeal an issue they failed to raise during the first. *See, e.g.*, *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 963 (10th Cir. 2009) (enforcing appellee's waiver when it would be "unfair" to the appellant to excuse it); *Schering Co. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358–59 (7th Cir. 1996) (enforcing appellees' waiver because the appellees, "by reserving their challenge to the district court's evidentiary ruling[,] have put themselves in the position of asking us to reexamine our previous ruling on the basis of [previously available] evidence").

Accordingly, we hold that the State forfeited the § 2254(e)(2) argument by failing to raise it on appeal.

B.

In an effort to avoid the consequences of its forfeiture, the State claims we must reach the issue *sua*

sponte because § 2254(e)(2) imposes jurisdictional limits on the authority of federal courts. We disagree.

The Supreme Court "has long rejected the notion that all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012) (quotation marks omitted). A rule is jurisdictional only "[i]f the Legislature *clearly states* that [it] shall count as jurisdictional." *Id.* at 141–42 (emphasis added). In *Gonzalez*, for example, the Supreme Court held that 28 U.S.C. § 2253(c)(1) satisfies this clear statement rule because it expressly provides that "an appeal may not be taken to the court of appeals" unless a judge issues a certificate of appealability. *Id.* at 142. By contrast, §§ 2253(c)(2) and (c)(3)—which set "threshold condition[s]" for granting a certificate of appealability —are not jurisdictional because they do not clearly "speak in jurisdictional terms." *Id.* at 142–43.

Likewise, § 2254(e)(2) does not "speak in jurisdictional terms" and therefore is not a jurisdictional rule. *Id.* at 143. In full, it provides as follows:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review

> by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). In other words, this part of the Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes evidentiary rules for federal habeas proceedings. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011) (explaining that § 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court"). Critically, it applies only when a court *already has* jurisdiction over the habeas claim. As *Gonzalez* makes clear, even mandatory limits on a court's authority in a case properly before it do not qualify as jurisdictional. While § 2254(e)(2) states that "the court shall not hold an evidentiary hearing" unless the statutory conditions are met, the Supreme Court has repeatedly clarified that the word "shall," without more, does not render a statute jurisdictional. *Gonzalez*, 565 U.S. at 146; *Dolan v. United States*, 560 U.S. 605, 611–12 (2010).

The text of a neighboring AEDPA provision reinforces our conclusion. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the

exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). In other words, this provision expressly exempts states from forfeiting arguments concerning a petitioner's procedural default. Section § 2254(e)(2), of course, contains no such language. When read alongside the express no-forfeiture provision in § 2254(b)(3), this indicates Congress chose not to immunize states from forfeiting evidentiary objections based on § 2254(e)(2).

We also find it relevant that in *Shinn* itself, the Supreme Court treated § 2254(e)(2) as a non-jurisdictional provision subject to the ordinary rules of forfeiture. In response to the petitioner's argument that the state of Arizona had forfeited its § 2254(e)(2) defense, the Supreme Court did not hold that § 2254(e)(2) is a non-waivable jurisdictional provision, though that question was raised in the briefing. Brief for Respondents at 61–63 & n.16, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (No. 20-1009), 2021 WL 4197216. Instead, the Court considered whether Arizona had in fact forfeited its defense and then exercised its "discretion to forgive any forfeiture," *see Shinn*, 142 S. Ct. at 1730 n.1—as would be appropriate if and only if § 2254(e)(2) is a non-jurisdictional rule subject to waiver and forfeiture.

In short, we see no reason to treat this case any differently than the Supreme Court has treated forfeitures of other defenses to federal habeas claims: we have discretion to excuse the forfeiture, but we are not obligated to do so. *See id.*; *Day v. McDonough*, 547

U.S. 198, 208–09 (2006) (timeliness of habeas petitions); *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (nonretroactivity defense).

C.

The next question, then, is whether we should exercise our discretion to excuse the State's forfeiture in this case. We decline to do so because it would produce marked injustice and reward the State for "sandbagging" this Court during earlier proceedings. *Hillman*, 263 F.3d at 343 n.6.

1.

"[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012). In a few different cases, the Supreme Court has explained when it may be appropriate to excuse a state's failure to raise other defenses to federal habeas claims. Excusing a state's forfeiture is warranted in "extraordinary circumstances," where the state "inadvertently" overlooked the issue earlier in the proceedings. *Id.* at 471 (cleaned up). But before reaching the issue, a court "must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the [] issue, and 'determine whether the interests of justice would be better served'" by reaching it. *Day*, 547 U.S. at 210 (quoting *Granberry v. Greer*, 481 U.S. 129, 136 (1987)); *see also Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 105–06 (4th Cir. 2020) (stating that waiver and forfeiture rules "are devised to promote the ends of justice," and that this Court may

reach a forfeited issue "where injustice might otherwise result").[6]

Stokes contends that the State did not merely forfeit the § 2254(e)(2) argument, but made a conscious, intelligent decision to waive it, which would make it unreviewable. *See Day*, 547 U.S. at 210 n.11; *see also Milyard*, 566 U.S. at 471 n.5 ("[A] federal court has the authority to resurrect only forfeited defenses."). However, we have explained that a party may "waive" an issue only in the district court, and that a party's "decision not to advance [an] argument on appeal is better treated as abandonment or forfeiture." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 271 n.6 (4th Cir. 2019) (en banc); *see also United States v. Simms*, 914 F.3d 229, 238 n.4 (4th Cir. 2019) (en banc) (stating that "waiver, in a technical sense, concerns a party's relinquishment of rights before a *district court*"

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[6] This Court also has discretion to reach a forfeited issue "where there is an intervening change in the case law." *Arakas*, 983 F.3d at 105. But that applies only if the issue "was not previously available"—meaning there was "'strong precedent' prior to the change, such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner." *United States v. Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018) (quoting *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605–06 (4th Cir. 1999)). Here, prior to *Shinn*, the Fourth Circuit had not addressed whether § 2254(e)(2) bars a federal evidentiary hearing for claims brought under *Martinez*. *See Moore v. Stirling*, 952 F.3d 174, 182 & n.7 (4th Cir. 2020). In the proceedings before the magistrate judge, the State acknowledged this was an open question. D.S.C. Dkt. No. 159, at 4–5. Thus, the intervening-change-in-law exception is inapplicable here.

(emphasis in original)). Thus, the State did not irrevocably waive the § 2254(e)(2) argument on appeal.

That said, the nature of the State's forfeiture is relevant as we consider which direction "the interests of justice" point. *Day*, 547 U.S. at 210. Here, the record strongly suggests that the State made a conscious, strategic decision not to litigate the § 2254(e)(2) issue on appeal. The State recognized the issue early in the proceedings; before the evidentiary hearing, it argued that § 2254(e)(2) prevented the magistrate judge from receiving or considering new evidence on Stokes's underlying ineffectiveness-of-trial-counsel claim. But on appeal to this Court, the State did not merely fail to argue that the statute prohibited us from considering the new evidence; *it relied extensively on the evidence produced during the evidentiary hearing* to argue that Stokes's underlying claim lacked merit. *See* Resp. Br. 31–32, 36–41, 48–50, 51–52; *see also id.* at 71 ("[Stokes] had a full opportunity to present the merits of his claim at an evidentiary hearing."). In short, the State invited this Court to use the evidence for the very purpose it had previously argued (and now belatedly argues) is prohibited. This is worlds apart from the forfeiture the Supreme Court excused in *Day*, which involved "merely an inadvertent error" and where "nothing in the record suggest[ed] that the State 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211.

It is unsurprising that the State does not engage with the Supreme Court's decisions in *Day* or *Wood*, given that considerations of justice and fairness point so strongly against excusing its forfeiture. It is difficult

to conceive of a case where a party would be more "significantly prejudiced" by a decision to reach an unpreserved issue. *Id.* at 210. We have already held that Stokes was deprived of his Sixth Amendment right to effective counsel during his capital sentencing. The State now urges us to strike that decision—and rubber-stamp an unconstitutional death sentence—based on an evidentiary limitation the State knew might apply but invited us to ignore on appeal. If excusing the State's forfeiture in this scenario best served "the interests of justice," *id.*, justice would be a hollow word indeed.

2.

Nothing in *Shinn* requires us to excuse the State's forfeiture here. In *Shinn*, Arizona had not objected to some evidentiary development during habeas proceedings in the district court. *See* 142 S. Ct. at 1730 n.1. On appeal to the Supreme Court, the petitioner argued that Arizona had also failed to raise the § 2254(e)(2) issue during the Ninth Circuit appeal. The Supreme Court disagreed, noting that "Arizona did object to further factfinding before the Ninth Circuit panel" and that the "Ninth Circuit passed upon § 2254(e)(2) when it ordered additional factfinding on remand." *Id.* The Supreme Court then exercised its discretion "to forgive the State's forfeiture before the District Court" because "our deciding the matter now will reduce the likelihood of further litigation in a 30-year-old murder case." *Id.* (quotation marks omitted).

The present case is different than *Shinn* in important respects. The record in *Shinn* indicated that Arizona made "an inadvertent error" by neglecting to

raise the § 2254(e)(2) argument in the district court, *Day*, 547 U.S. at 210, but then sought to correct that error by raising the issue on appeal, which gave the Ninth Circuit an opportunity to consider it. Here, by contrast, the State abandoned the § 2254(e)(2) argument as soon as the magistrate judge recommended denying Stokes relief on the merits, and actually relied on the new evidence when arguing that trial counsel were not constitutionally ineffective. This "suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Id.* And beyond the obvious injustice it would create, overlooking the State's decision not to litigate the § 2254(e)(2) issue certainly would not "enhanc[e] the efficiency of the decisionmaking process and the conservation of scarce judicial resources." *Holness*, 706 F.3d at 592. The State now tells us that our close review of the federal-court record was a waste of time, even though it asked us to look to that very evidence to rule on the merits of Stokes's claims.

To be sure, the *Shinn* Court looked to a state's interest in the finality of a criminal conviction and sentence to justify excusing Arizona's forfeiture of the § 2254(e)(2) argument. But such finality interests do not require us to reach a forfeited issue when doing so would lead to an unjust result. *See Day*, 547 U.S. at 210–11 (recognizing that non-jurisdictional AEDPA rules may be forfeited despite "implicat[ing] values beyond the concerns of the parties," including the "finality [of] state court judgments") (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). In fact, the Supreme Court has noted that a court's discretionary authority to excuse unintentional forfeitures itself

affords sufficient respect to federal-state comity interests. *See Milyard*, 566 U.S. at 471 ("With that comity interest in mind, we held that federal appellate courts have discretion, in exceptional cases, to consider a[n argument] inadvertently overlooked by the State in the District Court" (cleaned up).).

3.

Finally, the State points out that the Supreme Court granted certiorari, vacated our prior decision, and remanded for further proceedings, even though Stokes's brief in opposition to certiorari argued that the State had forfeited the § 2254(e)(2) argument. *See* Brief in Opposition at 33–36, *Stirling v. Stokes*, 142 S. Ct. 2751 (2022) (mem.) (No. 21-938), 2022 WL 769491. But a decision to grant certiorari, vacate, and remand for further consideration in light of new Supreme Court precedent does not resolve questions of waiver or forfeiture. *See, e.g.*, *Dick v. Oregon*, 140 S. Ct. 2712, 2712 (2020) (mem.) (Alito, J., concurring in decision to grant, vacate, and remand) ("I concur in the judgment on the understanding that the Court is not deciding or expressing a view on whether the question was properly raised below but is instead leaving that question to be decided on remand."). Indeed, in previous cases returned to this Court following a grant, vacate, and remand order, we have reaffirmed our prior opinion because a litigant had waived or forfeited the relevant issue. *See United States v. Vanegas*, 612 F. App'x 664, 666 (4th Cir. 2015) (per curiam); *United States v. One Male Juvenile*, 149 F. App'x 213, 214 (4th Cir. 2005) (per curiam). We are not breaking any new ground by doing the same here.

4.

A § 2254 petitioner faces no shortage of procedural obstacles in federal court, most of which are unrelated to the actual merits of his or her constitutional claims. For petitioners like Stokes, who (through no fault of his own) did not exhaust a claim in state PCR proceedings, AEDPA erects a high wall to excusing that procedural default, even as § 2254(b)(3) shields states that fail to timely raise a procedural default defense. And even when new evidence would show cause for excusing a petitioner's procedural default, that evidence is almost never admissible in federal court. *See Shinn*, 142 S. Ct. at 1734.

That the playing field in § 2254 cases tilts heavily in the State's favor comes as no surprise—AEDPA was enacted to "make[] winning habeas relief more difficult." *Brown v. Davenport*, 142 S. Ct. 1510, 1526 (2022). But here, the State takes a step too far, telling us we must ignore its own flagrant forfeiture so it can enforce a death sentence we have already held was unconstitutional. Nothing in § 2254(e)(2), *Shinn*, or any other precedent requires us to reach such a perverse result, which would transform a "difficult" task for Stokes into a Sisyphean one. *Id.*

Our forfeiture rules exist to "provide a substantial measure of fairness and certainty to the litigants who appear before us," and "we strive to apply [them] on a consistent basis." *Holness*, 706 F.3d at 592. We have not hesitated to enforce these rules against criminal defendants on remand from a grant, vacate, and remand order. *See Vanegas*, 612 F. App'x at 666. Fairness dictates that we hold the State to the same

standard, especially in a capital case. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (noting that a death sentence raises "unique" concerns).

Because the State abandoned any argument that our prior opinion conflicts with § 2254(e)(2), and we find no justification for overlooking its forfeiture, we decline to revise our prior opinion.[7]

III.

For the reasons stated above, we reaffirm our prior decision holding that Stokes's trial counsel provided constitutionally ineffective assistance. Accordingly, we direct the district court to issue the writ of habeas corpus unless the State grants Stokes a new sentencing hearing within a reasonable time. The district court's order dismissing Stokes's habeas petition is

VACATED AND REMANDED.

QUATTLEBAUM, Circuit Judge, dissenting:

Previously, we reversed the judgment of the district court that dismissed Sammie Stokes' 28 U.S.C. § 2254 habeas petition and instructed the district court to grant the petition due to the ineffective assistance provided by Stokes' trial counsel. But the Supreme Court vacated our judgment and remanded the case to us with instructions to reconsider Stokes' petition in

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[7] The State separately argues that our prior opinion misapplied the *Strickland* test. These arguments rest in large part on mischaracterizations of our analysis, and they give us no reason to doubt our conclusion that Stokes's trial counsel were constitutionally ineffective.

light of *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022). In *Shinn*, the Court held that 28 U.S.C. § 2254(e)(2) prohibits a federal habeas court from conducting evidentiary hearings or otherwise considering evidence not developed in state court based on the ineffective assistance of state post-conviction counsel. *Id.* at 1734. Critically, that is exactly the type of evidence upon which Stokes, and the opinion the majority reinstates, rely. Both rely substantially, if not entirely, on evidence developed at an evidentiary hearing during federal habeas proceedings. Make no mistake about it—Stokes' petition and the opinion the majority reinstates today are inescapably at odds with *Shinn*. So, I would remand for the district court to rule on Stokes' petition based solely on the state court record.

Despite the Supreme Court's express instruction for us to reconsider this case in light of *Shinn*, the majority holds that we can ignore that decision's holding because the State forfeited the § 2254(e)(2) issue by not raising it prior to the State's petition for rehearing. In my view, the State did not forfeit the § 2254(e)(2) argument. But even if it did, I would excuse such forfeiture. In sum, I would do what the Supreme Court instructed us to do—reconsider Stokes' petition in light of *Shinn*. And *Shinn* forecloses habeas relief based on evidence developed in federal court. Accordingly, I dissent.

I.

I begin with a review of *Shinn*. There, two petitioners were convicted of capital crimes in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed the convictions and sentences

on direct review. The petitioners were also denied state post-conviction relief. After both filed for federal habeas relief, the respective district courts held that the petitioners' ineffective assistance of trial counsel claims were procedurally defaulted because they did not properly present those claims in state court. *Id.* at 1729.

In one case, the district court permitted the petitioner to supplement the record to include evidence that was not presented in state court to support his request to excuse the procedural default. *Id.* The district court excused the procedural default based on the new evidence but rejected the ineffective assistance of counsel claim on the merits. The Ninth Circuit, like the district court, held that the state post-conviction counsel's failure to develop the trial ineffective assistance of counsel claim constituted sufficient cause to forgive the procedural default. And it reversed and remanded for the development of more evidence on the merits of the ineffective assistance of counsel claim, which it considered to be substantial.

In the other case, the district court held an evidentiary hearing to determine whether cause existed to excuse the procedural default and if declining to hear the claim would result in actual prejudice. The district court forgave the procedural default and held, on the merits, that the state trial counsel provided ineffective assistance of counsel. *Id.* at 1730. Arizona appealed, arguing that § 2254(e)(2) did not permit the evidentiary hearing. The Ninth Circuit affirmed in that case, holding that § 2254(e)(2) did not apply because the state post-conviction counsel was

ineffective in failing to develop the state court record. *Id.* Both petitioners did not dispute, and therefore conceded, that their habeas petitions failed based on the state court records alone. *Id.*

The Supreme Court reversed the Ninth Circuit, holding that the federal habeas courts may not conduct an evidentiary hearing or consider evidence beyond the state court record. The Court reasoned that § 2254(e)(2) did not permit extending *Martinez v. Ryan*, 556 U.S. 1 (2012)[1] to allow ineffective assistance of post-conviction counsel to excuse a prisoner's failure to develop the state court record. It explained that in § 2254(e)(2), Congress limited the authority of federal courts to conduct such hearings. Federal courts, *Shinn* makes clear, "have no power to redefine when a prisoner" has failed to develop the factual basis of a claim in state court proceedings. *Id.* at 1736. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." *Id.* (internal citation omitted) ("§ 2254(e)(2) is a statute that we have no authority to amend.").

Since *Shinn*, the Supreme Court reiterated § 2254(e)(2)'s limitation on the power of federal courts in *Shoop v. Twyford*, 142 S. Ct. 2037 (2022). There, the Court held that the district court's Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) review was limited to "the record that was before the state

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[1] *Martinez* recognized that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

court." *Id.* at 2046 (internal quotation marks and citation omitted). And the circuit courts that have addressed this question post-*Shinn* have acknowledged the Supreme Court's clear guidance precluding federal courts from conducting evidentiary hearings or considering evidence beyond the state court record. *See, e.g., Houston v. Phillips*, No. 20-6102, 2022 WL 3371349 (6th Cir. Aug. 16, 2022) ("In short, federal habeas courts are prohibited, by statute, from granting evidentiary hearings when petitioners have 'failed to develop the factual basis of [their] claim[s] in State court proceedings.'" (quoting *Shinn*, 142 S.Ct. at 1728)); *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 720 (3d Cir. 2022) ("AEDPA does not allow us to excuse Williams's separate failure to develop the record just because his state post-conviction lawyer did a bad job . . . . We are therefore limited to the facts developed in state court.").

Without question, *Shinn* abrogates the opinion the majority reinstates. The opinion's analysis and conclusions about Stokes' ineffective counsel claim depend almost entirely on the record developed before the magistrate judge in federal court. That is the precise type of evidence that § 2254(e)(2) prohibits. As the Supreme Court explained, federal courts "have no power" to develop or consider this evidence. *Shinn*, 142 S. Ct. at 1736. There is simply no way to square the opinion the majority reinstates with *Shinn*.[2]

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[2] And neither Stokes nor the majority suggests that Stokes satisfies the narrow exceptions of § 2254(e)(2). Section 2254(e)(2) permits a federal habeas court to hold an evidentiary hearing where an applicant has failed to develop the basis of the claim in

II.

For good reason, the majority does not even try to justify its decision under *Shinn*. Instead, it concludes that the State forfeited the application of § 2254(e)(2)'s ban on evidentiary hearings by not previously raising it before us in its brief or at oral argument. I disagree.

A.

First, the State preserved the § 2254(e)(2) issue in the district court. As the majority acknowledges, the State objected to the magistrate judge's decision to conduct a hearing to develop evidence outside the state court record several times. Then, in its summary judgment filings, the State asserted that Stokes improperly included and relied "upon documents that were not a part of the state court record." J.A. 2838. It also moved to strike such evidence, noting that § 2254(e)(2) expressly limits the district court's ability to accept new evidence. And, although not in our record, the State filed a pretrial brief on the scope of the district court's ability to accept new evidence, arguing that § 2254(e)(2) "bars the grant of an evidentiary hearing to receive evidence not in the state court record on the underlying claims of ineffective

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state court only where the applicant shows that: (1) the claim relies on "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence"; and (2) "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." 28 U.S.C. § 2254 (e)(2).

assistance of counsel." *Stokes v. Stirling*, No. 1:16-CV-00845-RBH (D.S.C.), ECF No. 159. It added that the "*Martinez* equitable decision does not trump the clear direction by Congress." *Id.* Over the State's objections, the magistrate judge conducted an evidentiary hearing and considered evidence developed from that hearing. But even upon considering such evidence, it recommended granting summary judgment to the State and denying Stokes' habeas petition, and the district court, with certain modifications, adopted those recommendations.

When Stokes then appealed to us, it is true that the State did not raise the § 2254(e)(2) issue in its briefs or at oral argument. It certainly could have raised the issue as an alternative ground for relief in its brief or at oral argument. As the Supreme Court has stated, "without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).[3] But just because an appellee is permitted to raise such alternative arguments does not mean that failing to do so forfeits them.

True, an appellant is considered to have abandoned an argument not included in his opening briefs. *See A*

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[3] Florida and Georgia call it the "tipsy coachman" rule borrowing from Oliver Goldsmith's poem "Retaliation": "The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home." *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963); *see also Lee v. Porter*, 63 Ga. 345, 346 (1879).

Helping Hand, LLC v. Baltimore Cnty., 515 F.3d 356, 369 (4th Cir. 2008). But there is good reason for treating an appellant and an appellee differently. They are in materially different procedural postures. As the losing party before the district court, the appellant seeks relief on appeal. As such, the appellant carries the burden of establishing an error. The appellee, in contrast, won below. The appellee only seeks to maintain the status quo. And without a burden to show that the judgment below should be altered, we should not require the appellant to raise an argument at the risk of forfeiture.

Here, the first time the State sought relief from us was when it moved for rehearing of our panel decision that reversed the district court's order granting it summary judgment. At that point, it raised § 2254(e)(2)'s prohibition against the use of evidence beyond the state court record. And it continued to press the issue in petitioning the Supreme Court for certiorari after we denied its petition for rehearing. So, every time the State bore the burden of showing error, it raised § 2254(e)(2). Under these facts, I would not find the State forfeited the issue.

To be fair, the circuits appear divided on this issue. *See Hernandez v. Starbuck,* 69 F.3d 1089, 1093 (10th Cir. 1995) (unlike the obligations of the appellant, the briefing requirements for the appellee's brief are not considered categorical imperatives since a court of appeals may affirm the district court on any grounds supported by the record, including grounds not relied on by the district court or contained in the appellee's brief); *International Ore & Fertilizer Corp. v. SGS*

Control Servs., Inc., 38 F.3d 1279, 1286 (2d Cir. 1994) ("This rule applies even when the alternate grounds were not asserted until the court's questioning at oral argument."); *Kennedy v. City of Villa Hills, Ky.,* 635 F.3d 210, 214 n.2 (6th Cir. 2011) (noting that appellees do not waive claims by failing to respond to appellant's arguments on appeal); *see also Eichorn v. AT&T Corp*., 484 F.3d 644, 657-58 (3d Cir. 2007) (concluding that appellees were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds); *Laitram Corp. v. NEC Corp*., 115 F.3d 947, 954 (Fed. Cir. 1997) (recognizing that appellees do not select the issues to be appealed); *but see Hamilton v. Southland Christian Sch*, 680 F.3d 1316, 1318-19 (11th Cir. 2012)(concluding that the appellee abandoned a defense by failing to list or state it as an issue on appeal).

In deciding that the State forfeited the issue, the majority joins the Eleventh Circuit's approach. It suggests that result is dictated by *Mayfield v. National Association for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012), *United States v. Clay*, 627 F.3d 959 (4th Cir. 2010), *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), and *Hillman v. I.R.S.*, 263 F.3d 338 (4th Cir. 2001). But while those cases provide some support for the majority's conclusion, they do not settle the issue. *Mayfield* involved the obligations of appellants, not appellees, which, as already explained, are in materially different procedural positions. The pertinent language in *Mironescu* and *Clay* are dicta contained in footnotes. And *Hillman* actually rejected the argument that the taxpayers had forfeited their alternative argument by not including it in their appellee's brief,

finding that the "failure to specify in their briefs the alternative relief they desired does not prevent us from granting such relief." *Hillman*, 263 F.3d at 343, n. 6. To be sure, part of the majority's reasoning was that the alternative argument related to the form of available relief rather than a separate substantive argument. But it nonetheless allowed the taxpayers to pursue an argument they had not briefed. So, I do not agree that our precedent compels a finding of forfeiture.

B.

But even if the State forfeited an argument that § 2254(e)(2) precluded the evidentiary hearing, I would excuse. We retain the "inherent authority to consider and decide pertinent matters that otherwise may be ignored as abandoned or waived." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013). And for several reasons, we should exercise our discretion to do so here.

First, the Supreme Court instructed us to consider the appeal in light of *Shinn*. And it did so over Stokes' objections that the State had forfeited the § 2254(e)(2) issue. I realize that we should not generally consider the Court's decision to grant certiorari, vacate an opinion and remand to express a view on the merits. *See, e.g., Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). But in *Shinn*, this same issue arose. There, the habeas petitioner "allege[d] that Arizona forfeited any § 2254(e)(2) argument in his case because it did not object to some evidentiary development in the District Court or before the Ninth Circuit panel." *Shinn*, 142 S.Ct. at 1730 n.1. Even so, the Supreme Court said that it had "discretion to forgive any forfeiture," and chose

to do so because doing so would reduce the likelihood of further litigation in decades old murder cases. *Id.* We should hesitate to chart a path so at odds with the one traversed by the Supreme Court.

Second, as described above, § 2254(e)(2) does not involve a discretionary decision or claims processing issue. It limits the power of federal courts. To me, exercising our discretion so that our decision does not extend beyond the limits Congress placed on federal courts is appropriate.

Third, declining to excuse any forfeiture reinstates an opinion that, by any measure, is directly foreclosed by the Supreme Court's holding in *Shinn*. Any frustration with the State not raising the § 2254(e)(2) issue to us sooner should not cause us to issue an opinion inconsistent with current Supreme Court law.

Fourth, the majority explains that one of the reasons we should not excuse forfeiture is because doing so would allow an unconstitutional sentence to stand. I disagree with that conclusion for two reasons. One, in determining that the sentence was unconstitutional, the panel majority considered evidence that, by law, we cannot consider. And two, I would not deny his petition. Although I find it hard to see how Stokes could succeed if, as the law requires, his petition is limited to the state court record, I would nevertheless remand the case to the district court to evaluate the petition in accordance with § 2254(e)(2) and *Shinn*.

III.

The decision we reinstate today could not possibly stand under *Shinn*. It is based on evidence that § 2254(e)(2) precludes federal courts from developing and considering. *Shinn* requires that we remand the case to the district court for consideration of Stokes' petition based solely on the state court record.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6

[Filed August 19, 2021]

SAMMIE LOUIS STOKES,

Petitioner – Appellant,

v.

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

Respondents – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Aiken. R. Bryan Harwell, Chief District Judge. (1:16-cv-00845-RBH)

Argued: May 6, 2021 Decided: August 19, 2021

Before GREGORY, Chief Judge, HARRIS, and QUATTLEBAUM, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Harris joined. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Paul Alessio Mezzina, KING & SPALDING LLP, Washington, D.C., for Appellant. Michael Douglas Ross, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Diana L. Holt, DIANA L. HOLT, LLC, Columbia, South Carolina; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; Ashley C. Parrish, Joshua C. Toll, Isra J. Bhatty, Edward A. Benoit, KING & SPALDING LLP, Washington, D.C., for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

GREGORY, Chief Judge:

Sammie Louis Stokes confessed to capital murder, putting mitigation of the death penalty at the heart of his defense. His trial counsel prepared some personal mitigation evidence but, at the last minute, withheld it. Instead, counsel presented a single witness at sentencing: a retired prison warden who was unprepared and counterproductive. The jury returned a death sentence without hearing a word from the defense about Stokes as an individual. In postconviction proceedings, new counsel found more information about Stokes's traumatic upbringing, but

failed to pursue a mitigation-based ineffective assistance of counsel claim. We conclude that postconviction counsel were ineffective, providing good cause for Stokes's procedural default of such a claim. On the merits, we find that trial counsel's failure to adequately investigate and present personal evidence was objectively unreasonable and prejudicial. We reverse the district court order dismissing Stokes's petition and remand for issuance of the writ unless the State grants resentencing.

I.

A.

Stokes's childhood in Branchville, South Carolina was marked by extreme abuse and neglect. His parents were serious alcoholics. Stokes initially lived with his father. He met his mother, Pearl, for the first time when he was four years old. When he was five, Stokes went to live with Pearl and met his sister Sara for the first time.

Pearl lived with a man, Richard, whom the kids regarded as a stepfather. As one relative put it, the family lived in a "run-down wooden shack" without running water or indoor plumbing. Richard and Pearl sometimes took the children along to clubs and bars, and other times the children were left unsupervised. Stokes and Sara often skipped school and sometimes stole food from neighbors to eat. On some weekends, they stayed with their paternal grandmother, who ran a liquor house and brothel out of her home. When Stokes was nine years old, his father died suddenly on

the front lawn, where Stokes saw his body. Afterwards, the kids lived with Pearl and Richard permanently.

The children witnessed and suffered physical and sexual abuse. Richard sexually abused Sara, regularly and openly. When Sara was as young as 13 years old, Pearl sometimes "gave" Sara to men as "payment" in exchange for car rides. Stokes was disciplined by whippings with an extension cord. Pearl and Richard fought explosively. One witness recalled Pearl being hospitalized after Richard broke a bottle over her head; Stokes recalled Richard breaking her jaw. When Stokes was 13, he witnessed his mother, on the couch, intoxicated, as she fell into a coma and then died, leaving Stokes parentless.

Stokes remembers his mother's death as a point when his life turned for the worse. Stokes and Sara briefly lived with an aunt but ultimately chose to live unsupervised with Richard. Stokes began using drugs and alcohol. He attended under-resourced schools where his failure to progress was ignored. Stokes repeated the eighth grade three times, yet only stopped attending school at age 18, when he was in the ninth grade. Around age 11 or 12, Stokes had been sexually abused by a babysitter. Thereafter, he had many sexual encounters, and at age 15, impregnated two partners. At that same age, a "relationship" began between Stokes and Audrey Smith, a friend of his mother's, who was almost ten years older than him. Stokes was "obsessed" with Smith, and their relationship was often tumultuous. When Stokes was 18 and Smith was 27, they married.

According to the child development expert retained by Stokes's federal counsel, these facts amount to an extraordinarily traumatic childhood that impaired Stokes's future emotional regulation and social adaptation.[1]

B.

In 1988, Stokes was convicted of assaulting Smith with a knife. Soon after his release in 1990, the couple became involved again. Before long, Stokes assaulted Smith for a second time, choking her in a park and leaving her unconscious. He was convicted of that assault in 1991 and sentenced to ten years. While serving the sentence, in 1998, Stokes was cellmates with Roy Toothe. Toothe's mother, Pattie Syphrette, lived with his children and their mother, Connie Snipes. Syphrette wanted to gain custody of her grandchildren by having Snipes killed. Stokes agreed to carry out the murder for $2,000.

Stokes was released from prison several months later. Within weeks, he and Syphrette met to make plans. Syphrette falsely told Snipes that she had kidnapped and planned to murder Doug Ferguson, a

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[1] The expert, Dr. James Garbarino, applied the Centers for Disease Control and Prevention's well-known "Adverse Childhood Experiences" (ACE) standard to quantify the adversity Stokes experienced on a ten-point scale. According to Dr. Garbarino, only 13 percent of the population have an ACE score of four or greater, with less than one percent scoring seven or greater. Based on his evaluation, Dr. Garbarino concluded Stokes has an ACE score of nine, meaning he was exposed to more childhood adversity than 999 out of 1,000 individuals on average. *See generally* J.A. 2173–2201.

man who sometimes lived with them. Syphrette invited Snipes to join, and Snipes agreed. Stokes also invited Norris Martin, a longtime friend from childhood. Martin, who has an intellectual disability, was a "follower" of Stokes growing up. Snipes went with Syphrette, Stokes, and Martin on a drive to an isolated area. While Syphrette waited by the car, Snipes walked with Stokes and Martin into the woods. Though the factual accounts differ about exactly what happened next, it is undisputed that Stokes drew a gun and held Snipes at gunpoint; Martin raped Snipes, followed by Stokes; and Martin and Stokes each shot Snipes once in the head, killing her. When a car passed nearby, they fled, leaving the body in the woods where it was found days later. At the scene, police found a hat, knife, and wallet belonging to Martin. The group was arrested soon after, and Stokes penned a detailed confession in county jail.

Martin later testified to further details about the crime. According to Martin, Stokes instigated the rape and murder of Snipes; Stokes was especially abusive, anally raping Snipes and using Martin's knife to mutilate her breasts; Stokes pushed the gun into Martin's hand and forced him to pull the trigger; and Stokes mutilated the corpse, cutting off a portion of the scalp and cutting off the genitals.

The jury also heard about the subsequent murder of Doug Ferguson. In the days after the Snipes murder, Syphrette feared Ferguson's knowledge of her plans to murder Snipes. Syphrette enlisted Stokes and a friend, Faith Lapp, to kidnap Ferguson. The group had bound Ferguson with duct tape when police arrived at

Syphrette's home. Ferguson died of suffocation from his bindings. In a subsequent prosecution, Stokes pleaded guilty to Ferguson's murder.

C.

In 1998, the trial court appointed Thomas Sims as Stokes's lead counsel and Virgin Johnson as second chair. The lawyers were former prosecutors with several years of experience in private practice. They had some limited death penalty experience, but little to no experience preparing a mitigation defense. Trial preparation spanned nine months. Sims and Johnson began preparing mitigation evidence six months in. Trial counsel's efforts on the mitigation investigation totaled around 45 hours out of the hundreds they billed. They hired their fact investigator's receptionist as the mitigation investigator, though she had no prior experience with mitigation investigations. She was conducting an interview the same day that the jury reached its initial verdict.

The guilt phase of the trial began on October 25, 1999. The parties agreed to restrict the guilt phase to a bare recitation of the facts and reserve any aggravating facts about the crime for the penalty phase. Four days later, the jury returned a guilty verdict after an hour's deliberation. For the penalty phase, trial counsel decided to focus on prison adaptability: they planned to argue that Stokes's health condition made him especially suitable for a life sentence. Stokes was HIV-positive. His health was declining significantly around this time; he even needed an emergency blood transfusion in the days before trial. Trial counsel retained a neurologist who

was prepared to testify to evidence of brain damage possibly caused by AIDS. They also prepared a forensic psychiatrist to testify that Stokes was likely to imminently die of AIDS in prison.

Stokes was hesitant about this strategy, and trial counsel knew it. They repeatedly intervened to secure his consent. For example, a memorandum by the mitigation investigator describes a "very tense meeting" with Stokes five days before trial, in which Stokes opposed disclosing his HIV status. J.A. 2544. She secured his approval on the condition that the courtroom be cleared when the issue would be discussed. Ultimately, though, on the eve of sentencing, Stokes withdrew his consent, refusing to allow his counsel to mention his HIV status under any circumstances.

Still, the defense team had other evidence ready. Their investigation had not uncovered the full extent of Stokes's life story, but they knew the broad outlines. At the start of sentencing, Stokes's sister and aunt were on the witness list and prepared to testify. The same was true of the psychiatrist and neurologist, as well as a social worker who was prepared to testify about Stokes's psychological profile. However, in another last-minute decision, trial counsel decided not to present any personal evidence about Stokes.

In post-conviction testimony, Sims and Johnson explained that they reached this decision based on their impressions of the jury from the guilt phase, knowing that the worst details of the crimes were yet to come. They believed that "an Orangeburg County jury" "back in '97, '98, '99, when this was going on,"

would not be receptive to evidence about "the background of the individual and the kind of life that they had had as a child" after hearing the prosecution's case in aggravation. J.A. 3469–73; J.A. 3423–25. Trial counsel was also mindful of the jury's racial composition and "certain inner biases" that they believed would follow. J.A. 3523–24. They believed white jurors might react especially to Stokes, a Black man, raping Snipes, a white woman. And for Black jurors, especially "with the older Black females during that time," there was "this whole idea of homosexuality." *Id.;* J.A. 3520–21 ("AIDS, homosexuality . . . during that time there was a prejudice and a bias against it."). On this basis, trial counsel declined to present any background evidence about Stokes and proceeded with their prison adaptability approach. But because Stokes withdrew consent to present evidence related to his HIV status, this approach amounted to a single witness, James Aiken, offered as an adaptability expert.

Aiken was a retired prison warden. He opined that Stokes "does not demonstrate the behaviors of being a predator" and does not demonstrate an "unusual" risk of harm in prison. J.A. 1309–14. Aiken explained that his opinion was based on the prison facility more than Stokes as an individual. Indeed, he refused to meet Stokes, or interview anyone who knew Stokes, explaining that his analysis simulated how a prison official would evaluate an inmate from their case file alone. Yet the record Aiken reviewed was apparently incomplete, and he often could not recall the details. He emphasized the prison system's punitive nature, stating that if Stokes acted out, he would be punished,

including by lethal force if necessary.[2] In total, direct examination of Aiken—the entirety of the defense's case at sentencing—spans around four pages of trial transcript, while the State's cross-examination spans over 25. J.A. 1310–14; J.A. 1315–41. In closing arguments, the State emphasized that Aiken effectively agreed that Stokes may commit violence while in prison: "So it's sort of like an Alice in Wonderland thing, where he's using the punishment for infractions, the ability to deal with that, to say that the man is adaptable. It's just the opposite. If it's adapting to prison, you don't have to punish him." J.A. 1365–66.

Meanwhile, the State presented robust aggravating evidence, calling 12 witnesses. Martin and the state pathologist added further details about the violence of the Snipes murder, and Faith Lapp testified about Stokes's role in the Ferguson murder. The State also presented evidence related to Stokes's prior criminal convictions. Early in his second prison stint, Stokes assaulted an inmate with a box cutter, and the State presented graphic pictures of the victim and the crime scene. Smith, Stokes's ex-wife, testified to the facts underlying Stokes's 1988 and 1991 assault convictions.

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[2] Aiken stated: "[Prison guards] have the ability, have the technique, have the training and have the equipment to effect lethal force if that person does not adequately follow certain rules and regulations," and "I have ordered inmates killed because they did not follow rules and regulations and that inmate has been killed." J.A. 1321. He said the facility could "put[] [Stokes] in a prison within a prison . . . [using] lethal force and taking his life if required." J.A. 1327.

The evidence of Stokes's 1991 assault of Smith is especially relevant on appeal. Stokes's lead trial counsel, Sims, personally prosecuted that case against Stokes. In so doing, he developed and presented extensive testimony from Smith. Stokes had refused to be present in the courtroom for the 1991 trial, so he had not personally witnessed Sims's arguments and presentation. Sims never disclosed this issue to the court.[3] He later explained, "It was never asked, and I did not—it just didn't come up." J.A. 1612. It is undisputed that Sims told Stokes about his prior role; he recalled, "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him. . . . He never expressed any desire not to have me as his attorney." J.A. 1612; *see* J.A. 1640–56. Despite his prior prosecution of the crime now being presented by the State as aggravating evidence against his client, Sims elected to personally cross-examine Smith. Indeed, the second chair, Johnson, never spoke a word on the record.

After the close of evidence, the jury deliberated for around three hours before returning a death sentence.

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[3] Sims did point out that his name appeared on the 1991 indictment when it was entered into evidence, requesting that it be redacted. J.A. 1426–27. However, in the brief exchange, he states that his name was on every indictment the office issued at that time; it does not appear that the request put the court on notice that Sims had personally prosecuted the case against Stokes and presented extensive testimony from Smith. *See id.*

D.

Stokes filed an application for postconviction relief ("PCR") in October 2001, claiming ineffective assistance based on trial counsel's mitigation presentation. The court appointed PCR counsel—Keir Weyble and Robert Lominack—who filed an amended application in May 2002, adding some additional claims. PCR counsel deposed trial counsel, hired new experts, and hired a mitigation investigator.

In August 2004, PCR counsel filed another amended application, this time dropping the mitigation claim while adding an Eighth Amendment intellectual disability claim and a Sixth Amendment conflict-of-interest claim. As a result, the State initiated a formal competency assessment process that stretched on for years. Stokes was eventually found competent, and PCR counsel dropped the disability claim. They proceeded on their remaining claims, including the conflict-of-interest claim and other ineffective assistance claims but not the mitigation theory.

The PCR court denied Stokes's application in October 2010. The parties litigated issues related to the court's order into 2013. Stokes petitioned for South Carolina Supreme Court review in November 2014, which was denied in February 2016. The United States Supreme Court also denied Stokes's petition for review, and the State set an execution date.

Stokes then filed a petition for habeas corpus, asserting two mitigation-based ineffective assistance claims and the conflict-of-interest claim. Because the ineffectiveness claims were not exhausted in state

proceedings, a federal magistrate judge held an evidentiary hearing to determine whether there was good cause for the default under *Martinez v. Ryan,* 566 U.S. 1 (2012). After hearing testimony from both sets of counsel, the magistrate recommended denying all relief. Stokes filed objections to the magistrate's report and the district court overruled them. The court adopted the report and concluded that PCR counsel were not ineffective, meaning the unexhausted mitigation-based claims were defaulted. Alternatively, the court found that trial counsel's alleged ineffectiveness was not prejudicial. Finally, the court found no actual conflict of interest, and, even if there had been a conflict, that Stokes waived any objection.

Stokes filed a timely appeal. Under 28 U.S.C. § 2253, we may consider whether Stokes is entitled to a certificate of appealability on his exhausted claims, and under *Martinez,* 566 U.S. 1, we may determine whether Stokes is entitled to appellate review of his defaulted claims. *See Owens v. Stirling,* 967 F.3d 396, 423–26 (4th Cir. 2020).

II.

In general, a state prisoner must exhaust all state court remedies before filing a 28 U.S.C. § 2254 petition. *Williams v. Stirling,* 914 F.3d 302, 311 (4th Cir. 2019). We then apply the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") standard of review, under which a petitioner is entitled to relief only if the state court adjudication of their claim was 1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or 2) "based on an unreasonable determination

of the facts in light of the evidence presented." *Long v. Hooks,* 972 F.3d 442, 457–58 (4th Cir. 2020) (en banc) (quoting 28 U.S.C. § 2254(d)).

Under this framework, a federal habeas court may not hear a claim that was procedurally defaulted in state proceedings unless the petitioner can show cause for the default. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). Ordinarily, an attorney's error is not valid cause for such a default because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *See id.* at 752–57. Ineffective assistance claims complicate matters, however, because state law sometimes dictates that collateral post-conviction proceedings are a defendant's first opportunity to challenge their trial counsel's effectiveness. *See id.* at 755–57. That is the case here under South Carolina law. *Sigmon v. Stirling,* 956 F.3d 183, 198 (4th Cir. 2020). In *Martinez v. Ryan,* the Supreme Court adopted a narrow exception to address this gap. *See* 566 U.S. at 9. The Court held that—if state law restricts ineffective assistance claims to initial-review collateral proceedings—the ineffectiveness of a petitioner's state PCR counsel may provide cause in a federal habeas proceeding to excuse the petitioner's failure to challenge the ineffectiveness of his trial counsel. *See id.* "[B]ecause a petitioner raising a *Martinez* claim never presented the claim in state court, a federal court considers it de novo, rather than under AEDPA's deferential standard of review." *Gray v. Zook,* 806 F.3d 783, 789 (4th Cir. 2015).

Stokes argues the district court erred in concluding that his PCR counsel provided constitutionally effective

representation. Therefore, Stokes argues, we may reach his underlying claim against his trial counsel. He asserts two distinct theories of trial counsel's ineffectiveness: that trial counsel unreasonably failed to investigate and present personal mitigation evidence, and trial counsel unreasonably presented Aiken as their sole mitigation witness. Finally, Stokes argues the state court's conclusions as to the conflict-of-interest claim were an unreasonable application of clearly established federal law.

III.

We first address PCR counsel's effectiveness to determine whether Stokes has shown good cause for defaulting his ineffectiveness claims. We conclude that PCR counsel's failure to develop and present a claim based on trial counsel's mitigation efforts amounts to ineffective assistance. Proceeding to the underlying claim, we conclude that trial counsel's mitigation investigation and choice not to present any personal mitigation evidence was unreasonable and prejudicial, establishing ineffectiveness. Because these conclusions alone require resentencing, we do not reach Stokes's remaining claims.

A.

The *Martinez* exception applies when, first, the petitioner shows that "appointed counsel in the initial-review . . . was ineffective under the standards of *Strickland* [*v. Washington,* 466 U.S. 668, 687 (1984)]." *Martinez,* 566 U.S. at 14. This means that PCR counsel "performed deficiently[] under the first prong of *Strickland,* . . . but not that said counsel's deficient

performance was prejudicial[] under the second prong of *Strickland*."[4] *Owens,* 967 F.3d at 423. Second, the petitioner must show that the underlying ineffectiveness claim against trial counsel "is a substantial one," meaning that it "has some merit."[5] *Martinez,* 566 U.S. at 14.

1.

To establish ineffectiveness under *Strickland,* a petitioner must show counsel's performance was constitutionally deficient, meaning it fell below an objective standard of reasonableness. 466 U.S. at 687. Counsel's performance is evaluated based on

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[4] Asking the petitioner to show that PCR counsel's ineffectiveness prejudiced the state proceedings would effectively require the petitioner "to show that the defaulted claim is itself meritorious." *Owens,* 967 F.3d at 423 (explaining this "apparent incongruity"). Circularly, the petitioner would have to "*prevail* on the merits of [their] underlying claim merely to excuse the procedural default and obtain consideration on the merits." *Id.* (internal quotations omitted). Therefore, we have joined our sister circuits in reading *Martinez's* use of the phrase "the standards of *Strickland*" to refer only to performance, not prejudice. *See id.*

[5] In imposing this requirement, the Supreme Court cited the standard that governs certificates of appealability under 28 U.S.C. § 2253(c)(2). *See Martinez,* 566 U.S. at 14 (citing *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003)); *Owens,* 967 F.3d at 423. Under that standard, "a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El,* 537 U.S. at 327 (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (internal quotations omitted)); *Owens,* 967 F.3d at 423.

"prevailing professional norms" at the time of the representation and in light of "all the circumstances." *Id.* at 688. Professional norms may be reflected in American Bar Association ("ABA") standards, or other comparable guides, though such guides are not dispositive of what constitutes reasonable representation in any given case. *Owens,* 967 F.3d at 412 ("[N]o fixed set of rules may 'take account of the variety of circumstances faced by defense counsel.'") (quoting *Strickland,* 466 U.S. at 688–89). Our assessment of counsel's performance is "highly deferential." *Id.* "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

Capital defense counsel have a duty to investigate and present substantial mitigating evidence, which includes the "obligation to conduct a thorough investigation of the defendant's background." *See Williams v. Taylor,* 529 U.S. 362, 391–99 (2000). The Supreme Court reaffirmed this duty several times before and during PCR counsel's representation of Stokes. *See, e.g., id.; Wiggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Porter v. McCollum,* 558 U.S. 30 (2009) (per curiam); *Sears v. Upton,* 561 U.S. 945 (2010). Counsel's investigation should cover the defendant's "psychological history," which "could explain or lessen the client's culpability for the underlying offense." *See Williams v. Stirling,* 914 F.3 d at 313. A reviewing court considers not only the "quantum of evidence already known to counsel," but also whether that evidence "would lead a

reasonable attorney to investigate further." *Id.* (quoting *Wiggins,* 539 U.S. at 527). If counsel declined to present their findings, the inquiry focuses on "whether the investigation supporting counsel's decision . . . was itself reasonable." *Wiggins,* 539 U.S. at 523.

Here, the district court found that PCR counsel performed reasonably because they investigated Stokes's background "to some extent" and then "intentional[ly]" withdrew the mitigation claim. J.A. 3839. True, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that [they] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 5 (2003).

But intentionality does not guarantee reasonableness, and presumptions are rebuttable. The adequacy of counsel's investigation informs the strength of the presumption of strategy. *See Strickland,* 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); *Wiggins,* 539 U.S. at 527–28 ("[C]ounsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable."). For example, in *Williams v. Stirling,* counsel's investigation uncovered evidence of the defendant's brain damage and his mother's alcoholism, but counsel "did not even consider whether [the defendant] had [fetal alcohol syndrome]" and "whether to pursue that evidence." 914 F.3d at 314. That counsel conducted some investigation in general was not

enough; they were ineffective because they "failed to conduct *any* investigation" into a potentially mitigating condition "despite the red flags." *Id.* at 315.

Similarly, in *Wiggins,* counsel learned of the defendant's "alcoholic, absentee mother" and his "physical torment [and] sexual molestation" in foster care, but they did not pursue either discovery further. *See id.* at 523–25. "Counsel's decision not to expand their investigation" violated professional standards because they did not attempt to discover "all reasonably available mitigating evidence." *Id.* ("[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, ..."). Thus, *Wiggins* rejected the "presumption" of strategy: "[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations." *Id.*

The same is true here of PCR counsel. Though they investigated "to some extent," their investigation was nevertheless inadequate because they ignored the valuable leads they uncovered. They knew about adversity in Stokes's background from trial counsel's cursory investigation. They hired their own investigator, whose additional interviews generated rich leads about Stokes's psychological, educational, and familial history. At that point, an objectively reasonable attorney would be prompted to investigate further. *See Williams v. Stirling,* 914 F.3d at 313–15 (holding "there was *necessarily* no opportunity for

counsel to make a strategic decision" after counsel failed to "further explor[e]" significant "red flags"). Yet PCR counsel conducted essentially no investigation beyond the investigator's interviews. They did not re-interview any of the witnesses themselves or seek out corroborating documentary evidence. They did not speak to or request files from the social worker retained by trial counsel. While they interviewed the neurologist, who had found indicators of brain damage, they did not obtain his files or his testing results.

And, perhaps most consequentially, they did not retain an expert capable of applying their investigator's findings. Because "psychological and social history" and "emotional and mental health" are often of "vital importance" to a mitigation defense, "the defense team should include at least one person qualified to screen for mental or psychological defects." *Id.* That duty was certainly implicated in this case when the investigator found reports of Stokes's childhood experiences of physical and sexual abuse and neglect, domestic violence, and substance abuse. Without consulting an expert capable of analyzing these significant "red flags," counsel did not make "efforts to discover *all reasonably available* mitigating evidence." *See Wiggins,* 539 U.S. at 524 (quoting ABA Guideline § 11.4.1(C) (1989)); *see, e.g., Gray v. Branker,* 529 F.3d 220, 229–32 (4th Cir. 2008) (holding counsel ineffective where they "simply missed or ignored—and failed to act on—the many signs that [the defendant] was mentally and emotionally unstable" and failed to "explor[e] the need for mental health testimony from an expert"); *Hamilton v. Ayers,* 583 F.3d 1100, 1114–17 (9th Cir. 2009) (finding ineffectiveness where indicators of mental

illness meant that counsel "should have retained a mental health expert and provided the expert with the information needed to form an accurate profile of [the defendant's] mental health").

PCR counsel themselves testified that this error explained their unreasoned approach to the mitigation issues. When asked whether they "consult[ed] an expert to assess [the] rather wealth of mitigation information," Weyble responded, "No, we didn't." J.A. 2718. And when asked "Did you have a strategic reason for failing to do that?" he said, "No." *Id.* Similarly, Lominack testified, "We did not hire a social worker. And I do not think that I worked on a case before or since . . . in which I did not hire a social worker." J.A. 2998 ("I absolutely need someone who has the knowledge and the expertise to take this evidence and characterize it and put it in the right boxes."); *see also* J.A. 3377 ("[W]e stopped short of putting [the findings] in front of people who could help us understand it and generate that plausible explanation for behaviors."). He explained that this error was due to a lack of experience, as opposed to strategy:

> I look back at the cases I handled early in my career with some degree of embarrassment. I think the most specific example is ever working on a case without a social worker. I can't imagine doing that at the end of my career. And when I encountered that in other cases, it was shocking because it's not the standard of care and wasn't when I worked on this case.

J.A. 2621. And while it is true that a decision not to investigate may itself be strategic—for example, if the

findings would be more harmful than helpful, *see Wiggins,* 539 U.S. at 525 (collecting cases)—there is no evidence that informed PCR counsel's decisions here.

Instead, PCR counsel cited non-strategic reasons for their investigatory decisions and abandonment of the claim. *See, e.g.* J.A. 2983–85 (explaining that the failure to "personally interview[] any of those [mitigation witnesses]" was either "lazy or not knowing that should have been done or not knowing I should have done it."); J.A. 3018 ("We didn't have a social worker. . . . I don't think we had enough information at the time to decide that it was a claim that needed to be thrown out, and I don't think that's what we did, certainly not with any intentionality."); J.A. 3031 ("We weren't thoughtful enough to have personally interviewed any of the people that were relevant to the claim that we dropped."). Because PCR counsel's investigation fell short of professional standards, it cannot support the presumption that their subsequent abandonment of the claim was strategic. *See Wiggins,* 539 U.S. at 527–28, 536 ("[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."); *Williams v. Stirling,* 914 F.3d at 316–17 ("[T]he PCR court relied on the factual assumption that trial counsel made a strategic choice not to present" mitigation evidence, but "it was impossible for trial counsel to have made a strategic choice because there was no investigation into" that issue).

Beyond the investigation's shortcomings, PCR counsel's testimony directly rebuts the presumption

that they dropped the mitigation claim strategically. PCR counsel testified that they neglected the mitigation theory after becoming preoccupied with other claims. When asked if he recalled "why [he] would have omitted that claim," Weyble explained: "At that same time, what was then called mental retardation [and] is now called intellectual disability claim arose, somewhat to our surprise, frankly. And I think we became somewhat distracted by the shiny object, if you will, and thought we—that we were really on to something there." J.A. 3259. Likewise, when asked "why did [he] withdraw the mitigation claim," Lominack responded:

> [W]e were so focused at the time on the intellectual disability claim, . . . somewhat to the detriment of . . . [a] mitigation claim. I don't recall having a specific reason why we would abandon a general mitigation claim, especially when at trial nothing was presented, which is quite rare, actually, for there not to be any mitigation presented about a client's childhood. I don't recall in Mr. Stokes's case, and frankly, in any case, how I could have thought that that was going to be a wise or reasonable choice, and the only thought that I have now is that we were so focused on the I.D. claim that we dropped it and focused on that instead.

J.A. 2918. This testimony does not describe strategic prioritization among multiple claims. Rather, counsel testified that their prioritization of other claims was uninformed and happenstance, the product of distraction, inexperience, and carelessness. *See, e.g.,*

J.A. 3018 ("I'd love to, in hindsight, say, yeah, we knew what we were doing. We didn't. We were focusing on the [disability], adaptability, and IQ investigation."); J.A. 3031 ("I think one of the reasons I'm not remembering a real strategic reason . . . is that, to be blunt, I'm not sure that we were that thoughtful about it."); *cf Wood v. Allen,* 558 U.S. 290, 309 (2010) (Stevens, J., dissenting) (distinguishing a decision that is "the product of a deliberate choice between two permissible alternatives" from one that is "the product of inattention and neglect by attorneys preoccupied with other concerns").

Also, Stokes was ultimately found competent years later, and PCR counsel dropped the disability claim that had been hogging their attention. PCR counsel did not testify to any strategic basis for declining to pursue the mitigation theory at that point. *See, e.g.,* J.A. 2993 ("[T]o me, it's nonsensical to be so hyper-focused [on intellectual disability], . . . especially when th[at claim] went by the wayside after the [state] evaluation."); J.A. 3262 (responding, after being asked why they did not revive the mitigation claim after the intellectual disability claim failed, "I don't have a good answer to that question").[6] Nothing suggests that counsel was

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[6] The district court largely ignored PCR counsel's testimony. It relied on one exchange from Weyble's cross-examination, where Weyble responded "yes" to the prosecutor's statement that "there had to be a reason that [he] withdrew [the claim]" because if he "thought it was a strong claim," he would have presented it. *See* J.A. 3840–41. The court discredited the countervailing portions of PCR counsel's testimony as "fall[ing] on their sword for their former client." J.A. 3840. But nothing in the record justifies selectively crediting this exchange while disregarding extensive

strategically winnowing the claims, selecting only those few deemed most meritorious: In their original petition, PCR counsel raised six claims in addition to the intellectual disability claim, three of which were so weak that they later abandoned them and two of which, alleging ineffective assistance of appellate counsel, had obvious and dispositive weaknesses.[7] Considering the dramatic lack of mitigation evidence presented at trial despite Stokes's background, PCR

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contrary evidence from the same witnesses. An evidentiary ruling may not rest solely on the court's presumption of the witness's sympathies and intentions. For example, the dissent the district court cited as its sole authority called out perceived "sword falling" in a footnote, but it supported that charge by arguing the witness's testimony about "the particulars of his investigation" contradicted his "self-denigrating" characterizations. *Dugas v. Coplan,* 428 F.3d 317, 346 n.39 (1st Cir. 2005) (Howard, J., dissenting). Here, the district court pointed to no factual contradictions in Weyble and Lominack's testimony that undermined their generally negative portrayal of their performance. They gave reasonable explanations for why they made decisions they now believed to be improper, such as a lack of experience or being distracted by new developments. The district court did not identify, nor do we find, anything in the record making PCR counsel any less credible than trial counsel, whose testimony the district court relied on extensively.

[7] As the PCR court explained, the two claims alleging ineffective assistance by appellate counsel were without merit because they improperly faulted appellate counsel for failing to argue points that had not been preserved at trial. Additionally, the PCR court noted that one of the claims—that appellate counsel should have argued that the trial court erred by failing to instruct on a mitigating factor for the victim's participation or consent in the act—was "groundless" in any event, because "Snipes did not consent to the violence that was about to strike her." J.A. 1775–76 n.6.

counsel's failure to consider adding the mitigation claim back into the petition is further evidence of unreasonableness, not strategy. *See McKee v. United States,* 167 F.3d 103, 106 (2d Cir. 1999) ("A petitioner may rebut the suggestion that the challenged conduct reflected merely a [tactical] choice . . . by showing that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."). Here, like in *Wiggins,* the purportedly strategic decision "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations." *See* 539 U.S. at 523–25.

Absent strategic justifications, PCR counsel's abandonment of the mitigation claim was objectively unreasonable. PCR counsel knew that trial counsel's investigation was paltry. Further, trial counsel presented no background mitigation evidence at all, and the Supreme Court had recently deemed trial counsel ineffective for even more robust presentations. *See, e.g., Williams v. Taylor,* 529 U.S. at 368, 395 (finding mitigation presentation ineffective, despite testimony from the defendant's "mother, two neighbors, and . . . a psychiatrist," because counsel failed to relay "[the defendant's] nightmarish childhood"); *Porter,* 558 U.S. at 32, (finding ineffectiveness, despite testimony about the defendant's relationship with his son, because counsel "failed to . . . present any evidence of [the defendant's] mental health . . ., his family background, or his military service").

PCR counsel's own failure to pursue and present a mitigation-based claim arising from trial counsel's

performance constitutes ineffective assistance. *See, e.g., Blake v. Baker,* 745 F.3d 977, 982–83 (9th Cir. 2014) (finding PCR counsel ineffective where counsel did nothing with witness statements describing "the abhorrent conditions of [the petitioner's] upbringing and family history" and "failed to . . . retain experts" to review the findings); *Trevino v. Davis,* 829 F.3d 328, 348–49 (5th Cir. 2016) (holding that PCR counsel were ineffective in failing to pursue a mitigation claim where trial counsel "presented only one mitigation witness and no other evidence," and "[t]he deficiency in that investigation would have been evident to any reasonably competent habeas attorney").

2.

Given the extraordinary facts of this case, Stokes's underlying ineffectiveness claim against his trial counsel is "substantial" for *Martinez* purposes. *See* 566 U.S. at 14. The basis for questioning trial counsel's effectiveness is plain enough that PCR counsel's failure to adequately pursue it was objectively unreasonable. It follows that the underlying claim has "some merit"—meaning, at the very least, reasonable jurists could debate its viability.[8] *See id.; Miller-El,* 537 U.S. at 327.

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[8] The district court also found, alternatively, that Stokes could not show prejudice from trial counsel's alleged ineffectiveness, and therefore "his underlying claim . . . is not substantial." J.A. 3849 (citing *Martinez,* 566 U.S. at 14). Though inconsequential, this was an improper application of *Martinez's* substantiality requirement. A claim that fails on the merits may very well still be "substantial" for purposes of showing cause for a procedural default. *See Owens,* 967 F.3d at 423. The question is whether the claim has "some merit," meaning that reasonable jurists could at least debate its

Therefore, under *Martinez,* Stokes has established cause for procedurally defaulting his mitigation-based ineffective assistance claim against trial counsel in state proceedings. Accordingly, we proceed to the merits.

B.

To establish trial counsel's ineffectiveness, the petitioner must show that 1) their performance fell below an objective standard of reasonableness, and 2) the deficient performance was prejudicial. *See Strickland,* 466 U.S. at 687. To establish prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 694.

1.

Trial counsel were constitutionally deficient for much the same reasons as PCR counsel. Their investigation was inadequate, and their decision to withhold all personal mitigation evidence was unreasonable.

Trial counsel had little-to-no experience preparing a mitigation defense, yet they consulted with no experienced attorneys or mitigation experts. Their mitigation efforts, totaling around 45 hours, began six months into their nine-month representation, though the ABA Guidelines stated that sentencing investigation should "begin immediately upon counsel's entry into the case and should be pursued

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viability. *See Martinez,* 566 U.S. at 14 (citing *Miller-El,* 537 U.S. at 327); *Owens,* 967 F.3d at 423.

expeditiously." ABA Guidelines § 11.4.1 (1989). They hired an inexperienced mitigation investigator who was still conducting interviews through the guilt phase of the trial. They did not personally conduct any follow-up interviews or otherwise develop the investigator's findings. They retained experts to testify at sentencing, but those experts were apparently not consulted about the personal mitigation evidence. In a capital murder trial where mitigating the death penalty was the central issue in the defense, such an investigation is objectively unreasonable.[9] *See Wiggins,* 539 U.S. at 523–25 ("Despite these well-defined norms, . . . counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."); *see also Earp v. Ornoski,* 431 F.3d 1158, 1175–76 (9th Cir. 2005) ("*Wiggins* . . . establishes that the presence of certain elements in a capital defendant's background, such as a family history of

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[9] Trial counsel did conduct *some* investigation. Their investigator subpoenaed records and interviewed several friends and family members, going beyond some investigations that have been deemed unreasonable. *See, e.g., Wiggins,* 539 U.S. at 523–24 (counsel only obtained the presentence report and one set of social services records); *Porter,* 558 U.S. at 39 (counsel obtained no records and conducted no interviews of the defendant's family). Nevertheless, trial counsel unreasonably failed to pursue the indications of extreme childhood trauma, neglect, and abuse. *See Gray v. Branker,* 529 F.3d at 229–32 (finding unreasonableness, even where counsel interviewed "friends and associates" and retained experts, because they "failed to investigate for mental health evidence"); *Williams v. Stirling,* 914 F.3d at 313–16 (faulting counsel for ignoring "red flags," though their investigation otherwise "*did* bear the hallmarks of effective assistance").

alcoholism, abuse, and emotional problems, triggers a duty to conduct further inquiry before choosing to cease investigating.").

Trial counsel's subsequent decision to withhold the personal mitigation evidence they did have was also objectively unreasonable. At the outset of sentencing, members of Stokes's family and a social worker were prepared to testify. A neurologist and psychiatrist were prepared to testify about Stokes's HIV status, but presumably could have offered other personal testimony about Stokes instead. Yet counsel abandoned this evidence based on their impressions of the jury, deciding the jurors—the Black jurors in particular—would react negatively to evidence of Stokes's life story after hearing the prosecution's aggravating case. As Johnson put it:

> [H]ow do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

J.A. 3424–25.

This concern reflects a misunderstanding of the duty to mitigate. Trial counsel were not obliged to ask the jury to excuse Stokes's actions. Instead, their duty was to mitigate Stokes's "moral culpability." *See, e.g.,*

Williams v. Taylor, 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" by showing that his violence was "compulsive" as opposed to "cold-blooded premeditation"); *Caro v. Woodford,* 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [the defendant's] behavior was physically compelled, . . . or even due to a lack of emotional control, his moral culpability would have been reduced."). Counsel can carry out this duty without diminishing the defendant's responsibility for their actions or the seriousness of their crimes. *See Eddings v. Oklahoma,* 455 U.S. 104, 115–16 (1982) (qualifying, after explaining why youth mitigates moral culpability, that "[a]ll of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case"). As one mitigation specialist has put it:

> Mitigation is *not* a defense to prosecution. It is not an excuse for the crime. It is not a reason the client should "get away with it." Instead, mitigation is a means of introducing evidence of a disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime. . . . It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed in a damaged brain. It is a basis for compassion—not an excuse.

Russell Stetler, *The Mystery of Mitigation,* 11 U. Pa. J. L. & Soc. Change 237, 261 (2008). Thus, trial counsel did not have to ask the jury to "overlook" the graphic details of the prosecution's case. Instead, their personal evidence could have provided humanizing context, allowing the jury to reach a more sympathetic understanding of the individual behind the aggravating evidence. *See Allen v. Woodford,* 395 F.3d 979, 1000 (9th Cir. 2005) ("[Using] mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading jurors that the life of a capital defendant is worth saving.").

But because trial counsel had no experience or formal training in mitigation, conducted a shallow investigation, and failed to consult with experts, they underestimated the value of their evidence. Stokes's life story contains far more than a merely "difficult upbringing" and "struggles coming up"; the evidence shows profound and chronic trauma that was about as extreme as any child can experience. Such evidence is prototypical for a personal mitigation narrative. *Wiggins,* 539 U.S. at 535 (referring to "severe privation and abuse in the first six years of [the defendant's] life" as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"); *Hooks v. Workman,* 689 F.3d 1148, 1203–04 (10th Cir. 2012) ("[E]ven the most minimal investigation would have uncovered a life story worth telling, . . . [which is] exactly the sort of evidence that garners the most sympathy from jurors."). If 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.

That is especially true when considered against their alternative decision: to offer almost no mitigation presentation at all. Having declined to present their personal mitigation evidence, trial counsel put forward one witness, the former prison warden, who never met Stokes and was repeatedly unfamiliar with the details of Stokes's records. Trial counsel's direct examination produced about four pages of trial transcript, the entirety of their sentencing presentation. *Cf. Wiggins,* 539 U.S. at 526–27 (describing counsel's presentation, which failed to provide details of the defendant's history, but did provide one expert's testimony about prison adaptability, a "halfhearted mitigation case" taking a "shotgun approach"). Meanwhile, as anticipated, the government put forward 12 witnesses detailing Stokes's violence in the Snipes murder and in previous incidents. Thus, the only evidence the jury heard about Stokes detailed his crimes and violence, distorting the jury's perception of "the uniqueness of the individual" facing execution. *See Lockett v. Ohio,* 438 U.S. 586, 604–05 (1978); *see, e.g., Ferrell v. Hall,* 640 F.3d 1199, 1234, 1236 (11th Cir. 2011) (concluding that, because "the jury heard absolutely nothing about the substantial mitigating evidence," including childhood abuse, "[t]he jury labored under a profoundly misleading picture of [the defendant's] moral culpability").

The basis for trial counsel's decision—that a South Carolina jury in the 1990s, and particularly Black people, would not be open to a personal mitigation

narrative—was objectively unreasonable. In 1989, ten years before Stokes's trial, the Supreme Court referred to "the belief, *long held by this society,* that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (emphasis added) (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002). Even earlier, in 1976, the Court explained: "A process that accords no significance to relevant facets of the character and record of the individual offender . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). There is no reason to believe that South Carolinians in 1999—no matter their race—would have been indifferent to the "frailties of humankind" and these bedrock principles of mercy and morality.

Therefore, even when giving appropriate deference to trial counsel's strategic judgment, trial counsel's failure to investigate and present personal mitigation evidence was objectively unreasonable under professional standards at the time of the representation.

2.

As to prejudice, "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." *Strickland,* 466 U.S. at 694–95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the sentencer in this case was a unanimous jury, prejudice "requires only 'a reasonable probability that at least one juror would have struck a different balance'" when appraising Stokes's moral culpability and deciding on death. *See Andrus v. Texas,* 140 S. Ct. 1875, 1886 (2020) (quoting *Wiggins,* 539 U.S. at 537). To determine whether the petitioner has made that showing, "the reviewing court must consider 'the totality of the available mitigation evidence,'" both at trial and from postconviction proceedings, "and 'reweig[h] it against the evidence in aggravation.'" *Id.* (quoting *Williams v. Taylor,* 529 U.S. at 397–98).

The district court summarized the evidence of Stokes's life story in a sentence, referring to the death of his parents, his "abusive[] and neglectful" childhood, and "that he struggled in school with no intervention." J.A. 3843. It also considered the report of Stokes's new expert, who concluded that these "aspects of [Stokes's] background" likely impacted his adult behavior. J.A. 3843–44. The court then summarized the State's case in aggravation and concluded that Stokes failed to establish prejudice because the aggravating evidence "was overwhelming." J.A. 3844–48. The court especially emphasized the "horrific circumstances" of the Snipes and Ferguson murders, noting that an additional murder is recognized as "the most powerful imaginable aggravating evidence."[10] *Id.* (citing *Wong v. Belmontes,*

[10] In emphasizing these aspects of the Snipes murder, and the commission of the Ferguson murder, the district court considered

558 U.S. 1, 27–28 (2009); *Morva* v. *Zook,* 821 F.3d 517, 532 (4th Cir. 2016)). Thus, the court concluded that "all the mitigating evidence does not outweigh all the aggravating evidence presented at trial," and so Stokes did not show "a reasonable probability that at least one juror would have voted against the death penalty had it heard the additional mitigating evidence in question." J.A. 3848–49.

We disagree. While there is no doubt that the State's aggravation case was extensive, the analysis is not as simple as comparing two piles of evidence and asking which is greater. The addition of just some meaningful mitigating evidence could be enough to sway one juror against death, even in the face of plentiful aggravating evidence. *See, e.g., Williams v. Taylor,* 529 U.S. at 398 ("Mitigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."). And when a jury heard virtually no mitigation evidence at trial, and nothing about the defendant as

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evidence going to the aggravating factors that the jury did not find. The jury found the evidence established: 1) criminal sexual conduct; 2) kidnapping; 3) murder for the purpose of receiving money; and 4) that the defendant caused another person to participate. But the jury did not find that the State established: 1) physical torture; or 2) that two or more persons were murdered by the defendant. While there were surely other "horrific" elements of the Snipes murder that the court may have been referring to, the court should not have given weight to Stokes's alleged torture of Snipes or his role in the Ferguson murder. *Cf. Porter v. McCollum,* 558 U.S. 30, 41–42 (2009) (explaining that "the weight of evidence in aggravation" was "not as substantial as the sentencing judge thought" where one of two aggravating factors was reversed on appeal).

an individual, the unheard personal evidence is especially impactful on the prejudice calculus. *See Porter,* 558 U.S. at 41–44.

In *Porter,* the jury "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability." 558 U.S. at 41–44. The jury could have heard about the defendant's PTSD from military service, a "childhood history of physical abuse," and a "brain abnormality" that caused learning disabilities. *Id.* "Instead, they heard absolutely none of that evidence, evidence which 'might well have influenced the jury's appraisal of [the defendant's] moral culpability.'" *Id.* (quoting *Williams v. Taylor,* 529 U.S. at 398). Some negative facts in the mitigation evidence were not enough to undermine its impact because the negative aspects were still "consistent with th[e] theory of mitigation and d[id] not impeach or diminish the evidence." *Id.* The Court found the prejudice requirement satisfied, especially because "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome, . . . but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Id.* at 44 (quoting *Strickland,* 466 U.S. at 693–94).

The same reasoning applies here. The unheard mitigation evidence would have shown Stokes experienced an "extraordinarily high" degree of childhood adversity, likely surpassing 99.9% of the population. J.A. 2181–82; *see generally* J.A. 2173–2201. And, through expert evidence, the defense could have explained the likely consequences of such a childhood, connecting "chronic trauma" to brain development and

adult behavior. Instead, by presenting no personal evidence at all, counsel failed to "explain to the jury why [Stokes] may have acted as he did . . . connect[ing] the dots between, on the one hand, [his] mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question." *See Hooks v. Workman,* 689 F.3d at 1204. As a result, "jurors faced with an especially brutal crime were left with almost nothing to weigh in the balance." *See id.*

Thus, the prejudice analysis turns on the likely influence of dramatic mitigation evidence on a jury that heard dramatically little about the defendant. In that context, the weight of the unpresented mitigation evidence is significantly increased, enough to outweigh even the upsetting and extensive aggravating evidence. *See, e.g., Williams v. Taylor,* 539 U.S. at 537 (finding prejudice in failure to present personal evidence even where the petitioner "had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw"); *see also Smith v. Stewart,* 189 F.3d 1004, 1013–14 (9th Cir. 1999) (explaining that "[t]he horrific nature of the crimes . . . does not cause us to find an absence of prejudice," especially "where the presentation of mitigating evidence was wholly inadequate"). If the jury could have placed Stokes's "excruciating life history on the mitigating side of the scale," then "there is a reasonable probability that at least one juror would have struck a different balance." *See Wiggins,* 539 U.S. at 537; *Porter,* 558 U.S. at 42. Simply put, "there exists too much mitigating evidence that was not presented to now be ignored." *Porter,* 558 U.S. at 44 (quoting *Porter*

v. Florida, 788 So.2d 917, 937 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

The district court failed to consider that trial counsel's decisions meant they presented almost no mitigating evidence. It cited cases where additional personal evidence was insufficient to show prejudice after a jury heard a significant quantity of such evidence at trial. *See Wong,* 558 U.S. at 20–21 (noting that "the mitigating evidence [the defendant] did present" at sentencing "was substantial," including nine witnesses who "highlighted [his] terrible childhood"); *Morva,* 821 F.3d at 522–23 (listing mitigation efforts including two court-appointed mental health experts, a specialist investigator, and thirteen witnesses). The hypothetical impact of Stokes's life story and expert evidence on a jury that heard nothing about Stokes at all is quite distinct from the impact of a few more witnesses on a jury that heard an already-robust mitigation presentation. *Cf. Wong,* 558 U.S. at 22 (finding that the proposed evidence "was merely cumulative of the humanizing evidence [the defendant] actually presented" and "would have offered an insignificant benefit"); *Morva,* 821 F.3d at 522–23, 529 (stating that counsel interviewed "many" family members, and several testified or submitted affidavits, but the defendant "complains that counsel could have interviewed other[s]").

In sum, trial counsel's unreasonable mitigation efforts prejudiced Stokes. Given Stokes's immediate confession, his defense turned almost exclusively on mitigation from its very outset. Yet trial counsel spent too little time on their investigation and failed to

appreciate their findings. Then, despite the wealth of reasonably available, highly compelling mitigation evidence, counsel told the jury effectively nothing about Stokes as an individual. Had the jury heard the unpresented evidence, the probability that at least one juror would have voted against death is great enough to undermine our confidence in the outcome. *See Porter,* 558 U.S. at 44; *Andrus,* 140 S. Ct. at 1886.

We conclude that Stokes has satisfied both the deficient performance and prejudice prongs of *Strickland* on his mitigation-based claim, establishing that he received ineffective assistance of counsel at sentencing. Because this conclusion alone requires resentencing, we do not reach the remaining claims.

IV.

For the foregoing reasons, we reverse the judgment of the district court and 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.

REVERSED AND REMANDED

QUATTLEBAUM, Circuit Judge, dissenting:

When considering the important skills of a trial attorney, those that might first come to mind are the skills we see in action—opening statements, examining witnesses and closing arguments. But as important as those skills are, just as important is a skill we don't see—strategic decision-making. A lawyer must make many decisions before and during the course of a trial. And what often makes those decisions so difficult is

that many cut both ways. The decision to advance an argument, introduce certain evidence, call a witness, cross-examine a witness aggressively or lightly and so many other decisions can be—and often are—double-edged swords. There are pros and cons each way.

Evaluating these decisions, a lawyer must consider a litany of questions. How much benefit can be gained? How much harm can be caused? Can the harm be mitigated? Is the benefit that can be gained worth the harm that can result? And so on.

Oftentimes, the answers to these questions are not obvious. In fact, answering them is more a matter of art than science because intangible factors come into play. A lawyer must rely on experience, intuition and even gut instinct.

Making things even harder, trials are fluid. What might have made sense before trial may become a bad idea based on events that transpire during trial. To address that fluidity, a lawyer must constantly consider how the trial is progressing, and how the judge and jury are responding to the evidence and arguments.

In these difficult decisions, different lawyers can, and do, come to different conclusions. For some issues, you could ask ten lawyers and often get ten different decisions. Nevertheless, decisions must be made.

In this appeal, we review the decisions made by lawyers in the weightiest of circumstances—the defense of a capital defendant. Although the decisions were quintessentially strategic and informed by a thorough investigation, the majority determines that

they amounted to ineffective assistance of counsel. I disagree. These decisions, according to our precedent, merit our highest deference. In my view, the record does not come close to overcoming that required deference. Accordingly, I dissent.

I.

Over twenty years ago, Thomas Sims and Virgin Johnson's client, Sammie Stokes, was charged with the gruesome murder of Connie Snipes. The State sought the death penalty. The evidence against Stokes was overwhelming and horrific. Stokes even confessed to the murder. Because Sims and Johnson suspected Stokes would be convicted, they developed a strategy they felt would be most effective during the probable sentencing phase of the case. They wanted to emphasize Stokes' remorse and highlight the conduct and motivation of Norris Martin, who participated in the murder with Stokes, with the hope that the jury would view him as "the bad guy." J.A. 1543.

Trial counsel also planned to focus on the fact that Stokes had AIDS. Counsel planned for experts, including a forensic psychiatrist, to talk about Stokes' mental health and related medical issues. Sims and Johnson felt the best way to move the jury to spare Stokes' life would be to point out how AIDS would debilitate Stokes and given the knowledge about that disease at the time, that AIDS effectively was its own death sentence.

But trial counsel's preparation did not stop there. Sims and Johnson also investigated mitigating evidence. They hired a mitigation investigator and

interviewed witnesses including Stokes' family and friends. From that work, trial counsel learned that Stokes' childhood included significant trauma and abuse which might be useful in providing some context for Stokes' conduct.

For example, the trial defense team's interview with Stokes' sister revealed that Stokes' parents, who did not live together, both drank excessively. After their father died, Stokes' mother remarried. The stepfather also drank a lot but was violent as well. Stokes' sister reported that he abused their mother. Stokes' sister told the team that she and Stokes had to fight their stepfather to keep him from beating their mother.

Other family members revealed similar information to the trial team. A cousin told the trial team Stokes' mother was "a drinker, fighter and was wild" and that her children "grew to be the same." J.A. 2535. Another relative told the team that Stokes' mother and stepfather "liked to drink, party, go to clubs and often took [Stokes and his sister]." J.A. 2536. She added that Stokes' mother and stepfather both assaulted each other.

In addition to uncovering this evidence through their mitigation investigator, trial counsel assembled experts to testify about the mitigation evidence if they decided to use it. They engaged and worked with a forensic psychiatrist, a jury consultant and an expert in social work.

But Sims and Johnson's investigation revealed risks of utilizing this mitigation evidence. The witnesses who would, if asked, be able to provide mitigating evidence,

also had information that was damaging to their strategy of portraying Martin as the main culprit. Stokes' sister, during the trial team's interview of her, described Stokes as "very moody" and that his personality would "flip." J.A. 2529. She also talked about Stokes' relationship with Martin. She said Stokes frequently made Martin, who had been his friend since childhood, "hustle for him." J.A. 2529. And Stokes was violent toward Martin if he was not successful in those activities. More specifically, Stokes "beat [Martin] up when he did not get his money on time." J.A. 2529. Stokes' sister told the trial team that Martin was "very afraid of [Stokes]." J.A. 2529.

An ex-girlfriend provided additional information that Sims and Johnson had to consider. She told the team that they dated when she was fifteen but broke up after she became pregnant with Stokes' child. She said Stokes never supported the child in any way. She also revealed that it was rumored that Stokes was a bisexual and sexually abused Martin in the past.

With knowledge of the background of Stokes' relationship with Martin from these interviews and of the fact that there was even "some question as to whether or not there was even a homosexual relationship between [Stokes and Martin]," trial counsel "didn't want it to come out that [Stokes] had, you know, used him and had him doing everything . . . ." J.A. 1537.

Trial counsel's predictions about guilt proved to be correct. An Orangeburg County, South Carolina jury found Stokes guilty of murder, kidnapping, first degree criminal sexual conduct and criminal conspiracy

arising from the murder of Connie Snipes. J.A. 990–91. That set the stage for the penalty phase where the jury would determine whether Stokes would be sentenced to death or life in prison. J.A. 1013. South Carolina sought to prove several statutory aggravating circumstances in seeking the death penalty. With Stokes' life on the line, Sims and Johnson had to decide whether any statutory mitigating circumstances or other evidence might help save his life. J.A. 997–98.

Complicating their decision-making, about five days before trial, Stokes developed cold feet about introducing information about his AIDS prognosis to the jury. Even so, he decided that theme could only be pursued if certain people, particularly family and friends, were removed from the courtroom. J.A. 2544. And that was the plan—to clear the courtroom prior to offering the evidence. J.A. 1548–49, 3480.

Then Stokes changed his mind. As the sentencing phase began, "[j]ust as [they] got ready to start presenting that evidence, [Stokes] then said, no, I don't want it coming in," forcing the court into a recess as the defense team tried to persuade Stokes to allow the prepared defense to go forward. J.A. 1546. At the eleventh hour, Stokes decided he did not want his children and family, and the jury for that matter, to hear he had AIDS. While that was his choice, it substantially gutted his mitigation defense.

Based on this, Sims and Johnson had to adapt and decide what to do instead. Presenting mitigating evidence about Stokes' traumatic and abuse-ridden childhood was an option. The benefit of that mitigating evidence was that it might give jurors some

understanding of how and why Stokes came to the point of committing the horrific events the jury had just learned about. If jurors understood how such an upbringing could cause real psychological harm and lead to a propensity toward violence, they might be willing to spare Stokes' life. Sims and Johnson had gathered this evidence. The witnesses were available.

But they also knew that many of the witnesses who would testify about Stokes' childhood and background in a manner that provided some explanation or context for Stokes' criminal conduct—like Stokes' sister and aunt—also knew about Stokes' temperament and his relationship with Martin. They knew that along with the potential mitigating evidence, there was damaging information that would likely come out on cross-examination, information that would be harmful to Stokes' defense.

And they also felt the mitigating evidence might not, in this context, be helpful at all. They felt the jury might perceive the evidence not as mitigating evidence, but as an attempt to avoid responsibility for the crime. So, after considering the issue, they decided not to introduce it. Sims described how they came to that decision:

> Q. So did -- ultimately, did Sara Stokes, Ruth Davis, or Dr. Rodgers testify on Mr. Stokes' behalf at sentencing?
> A. No, they didn't.
> Q. And why was that?
> A. We made a strategic decision -- after having the opportunity to get together, we made a strategic decision that certain -- that mitigation

kind of evidence that was the ongoing way that things were done at that time was not going to work in Orangeburg County.

Having had the opportunity to look at the jury, having had the opportunity to see how they reacted to a number of things that were going on in the courtroom, we made a decision that we were going to take another avenue in order to try to save his life.

J.A. 3469. He continued:

Q. Okay. At the -- what made you decide that the jury would not be receptive to that testimony?

A. In trial work, and having been in trial work for a period of time up to that time -- this is going on my 40th year of being a trial lawyer -- you get the opportunity to look at the jury, you see their reaction to what is happening in the courtroom, you look at those who are leaning forward at certain times to certain testimony, you look at those who are leaning back and closing their arms at certain testimony, you try to look to see if anybody's shaking their head with where you want to go, and you try to -- and during the trial you look at things that are developing.

I always say that a trial has a life of its own. You may start out with a theory and a process that you want to go through, but in the middle of the trial, as it begins to progress, you may have to change the way that you are actually going to go, and that's what happened in this case.

And take into consideration also you're in Orangeburg County and there were things that, back in '97, '98, '99 when this was going on, that we have to take into consideration too. When you -- the way I looked at it, and I believe Mr. Johnson will verify this also, when we looked at it and we talked about the kind of crime that had been committed, we talked about some of the things that had happened to the young lady who was killed, how her body was mutilated, and those kind of things in Orangeburg County, we have to take that into consideration too.

Q. Can you help me understand what about the jury made you think that the type of evidence that you had intended to introduce originally through Sara Stokes, Ruth Davis, Dr. Rodgers, would not be persuasive to them?

A. I would have looked at that jury, I would have looked at the composition of the jury, probably during the trial would have gone home and reviewed the jurors' background information again to determine the best way that you could probably get that juror on your side. I would have -- would have -- there were African-Americans and there were white people on the jury too.

Looking at that, taking it into consideration as a whole and how the trial had been going and what was being brought out, the question at that point is whether or not putting out the background of the individual and the kind of life that they had had as a child would be effective

in light of the facts of the case and the people that you had on the jury.

J.A. 3470–3472.

Johnson also testified about their decision:

Q. So in terms of deciding how to or whether to investigate [Stokes'] childhood and background, did the aggravated nature of the case affect how you approached that?
A. It didn't affect how I approached it, but it sure enough affected how we presented it.
Q. In what way?
A. When you had to present it -- in your presentation at trial, you had to try to find a way to present it, if you had to present it, in the preparation. If you had to present it, you had to try to find a way to present it where it didn't seem so offensive, yet you can't play it down. It's just a fine balance, because how do you -- how do you tell somebody, how do you go to a jury and say, look, we want you to look at the fact that he had a poor upbringing, particularly African-American, which a lot of us had struggles coming up, how do you say, well, just because he had a poor upbringing, you need to overlook the fact that he raped this woman, you need to overlook the fact that he cut her vagina out, you need to overlook the fact that he cut her nipples off, you need to overlook the fact that he killed somebody else.

And my job was to defend [Stokes]. So what I did was I looked at every aspect of the case. If I was trying that case now, it would be a heck of

> a lot different because the tolerance we have now. But I would change nothing because they just wasn't tolerant of that.

J.A. 3524– 3525.

This testimony reveals that Sims and Johnson, in the exercise of their reasonable professional judgment, undertook a contemplative thought process about the pros and cons of using mitigation evidence of Stokes' childhood and upbringing. After doing so, they felt the circumstances of Stokes' crime were just too horrific for such evidence to be helpful. They decided not to introduce it.

They did, however, offer a different kind of mitigating evidence. They presented James Aiken, a prison adaptability expert, to testify about Stokes' ability to adapt to prison. Aiken's testimony was intended to dovetail with evidence concerning Stokes' AIDS diagnosis. Of course, Stokes' refusal to allow the AIDS evidence to be used made this strategy more challenging. But even without the AIDS evidence, Aiken emphasized that Stokes could be managed in a maximum-security environment for the rest of his life. Trial counsel used this testimony to argue that Stokes' life should be spared.

The jury was not convinced. They deliberated for 3 hours and 15 minutes before returning a death sentence finding four of the six aggravating factors alleged by the State to make Stokes eligible for the death sentence and recommended the death penalty.

II.

Now, over two decades later, the majority grades trial counsel's strategic decisions about mitigation evidence as ineffective. In my view, that conclusion ignores the reality of trial work and conflicts with Supreme Court precedent.

Importantly, Stokes did not press the mitigation strategy in his state PCR efforts. Since he did not, he must satisfy *Martinez v. Ryan,* 566 U.S. 1 (2012), which "provides a narrow exception to the general rule . . . that errors committed by state habeas counsel do not provide cause to excuse a procedural default." *Gray v. Zook,* 806 F.3d 783, 788 (4th Cir. 2015). *Martinez* permits a petitioner to excuse certain procedurally defaulted ineffective-assistance-of-trial counsel claims. *Id.* at 789. But the petitioner must establish cause to excuse the procedural bar before the federal court will consider the merits of that defaulted claim. This standard reflects the "well-established principle that [f]ederal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Owens v. Stirling,* 961 F.3d 396, 422 (4th Cir. 2020) (alteration in original) (internal quotation marks omitted).

Thus, Stokes must show that the underlying ineffective assistance of trial counsel claim is substantial, and that PCR counsel was deficient in not pursing that claim. *Id.* at 423. And if Stokes crosses those two hurdles, he must then show trial counsel was

deficient and that the deficiency prejudiced his defense. While ordinarily I would address these issues in that order, here I will address them chronologically because this really is somewhat of a chicken or the egg dilemma. PCR counsel could not have been ineffective unless trial counsel was as well. In my view, neither was defective.

A.

I begin with a discussion of Stokes' trial counsel because I do not believe that Stokes has shown a substantial underlying ineffective of assistance of counsel claim. Where a state prisoner claims ineffective assistance of counsel as the basis of habeas relief, the Court must also review the claim through the highly deferential lens of *Strickland v. Washington,* 466 U.S. 668 (1984). First, a petitioner must show counsel's performance was deficient and fell below an objective standard of reasonableness. *Id.* at 687–88. Second, the petitioner must show the deficient performance prejudiced the defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. But in considering these two factors, the bar is higher for strategic decisions. Much higher. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

Stokes' complaints involve classic strategic decisions that the Supreme Court has determined to be "virtually unchallengeable." Sims and Johnson—seasoned trial

lawyers with experience trying capital cases in Orangeburg County—felt the personal mitigation evidence cut both ways. Despite the potential benefits of that evidence to humanize Stokes, there were risks. Their strategy throughout the trial was to admit guilt, portray the other participants in the murder as more culpable than Stokes and ask for mercy. And they felt that jurors might view mitigating evidence as to Stokes' background as a poor excuse for him committing a gruesome murder. They questioned whether those jurors, from a poor county in South Carolina, many of whom may have had tough upbringings and life experiences, might take offense at the mitigating evidence. In other words, "the question at that point [was] whether or not putting out the background of the individual and the kind of life that they had had as a child would be effective in light of the facts of the case and the people that you had on the jury." J.A. 3472.

In weighing the pros and cons, Sims and Johnson evaluated how the trial was going. They had been with the jurors throughout the trial. They saw how the jury reacted to the opening statements and closing arguments and to the evidence presented. They also drew upon their knowledge of the community where the jurors lived. Recall that Sims and Johnson lived in that community too.

All of these things went into making the decision, that at that time, in that venue, with that jury, against the evidence that had been presented so far in that trial, they should not introduce certain mitigating evidence. Sims and Johnson made the choice—the

excruciating choice—that the benefits of the mitigation evidence, in this situation, were not worth the risks.

To be sure, one could have a different view. Like the majority, one could conclude that in the face of the inevitably gruesome evidence about what Stokes did, the best chance to save his life was to attempt to humanize that conduct through the personal mitigation evidence. Maj. Op. at 28.

But trial counsel considered that approach. Their best judgment, sitting in counsel's chair with an appreciation of the dynamics at the moment, was that the mitigating evidence would do more harm than good. We are in no position to label that decision unreasonable. In fact, the Supreme Court has provided guidance in the context of similar arguments. Substituting Stokes for the petitioner in *Wong v. Belmontes,* 558 U.S. 15, 25 (2009), Stokes would argue for a "more-evidence-is-better" approach; "after all, what is there to lose?" "But here there was a lot to lose. A heavyhanded case to portray [Stokes] in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the evidence that [Stokes] was responsible for not one but two murders." *Id.* The Supreme Court tells us that we should not second guess those decisions.

Despite that, the majority engages in just that sort of second guessing, chastising Sims and Johnson about how they should have tried the case. According to the majority, the concern counsel identified "reflects a misunderstanding of the duty to mitigate. Trial counsel were not obliged to ask the jury to excuse Stokes's actions. Instead, their duty was to mitigate Stokes's

'moral culpability.'" Maj. Op. at 27. Remarkably, the majority goes on: "[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." Maj. Op. at 29.

I agree with the majority that the purpose of mitigating evidence is not to excuse conduct, but to help place the moral judgment about the conduct in a context more favorable to the defendant. And in sociology classes, law review articles and even appellate court chambers, that distinction may seem clear. But in the fast-paced and intense context of a trial, particularly one in which a defendant's life is in the hands of twelve jurors from the community, the line is blurry. 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. In my view, this is the exact type of strategic judgment to which we must defer. Indeed, *Strickland* tells us that. It counsels us to make every effort to "eliminate the distorting effects of hindsight" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland,* 466 U.S. at 689.

Likely recognizing the difficult hurdle of claiming ineffective assistance based on strategic decisions, Stokes tries to masquerade his criticism of those strategic decisions as criticism about preparation. He is right that without a reasonable investigation, counsel does not get the benefit of the strong deference

we afford to strategic decisions. Seizing on that law, Stokes argues that trial counsel did not sufficiently investigate mitigation evidence and did not do so soon enough. Although the majority largely agrees with Stokes, in my view this argument also falls short. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter,* 562 U.S. 86, 105 (2011) (internal quotation marks omitted). Capital sentencing counsel has an "obligation to conduct a thorough investigation of the defendant's background . . . to discover all reasonably available mitigating evidence," but the investigation need only be "*reasonably* thorough." *Owens*, 961 F.3d at 413 (internal quotation marks and citations omitted). We are to employ a highly deferential view of trial counsel's performance, recognizing the dangers of second-guessing counsel's assistance after an adverse sentence and acknowledging there are "countless ways to provide effective assistance in any given case." *Strickland,* 466 U.S. at 689.

Here, as noted above, the record demonstrates the significant work that trial counsel and their team did in interviewing witnesses and working with experts to develop a trial strategy. As described above, trial counsel's investigative efforts involved interviewing a significant number of Stokes' family and friends to learn about his upbringing. Through those efforts, trial counsel learned extensive and specific information about the traumatic and abusive upbringing Stokes endured. While I recognize not every detail of mitigation evidence was discovered, that, of course, is

not required. What is clear is that trial counsel's investigation went well beyond broad outlines of Stokes' childhood troubles.

This simply is not a situation where trial counsel overlooked "red flags" about Stokes in investigating their case. *Rompilla v. Beard,* 545 U.S. 374, 392 (2005). It is also not a case where trial counsel "did not even take the first step of interviewing witnesses or requesting records." *Porter v. McCollum,* 558 U.S. 30, 39 (2009). Indeed, trial counsel's investigative efforts here were more than sufficient, particularly when compared to the attorneys' work in *Bobby v. Van Hook,* 558 U.S. 4, 9–10 (2009) where the record there showed that counsel "looked into enlisting a mitigation specialist when the trial was still five weeks away" and were in touch with expert witnesses "more than a month before trial." The Supreme Court there found that trial counsel's performance was not constitutionally deficient in terms of the timing and scope of the investigation, and that "even if . . . counsel performed deficiently by failing to dig deeper, [the defendant] suffered no prejudice as a result." *Id.* at 12.

Interestingly enough, the majority's analysis confirms that trial counsel's investigation went "beyond some investigations that have been deemed unreasonable." Maj. Op. at 26 n.9. It also rightly notes that counsel responded to that investigation by identifying witnesses who could have presented the personal mitigating evidence available. "[M]embers of Stokes's family and a social worker were prepared to testify. A neurologist and psychiatrist were prepared to testify about Stokes's HIV status, but presumably could

have offered other personal testimony about Stokes instead." Maj. Op. at 27. The absence of mitigating evidence about Stokes' upbringing and childhood was not a matter of preparation, or lack thereof. It was the result of strategic decision-making by trial counsel in the thick of an intense trial.

In hindsight, one could argue that counsel could have done more. Hindsight, after all, is always twenty-twenty. But that is simply not the standard we apply here. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith,* 539 U.S. 510, 533 (2003).

Trial counsel conducted the "reasonably thorough" investigation required of capital sentencing counsel. *Owens,* 967 F.3d at 413, 417 (finding no deficiency in counsel's mitigation team's efforts and further rejecting the complaint that counsel failed to present mitigating evidence within their possession, noting that counsel "judged with reasonable competence in avoiding such 'double-edged' evidence" (quoting *Gray,* 529 F.3d at 239)); *see also Strickland,* 466 U.S. at 691 (1984). With a thorough investigation of law and facts completed, we must credit counsel's exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 690. One thing professional judgment teaches is that the evidence can cut both ways. Here, trial counsel thought the burdens outweighed the possible benefits. Stokes has not presented sufficient evidence to overcome the presumption of adequate assistance for trial counsel's strategic decisions.

B.

I turn now to Stokes' PCR counsel. Stokes claims that not only was his trial counsel ineffective, his PCR counsel was also. Like trial counsel, PCR counsel investigated mitigation evidence. They hired a mitigation investigator to conduct more interviews of family, friends, teachers and Stokes' ex-wife. That investigation also unearthed even more aggravating evidence against Stokes. They had the benefit of trial counsel's consultation with a social worker who was a part of Stokes' trial defense and had met with Stokes as well. But, Stokes' PCR counsel, like trial counsel, decided not to pursue the mitigation claim, focusing instead on an intellectual disability claim and an actual conflict of trial counsel claim, which they felt were the stronger claims.[*]

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[*] Stokes claimed that trial counsel labored under an actual conflict of interest because the State's key witness at trial was Stokes' ex-wife. Trial counsel Sims prosecuted Stokes in his earlier assault case. Stokes claimed this conflict prejudiced him because Sims failed to explore several lines of inquiry in cross-examining Stokes' ex-wife during the sentencing phase allegedly due to this conflict. I am not convinced that trial counsel Sims labored under any actual conflict of interest. This issue was adjudicated below and as the district court recognized, the PCR court credited Sims' testimony that he knew Stokes' ex-wife would testify and his declaration that there was nothing in his earlier prosecution that would inhibit his defense. Sims testified that he had a theory in mitigation as to how to address the incident involving Stokes' ex-wife and noted that one of the issues he was trying to show was Stokes' remorse. As for his representation as a whole, when asked if he labored under a conflict Sims stated that "if I thought I couldn't have represented Mr. Stokes to the best of my ability I would not have been in the case." J.A. 1618.

Stokes claims in doing so, PCR counsel's assistance was ineffective. He claims that the mitigation issue should have been pressed. And as he and the majority note, PCR counsel now agree. In this collateral proceeding, PCR counsel conceded that they should have pursued the claim.

The testimony of PCR counsel certainly supports Stokes' claim. But their testimony as a whole must be considered from counsel's perspective at that time and without the "distorting effects of hindsight." *Strickland,* 466 U.S. at 689. And importantly, PCR counsel admitted that if they thought the ineffective assistance of counsel claim was strong, they would have presented that claim. In their own words, they "made some sort of judgment, explicit or implicit" in deciding not to pursue the referenced mitigation claim. J.A. 3259. That was the judgment at the time.

That testimony suggests that PCR counsel considered presenting mitigating evidence but decided against it. In other words, like trial counsel, they made a strategic decision not to include that and other claims that, at the time, they considered weaker. Instead, they felt the best approach was to focus only on the strongest claims.

Consistent with that conclusion, the record reveals that Stokes' pro se application for habeas relief includes the mitigating evidence issue. Then PCR counsel filed an amended application removing the mitigation issue. Removing an existing ground provides additional evidence of a conscious decision.

And let's not forget that PCR counsel are experienced death penalty lawyers. One of Stokes' PCR attorneys is currently a law professor and director of death penalty litigation at a law school who transitioned to that role after working almost exclusively on post-conviction and federal habeas cases while in private practice. He was trained in the development and presentation of mitigating evidence in death penalty cases and had done this work before. While even the best lawyers can make mistakes, PCR counsel's experience is even more evidence that counsel made a strategic decision not to pursue the mitigating evidence claim.

Finally, I find it significant that PCR counsel acknowledged "falling on [the] sword" for Stokes. J.A. 3044. In fairness, counsel admitted that in using that term, he meant "I didn't do as good a job as I should have." J.A. 3044. But to me, when considered in the context of his testimony as a whole, PCR's admission amounts to acceptance of responsibility in hindsight for a failed effort; not necessarily an effort that was ineffective at the time. In other words, PCR counsel, after his efforts proved unsuccessful, stated that he would have done things differently as he thought about that case several years later. Accepting that as true, it does not change the fact that PCR counsel, at the time, made a strategic decision to pursue the claims that they felt were the strongest. That view of the decision in hindsight is precisely what the Supreme Court has prohibited.

While one might reasonably say PCR counsel took the wrong approach in dropping the claim, it was

hardly unreasonable. In presenting arguments, lawyers often debate whether to pursue all potential arguments hoping one will stick—or to laser in on the best arguments because of concerns that the weaker ones may dilute the stronger ones. Reasonable minds can differ on that question. But the Supreme Court tells us that this approach is not unreasonable. "Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." *Yarborough v. Gentry,* 540 U.S. 1, 7 (2003). As is the case with almost any trial decision, "[f]ocusing on a small number of key points may be more persuasive...." *Id.* Thus, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Id.* at 8; *see also Workman v. Superintendent Albion SCI,* 915 F.3d 928, 942 (3d Cir. 2019) (discussing this presumption in an attorney's decision to pursue some claims and decline to pursue others as a tactical choice in relation to *Martinez).* Guided by *Strickland,* we must indulge the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. Here, PCR counsel made a strategic decision to focus on other claims and that was reasonable under *Strickland.*

C.

But even if Stokes could establish his trial counsel and his PCR counsel were deficient, he must show prejudice under *Strickland.* To show prejudice, a petitioner must demonstrate a reasonable probability that "at least one juror would have struck a difference

balance" and voted against the death penalty after having heard additional available mitigation evidence. *Wiggins,* 539 U.S. at 537. "To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter,* 558 U.S. at 41 (quoting *Williams v. Taylor,* 529 U.S. 362, 397–98 (2000)).

Considering the totality of the evidence, both aggravating and mitigating, I do not see where Stokes has "affirmatively prove[n] prejudice." *Strickland,* 466 U.S. at 693. Even crediting mitigating evidence derived from both trial counsel and PCR counsel's efforts and interviews, as well as potential testimony about Stokes' troubled childhood, neglectful parents, abuse, and trauma, and even if federal habeas counsel's child development expert testified, the aggravating evidence is simply overwhelming. It is hard to conjure a more horrific set of facts. The jury, of course, heard it all. They learned of how Stokes plotted several months in advance to murder Connie Snipes, a complete stranger, as he sat in a jail cell for having already committed yet another violent act. They heard testimony about the gruesome rape and murder of Connie. They learned that the murderers scalped her head, stabbed and mutilated her nipples and body, and cut her vagina out of her body. They heard the testimony of a forensic pathologist and then saw the graphic pictures of Connie's mutilated and dismembered body. They heard that Stokes committed another horrific murder mere days later. They also heard about his criminal history and that he assaulted his ex-wife and served prison

time for that conduct. And on top of it all, Stokes wrote a letter admitting to much of the detail about his role in the murders of Connie and Doug Ferguson. That letter is laced with profanity, graphic and detailed in nature, but shows little remorse—"[t]elling their family sorry would only make them hate me more." J.A.1225.

In light of this overwhelming evidence, I do not see how Stokes satisfies his burden or how any additional expert or fact testimony about his upbringing and difficult childhood would outweigh the gruesome and horrific nature of Connie Snipes' murder. Stokes and the majority rightly note that the relevant question is whether "there is a reasonable probability that at least one juror would have struck a different balance." *See Wiggins,* 539 U.S. at 537. But that does not mean we compromise our objective analysis or decline to view the evidence "taken as a whole." *Id* at 538. If we do, we water down the prejudice requirement to something akin to anything is possible. *See Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (noting that a reasonable probability sufficient to undermine confidence in the outcome requires a "'substantial' not just 'conceivable,' likelihood of a different result"). That, however, is exactly what Stokes asks us to do. His argument boils down to conjecture, speculating that it just takes one juror; so, the mitigating evidence could have made a difference. Of course, it could have. Anything could have made a difference. That is not, however, the approach the Supreme Court requires. Stokes must show that there is a "*reasonable probability* that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537 (emphasis added). A reasonable probability is one "sufficient to undermine

confidence in the outcome" but in the capital sentencing context, this means whether the sentencer would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death." *Owens,* 967 F.3d at 412 (internal quotation marks omitted). Objectively considering the facts here, there is no basis to conclude that presenting the mitigating evidence would have had any effect on the outcome of Stokes' sentence.

III.

In my view, the record does not support the conclusion that the choice Sims and Johnson made was unreasonable. It does not support the conclusion that PCR counsel was unreasonable. But the record does support the district court's conclusion that even if we are to conclude that their representation was deficient, Stokes faced no prejudice because of the overwhelming and horrific aggravating evidence before the jury. Therefore, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No.: 1:16-cv-00845-RBH

[Filed September 28, 2018]

Sammie Louis Stokes,	)
	)
Petitioner,	)
	)
v.	)
	)
Bryan P. Stirling, *Director, South Carolina Department of Corrections*; and Willie D. Davis, *Warden of Kirkland Correctional Institution*,	)
	)
Respondents.	)

ORDER

Petitioner Sammie Louis Stokes, a state prisoner sentenced to death and represented by counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is before the Court for consideration of Petitioner's objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Shiva V. Hodges, who recommends

granting Respondents' motion for summary judgment and denying and dismissing Petitioner's habeas petition with prejudice.[1] The Court adopts the R & R as modified herein.

Background[2]

In 1999 an Orangeburg County, South Carolina jury convicted Petitioner of murder, kidnapping, first-degree criminal sexual conduct, and criminal conspiracy, and he was sentenced to death for the murder conviction.[3] The facts giving rise to these convictions are summarized in the South Carolina Supreme Court's opinion rejecting Petitioner's direct appeal:

> Stokes was hired by Patti[e] 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.[2] The four of them then drove

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[1] This matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c) for the District of South Carolina.

[2] The R & R thoroughly details the factual and procedural history, which the Court briefly recounts here.

[3] Petitioner was sentenced to thirty years for first-degree criminal sexual conduct and five years for criminal conspiracy. Because of his death sentence for murder, no sentence was imposed for the kidnapping conviction in accordance with S.C. Code Ann. § 16–3–910 (Supp. 2000).

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 . . . [.]"

> FOOTNOTE 2: Allegedly, Snipes accompanied the others on the premise that they were going to Branchville to kill a man named Doug Ferguson, whom Syphrette and Stokes had tied up in the woods.

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,[3] and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.[4]

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

> FOOTNOTE 4: According to the pathologist, Snipes' injuries were consistent with having been scalped, had the nipple area cut from

> each breast, and having had the vaginal area cut 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.[5]
>
> FOOTNOTE 5: Stokes pleaded guilty to Ferguson's murder in a separate proceeding and was sentenced to life.

State v. Stokes, 548 S.E.2d 202, 203–04 (S.C. 2001). Attorneys Thomas Ray Sims and Virgin Johnson Jr. (collectively, "trial counsel") were appointed to represent Petitioner. In 2001, the South Carolina Supreme Court affirmed Petitioner's convictions and death sentence, denied his petition for rehearing, and remitted the case. *See id.* at 206–07; ECF Nos. 18-4 through 18-7.

Thereafter, Petitioner filed an application for post-conviction relief ("PCR") in state court and amended it twice. Attorneys Keir Weyble, Robert Lominack, and Susan Hackett (collectively, "PCR counsel") were appointed to represent Petitioner. In 2009, the state PCR court conducted an evidentiary hearing, and in 2010, it issued a written order denying and dismissing

Petitioner's PCR application with prejudice. *See* App.[4] 2139–84. In 2013, the PCR court denied Petitioner's motion to alter or amend the judgment. *See* App. 2373–95. Petitioner appealed the denial of his PCR application to the South Carolina Supreme Court, which summarily denied certiorari in February 2016. *See* ECF Nos. 18-8 through 18-12. In May 2016 (after the instant § 2254 action was filed), Petitioner filed a petition for a writ of certiorari in the United States Supreme Court.[5] In December 2016, the U.S. Supreme Court denied certiorari to review the judgment of the South Carolina Supreme Court. *See Stokes v. South Carolina*, 137 S. Ct. 589 (Dec. 12, 2016).[6]

On March 9, 2016, Petitioner commenced the instant § 2254 action by filing a motion to stay his execution and a motion to appoint counsel. *See* ECF No. 1. The Court granted the motions, *see* ECF Nos. 8 & 12, and Petitioner subsequently filed his § 2254 petition and a supplemental petition. *See* ECF Nos. 22, 51, & 75. Respondents answered and moved for

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[4] "App." refers to the appendix filed by Respondent, and it is available at ECF No. 19. The R & R cites the electronic court filing numbers ("ECF Nos."), but the Court cites the state-court appendix for the sake of clarity and brevity.

[5] *See* ECF No. 61 at p. 3; *Stokes v. South Carolina*, Case No. 15-9329 (U.S.S.C. filed May 11, 2016), *available at* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-9329.htm.

[6] Also during the pendency of this § 2254 action, Petitioner filed a state habeas corpus action in the South Carolina Supreme Court, which denied Petitioner's habeas petition in March 2017. *See* ECF No. 102-1.

summary judgment, *see* ECF Nos. 56, 89, 160, 161, & 175; Petitioner responded to the motion for summary judgment, *see* ECF Nos. 74, 96, & 172; and the Magistrate Judge determined an evidentiary hearing was necessary for Petitioner's *Martinez*[7] claims.[8] *See* ECF No. 101.

In January 2018, the Magistrate Judge held a four-day evidentiary hearing on the *Martinez* claims; Petitioner himself did not testify but he called other witnesses. *See* ECF Nos. 101, 195–99, & 204–07. In May 2018, the Magistrate Judge issued an R & R recommending granting Respondents' motion for summary judgment and denying and dismissing Petitioner's habeas petition with prejudice. Petitioner filed timely objections to the R & R, and Respondents filed a reply to Petitioner's objections. *See* ECF Nos. 221 & 222.

The matter is now before the Court for consideration of Petitioner's three remaining grounds

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[7] *Martinez v. Ryan*, 566 U.S. 1 (2012).

[8] The Magistrate Judge directed the parties to participate in discovery on the *Martinez* claims, *see* ECF No. 101, and the parties took depositions of trial counsel, PCR counsel, and Petitioner's childhood trauma expert Dr. James Garbarino. *See* ECF Nos. 126, 127, 130, 131, 134, 135, & 142; *see generally* Rule 6(a) of the Rules Governing Section 2254 Cases ("A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure . . . ."); *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991) ("A court should grant discovery in its discretion where there is 'good cause' why discovery should be allowed." (quoting Rule 6(a))).

for relief: Grounds Three, Six and Seven.[9] These grounds are, verbatim, as follows:

- **Ground Three (exhausted claim)**: "[Petitioner's] right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated as a result of representation by counsel who labored under an actual conflict of interest." ECF No. 22 at p. 9.
- **Ground Six (*Martinez* claim)**: "Trial and collateral counsel were ineffective to the prejudice of [Petitioner] by failing to investigate, develop[,] and present any mitigation evidence." ECF No. 75 at p. 5.
- **Ground Seven (*Martinez* claim)**: "[Petitioner's] Sixth Amendment right to the effective assistance of counsel was violated when his trial counsel offered an expert witness not suitable for the case and failed to prepare[] that witness." ECF No. 75 at p. 32.

Legal Standards

I. Review of the Magistrate Judge's R & R

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains

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[9] Petitioner originally raised eight grounds for relief, but has since withdrawn Grounds One, Two, Four, Five, and Eight. *See* ECF No. 140; ECF No. 221 at p. 39 n.7.

with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R & R, the Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge's recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983).

II. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see generally* Rule 12 of the Rules Governing Section 2254 Cases ("The Federal Rules of Civil Procedure . . . , to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."); *Brandt v. Gooding*, 636 F.3d 124, 132 (4th Cir. 2011) ("Federal Rule of

Civil Procedure 56 'applies to habeas proceedings.'" (quoting *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991))). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "The evidence must be viewed in the light most favorable to the non-moving party, with all reasonable inferences drawn in that party's favor. The court therefore cannot weigh the evidence or make credibility determinations." *Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 413 (4th Cir. 2015) (internal citation and quotation marks omitted).

Discussion

As indicated above, Petitioner presently seeks habeas relief on three grounds: a conflict of interest claim (Ground Three) and two *Martinez* claims (Grounds Six and Seven).[10] The Magistrate Judge recommends granting summary judgment on all three grounds.[11] *See* R & R at pp. 88–120, 133–93. Petitioner has filed objections to the R & R. *See* Pet.'s Objs. [ECF No. 221].

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[10] The Court refers to these grounds as originally identified in Petitioner's initial petition and supplemental petition, i.e., as Grounds Three, Six, and Seven. *See* ECF Nos. 22 & 75.

[11] The R & R also addresses Grounds Four and Five, *see* R & R at pp. 120–33, but Petitioner withdrew these grounds in his objections. *See* Pet.'s Objs. at p. 39 n.7.

I. Exhausted Claim—Ground Three (Conflict Claim)

Petitioner alleges in Ground Three that his "right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated as a result of representation by counsel who labored under an actual conflict of interest." ECF No. 22 at p. 9. Petitioner's conflict of interest claim arises from the undisputed fact that one of his trial counsel, Thomas Sims, had previously prosecuted him for an assault that Petitioner committed against his former wife, who testified about that assault during the sentencing phase of trial. *See* Pet.'s Objs. at pp. 2–10; ECF No. 22 at pp. 9–23; ECF No. 51 at pp. 3–36; ECF No. 172 at pp. 7–45.

A. Facts

1. Thomas Sims' Prosecution of Petitioner in 1991

In January 1991 (eight years before the underlying capital trial), an Orangeburg County grand jury indicted Petitioner for assault and battery with intent to kill ("ABWIK") allegedly committed against his former wife, Audrey Smith, in December 1990. App. 1696–97. At the time, Thomas Sims was an assistant solicitor for the First Circuit Solicitor's Office in Orangeburg, and he signed the indictment[12] and personally prosecuted the ABWIK case against Petitioner. App. 2396–2540. In March 1991, the

[12] Sims signed the indictment because he was the acting solicitor at the time. App. 1859.

ABWIK case was called for trial before Judge John H. Smith, and Sims appeared in court on behalf of the State. App. 2396–99. Petitioner was also present in the courtroom accompanied by his defense counsel, and before jury selection began, Petitioner waived his right to be present and voluntarily absented himself from the courtroom during trial. App. 2400–09. Ultimately, Petitioner was convicted of the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN") and sentenced to ten years' imprisonment. App. 2535–36. Sims went into private practice in 1993. App. 1505, 1860.

2. Sims' Representation of Petitioner at the 1999 Capital Trial

In May 1998, Petitioner committed the offenses giving rise to his capital trial, and in January 1999, the trial court (Judge M. Duane Shuler presiding) held a hearing at which it appointed Sims and Virgin Johnson Jr. to represent him. App. 1503–07. When providing his particular qualifications, Sims noted he had worked in the Solicitor's Office from 1982 until 1993, App. 1505–06, but did not inform the trial court that he had previously prosecuted Petitioner. The trial court appointed Sims as lead counsel given his prior experience in capital cases, and Johnson as second-chair counsel. App. 1503–07. At the conclusion of the hearing, the trial court noted that Petitioner was present in the courtroom and that Sims and Johnson had "talked to him ahead of time." App. 1511.

Petitioner proceeded to trial before Judge Paul Burch in October 1999, and after he was found guilty, the State introduced his criminal record as aggravating

evidence during the sentencing phase. App. 1112–13. This criminal record included the aforementioned 1991 ABHAN conviction as well as a 1988 ABHAN conviction also involving Petitioner's former wife Smith, who was the victim in both offenses and testified about the facts giving rise to the convictions and several threatening letters that Petitioner had written her from prison.[13] App. 1113–45. Sims briefly cross-examined Smith, asking her about the letters and whether Petitioner had contacted her after being released from prison in May 1998. App. 1142–44. Smith answered that Petitioner had no direct contact with her after being released from prison and that she had not received a letter from him for a couple years. App. 1142–43. Smith also acknowledged that when she and Petitioner were having problems, he was on drugs and jealous and possessive of her. App. 1143–44. Smith also confirmed that in a number of Petitioner's letters he was asking to be her friend and wanting to talk with her "about trying to get his head straight." App. 1144.

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[13] The record indicates the 19**8**8 ABHAN conviction is from "19**9**8," but this appears to be a typographical error in the trial transcript. *Compare* App. 1112 (solicitor reading the date as "March 9, 1998"), *with* App. 1121 (Smith testifying Petitioner "was convicted in March of th[e] assault" that had occurred in the preceding year of 1987).

The State also introduced a 1993 ABHAN conviction relating to Petitioner's assault of an inmate while he was incarcerated. App. 1113. The State presented a chart—not the indictments themselves—summarizing Petitioner's criminal record. App. 1087. This procedure was used due to Sims' name being on the 1991 indictment. App. 1637.

The parties agree the trial record is silent on the alleged conflict at issue, and that the trial court never inquired into the existence of any potential conflict due to Sims' prior prosecution of Petitioner. *See* ECF No. 22 at pp. 10–11; ECF No. 56 at p. 51.

3. PCR Evidentiary Hearing

At the 2009 evidentiary hearing before the state PCR court, Sims and Johnson testified about their representation of Petitioner and the alleged conflict of interest. App. 1857–1915.

a. Sims' Testimony at the PCR Hearing

Sims recalled signing the ABWIK indictment and handling Petitioner's 1991 prosecution. App. 1859–60. Sims had no further involvement with either Petitioner or Smith after the 1991 trial, and after unsuccessfully running for solicitor in 1992, he went into private practice. App. 1860–62. He remembered being appointed to represent Petitioner in 1999. App. 1862–63. When asked why he did not inform the trial court that he had prosecuted Petitioner, Sims stated "it just didn't come up." App. 1863. However, Sims explained he and Johnson met with Petitioner and discussed this issue; Sims testified as follows:

> Q: Do you recall meeting with Mr. Stokes and discussing if at all your prior prosecution of him?
>
> A: As I recall, after going through the information we did discuss with Mr. Stokes, my role, who I was, and what my role had

been in the previous matter with him. We discussed it, me and Attorney Johnson. We did discuss it. He never expressed any desire not to have me as his attorney.

. . . .

Q: What was the purpose of those discussions?

A: For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes. That also says the other side to me that if I don't want you I can say I don't want you any more.

Q: But just to be clear, did you have that type of discussion with Sammie?

A: We had that type of discussion in terms of, look, you know who I am. I'm the prosecutor, I was the prosecutor here. I've been here and you know who I am. I've – you and I have met before, we've been involved before.

Q: So it was clear from your discussion that Sammie could have said he didn't want you as a lawyer?

A: Yes.

Q: Right?

A: Yes.

Q: And he said he wanted you to continue?

A: Yeah.

. . . .

Q: [F]rom your representation in January of 1999, through the trial, did your client ever indicate to you any desire to have you removed as his lawyer?

A: None.

App. 1863–64, 1866. Sims also recalled that while Petitioner's direct appeal was pending, Petitioner called him, indicated that if the appeal succeeded he "still wanted [Sims] to be his lawyer," and said he thought Sims was "top flight." App. 1864–65.

Sims testified the State provided him information concerning the statutory aggravating circumstances and the evidence in aggravation. App. 1866. Specifically, the State notified him of its intention to call Audrey Smith as a witness and to put into evidence the 1991 ABHAN conviction as well as Petitioner's letters to Smith. App. 1867. Sims anticipated the conviction, Smith's testimony, and Petitioner's letters would be introduced at trial, and he discussed this fact "in depth" with Petitioner. App. 1867–88. Sims confirmed he knew this evidence "was coming in" and planned to address it with a showing of remorse. App. 1868. He answered questions about his cross-examination of Smith, testifying as follows:

Q: Did the fact that you had previously prosecuted Mr. Stokes for that same incident that was part of Audrey Smith's testimony, did that affect the way that you approached

her on cross-examination or any objection you may have available to you?

A: Now, look, if I thought that I couldn't have represented Mr. Stokes to the best of my ability I would not have been in the case.

Q: All right. And was that consideration that you had from the beginning of your appointment with Mr. Stokes being aware that you had, in fact, prosecuted him?

A: I take the position that if I got a conflict, if I have a moral issue, if I have an ethical issue or if I have any issue that's going to prevent me from presenting [*sic*] anyone, I will not take the case.

. . . .

Q: Is there anything that you learned in your prosecution of Mr. Stokes that inhibited you in his defense in any manner?

A: No.

App. 1869. Sims also spoke with co-counsel Johnson, who never expressed any concern about Sims' prior prosecution of Petitioner. App. 1870.

On cross-examination, Sims recalled researching the admissibility of Petitioner's prior convictions under South Carolina law, filing a motion to exclude the prior convictions, and arguing the motion to the trial court. App. 1876, 1880–90. Sims also recalled informing the trial court that his name appeared on the 1991 indictment. App. 1885; *see* App. 1637 (Sims informing

the trial court). Furthermore, Sims reiterated he had conversations with Petitioner in which they discussed his prior prosecution of Petitioner, the fact that Petitioner went to prison because of that prosecution, and the evidence the State would seek to use at trial (including the 1991 ABHAN conviction). App. 1891–92.

On redirect, Sims again testified he anticipated Audrey Smith would testify at trial and explained that fact to Petitioner. App. 1895. Sims recalled his name being on the 1991 indictment and wanting to make sure the jury did not see the actual indictment. App. 1896. He testified he "fought to keep [] out" Smith's testimony but anticipated the trial court would still admit it. App. 1906. He again confirmed Petitioner knew of his prior prosecutorial role:

> Q: What exactly did you tell [Petitioner] his options were as far as representation, who could represent him?
>
> A: Let me put it this way, he knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that? And, of course, after the trial he had no problem with it because he wanted me to go back and represent him again if the matter had been -- if the appeal had been upheld. . . . Mr. Stokes knew quite well if he had a problem with it all he had to do was to voice a problem, because during the course of our conversations I said, no, look, if you've got a problem with this let me know. And during

the trial, when that issue came up - - we talked about that indictment, too.

Q: Okay. And Virgin Johnson was present during your discussions with him about that?

A: Yes.

App. 1896.

On recross, Sims clarified the trial record indicated that the trial court was aware he had "conducted the ministerial task of signing the [1991] indictment," but not that he "had personally prosecuted that case." App. 1899. Additionally, Sims confirmed he (not Johnson) was the attorney who made all arguments and examined all witnesses at trial. App. 1904. Sims again testified he reminded Petitioner he was the prosecutor from the 1991 trial. App. 1904–05.

b. Johnson's Testimony at the PCR Hearing

Johnson testified that he knew Sims had prosecuted Petitioner and that they (Johnson and Sims) discussed the potential conflict of interest issue with Petitioner when they began representing him. App. 1909–10. Johnson remembered Sims "said . . . you know I put you in jail or I prosecuted you[,] and Sammie said yes," and that Petitioner said he had no problem with Sims representing him. App. 1910. Sims and Petitioner had a "good" relationship, and Petitioner expressed a desire to have Sims as his attorney again if his appeal succeeded. App. 1910. Johnson and Sims discussed with Petitioner the possibility of Smith's testimony concerning the 1991 ABHAN conviction being

presented during the penalty phase, and Petitioner never sought to have Sims relieved as counsel. App. 1910–11, 1913. Johnson never sensed Sims was hesitating to act on Petitioner's behalf based upon the prior conviction. App. 1911–12.

At the conclusion of the hearing, the PCR court confirmed "[t]here's no waiver on the [trial] record that anybody could find." App. 1916. Petitioner did not offer his live testimony at the PCR hearing and thus did not contradict Sims' or Johnson's testimony about their conversations with him on this issue.[14]

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[14] Sims and Johnson were the State's witnesses at the PCR hearing. App. 1810, 1857, 1908. Petitioner called two witnesses, one of which was attorney Jeffrey Bloom. App. 1848. Bloom testified he met with Sims "shortly sometime after April 1999" to discuss a jury issue as well as "a potential conflict of interest issue" regarding Sims' prior prosecution of Petitioner and the resulting conviction. App. 1850–51. Bloom asserted he told Sims to request an ex parte hearing before the trial court to address the matter, but when Sims later called to discuss the jury issue and "didn't seem concerned about" the conflict issue, Bloom "sever[ed] any professional relationship to the case." App. 1853–54. However, Sims (who was sequestered during Bloom's testimony) testified he did not recall discussing any potential conflict issue with Bloom, App. 1866, and the PCR court found Sims' testimony credible and discounted Bloom's testimony. App. 2173 n.10, 2385–90.

Moreover, Petitioner was present at the PCR hearing but did not testify. He later submitted an affidavit seeking to contradict the testimony of Sims and Johnson. App. 1929–30. The PCR court rejected the affidavit because it was untimely and "a blatant attempt to avoid the pitfalls of cross-examination and subjecting [him] to the adversarial process." App. 2183, 2379–85.

B. PCR Orders[15]

The PCR court issued an order denying relief on Petitioner's conflict of interest claim. App. 2163–83. Citing cases including *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Mickens v. Taylor*, 535 U.S. 162 (2002), the PCR court found (1) that Petitioner did not demonstrate an actual conflict of interest and (2) that he did not show the alleged conflict adversely affected Sims' representation of him. App. 2168–77. Alternatively, the PCR court found Petitioner made a knowing waiver of any conflict. App. 2163, 2177–83. In making these findings, the PCR court found Sims' testimony and Johnson's testimony were both credible. App. 2163. The PCR court subsequently issued an order denying Petitioner's motion to alter or amend and reaffirming its prior rulings. App. 2373–95.

C. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Three. R & R at pp. 88–120. Initially, the Magistrate Judge rejects Petitioner's argument that a different standard of review should apply because the PCR court adopted the State's proposed order without modification. *Id.* at pp. 96–97. Regarding the merits of Petitioner's claim, the Magistrate Judge concludes the PCR court's finding of no actual conflict of interest was not based on an unreasonable determination of the facts because Petitioner fails to show either an actual conflict or an adverse effect. *Id.* at pp. 97–112. The

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[15] The R & R extensively quotes the PCR court's order denying relief and thoroughly summarizes its findings. R & R at pp. 89–96.

Magistrate Judge further concludes the PCR court's alternative finding that Petitioner waived any actual conflict was not an unreasonable application of Supreme Court precedent. *Id.* at pp. 113–20. Petitioner objects to these findings. *See* Pet.'s Objs. at pp. 2–10.

D. Standard of Review

Ground Three is exhausted and ripe for review on the merits because Petitioner presented it to the state PCR court, the PCR court denied relief on the claim, and the South Carolina Supreme Court denied certiorari to review the PCR court's ruling.[16] *See generally Hedrick v. True*, 443 F.3d 342, 364 (4th Cir. 2006) ("[A] federal habeas court may consider only those issues which have been fairly presented to the state's highest court." (internal quotation marks omitted)). Because the South Carolina Supreme Court summarily denied Petitioner's certiorari petition, *see* ECF No. 18-11, the Court directly reviews the state PCR court's reasoning. *Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) (applying the "look-through" doctrine); *Hope v. Cartledge*, 857 F.3d 518, 523 (4th Cir. 2017) (same).

Petitioner filed this habeas action after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore 28 U.S.C. § 2254

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[16] As mentioned above, the U.S. Supreme Court denied certiorari to review the judgment of the South Carolina Supreme Court. The U.S. Supreme Court denied certiorari after conferencing the case multiple times and requesting the state court record. *See* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-9329.htm.

governs review of his claim in Ground Three. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615, 618 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This is a "difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted). "Section 2254(d)(1) describes the standard of review to be applied to claims challenging how the state courts applied federal law, while § 2254(d)(2) describes the standard to be applied to claims challenging how the state courts determined the facts." *Winston v. Kelly*, 592 F.3d 535, 553 (4th Cir. 2010). "'[A] determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" *Tucker v. Ozmint*, 350 F.3d 433, 439 (4th Cir. 2003) (quoting 28 U.S.C. § 2254(e)(1)).

Petitioner objects to the Magistrate Judge's conclusion that the PCR court's order warrants deference under 28 U.S.C. § 2254, claiming the PCR court merely rubber-stamped an order prepared by the State. Pet.'s Objs. at p. 10. Although the practice of signing proposed orders without modification is criticized by both the Fourth Circuit and the South Carolina Supreme Court, *see Bell v. Ozmint*, 332 F.3d 229, 233 (4th Cir. 2003); *Hall v. Catoe*, 601 S.E.2d 335, 341 (S.C. 2004),[17] the PCR court adopted the order as its own and adjudicated Petitioner's conflict claim on the merits. *See Young v. Catoe*, 205 F.3d 750, 755 n.2. (4th Cir. 2000) ("[T]he disposition of a petitioner's constitutional claims in such a manner [adopting a party's proposed order *in toto*] is unquestionably an 'adjudication' by the state court. If that court addresses the merits of the petitioner's claim, then § 2254(d) must be applied."); *Bell*, 332 F.3d at 233 (citing *Young*). Accordingly, the Court still must apply the highly deferential standard of § 2254(d) to Petitioner's conflict claim in Ground Three.

E. Analysis

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest." *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002). In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court articulated a two-prong test

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[17] The PCR court cited *Hall* when rejecting a similar challenge made in Petitioner's motion to alter or amend. App. 2375–79.

for analyzing conflict of interest claims.[18] *See Stephens v. Branker*, 570 F.3d 198, 208–09 (4th Cir. 2009) (summarizing the *Cuyler* test). "To establish ineffective assistance of counsel based on a conflict of interest that was not raised before the trial court, the defendant must demonstrate that (1) counsel operated under 'an actual conflict of interest' and (2) this conflict 'adversely affected his lawyer's performance.'" *Woodfolk v. Maynard*, 857 F.3d 531, 553 (4th Cir. 2017) (quoting *Cuyler*, 446 U.S. at 348). "If the defendant satisfies this showing, prejudice is presumed, and the defendant need not demonstrate a reasonable probability that, but for counsel's conflicted representation, the outcome of the proceeding would have been different." *Id.*; *see Mickens*, 240 F.3d at 355 ("After a petitioner satisfies this two-part test, prejudice is presumed.").

"[B]ecause an actual conflict of interest requires not only a theoretically divided loyalty, but also a conflict that actually affected counsel's performance, the actual conflict and adverse effect inquiries frequently are intertwined." *Woodfolk*, 857 F.3d at 553. "[T]he possibility of conflict is insufficient to impugn a criminal conviction," and "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for

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[18] The *Cuyler* test differs from the typical standard governing ineffective assistance claims articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Mickens*, 240 F.3d at 355 ("The *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan*, 446 U.S. 335 (1980).").

his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350.

The Court will address each prong of the *Cuyler* test in turn.

1. Actual Conflict

Cuyler's first prong requires a habeas petitioner to demonstrate "that his counsel actively represented conflicting interests." 446 U.S. at 350. The petitioner "must show that his interests diverged from his attorney's with respect to a material factual or legal issue or to a course of action." *Stephens*, 570 F.3d at 209 (internal brackets and quotation marks omitted).

The PCR court determined Sims' prior prosecution of Stokes did not create an actual conflict for the following reasons:

- Sims and Johnson both gave credible testimony. App. 2163, 2173, 2389–90.
- A per se conflict does not exist based upon a prior prosecution involving a different crime. App. 2173 (citing *State v. Childers*, 645 S.E.2d 233, 235 (S.C. 2007)).
- Sims and Johnson discussed with Petitioner his right to have different counsel appointed due to Sims' earlier prosecution of him; Petitioner was aware of Sims' prior prosecution of him and never requested to have Sims removed; and Petitioner advised them that he desired to have Sims continue to represent him. App. 2168–69, 2393.

- Petitioner knowingly and voluntarily waived a conflict of interest with full knowledge of the conflict and the ability to have a different lawyer; and he still desired to have Sims continue to represent him. App. 2163.

- Petitioner never attempted to have Sims relieved as counsel, and the record was "uncontradicted" that Petitioner knew of the prior prosecution. App. 2175.

- Regarding Audrey Smith's testimony and use of the 1991 ABHAN conviction at trial, the PCR court found: "[W]ith at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction.[19] There is no

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[19] In his objections, Petitioner quotes this sentence and the previous sentence and argues that the PCR court "mischaracterized the scope of the issue" by erroneously treating "the conflict as one involving only the introduction of a conviction as opposed to the presentation of the very same testimony by the very same witness, only with Mr. Sims now participating on the opposite side." Pet.'s Objs. at p. 3. Petitioner further argues the Magistrate Judge erred in "rewriting [] the PCR court's order" and finding its conclusion reasonable. *Id.* However, contrary to Petitioner's argument, the Court notes the PCR court's order clearly grasps the full extent of the issue—as one involving not only Sims' prior prosecution of Petitioner and use of the prior conviction against Petitioner but also the witness's (Audrey

showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith) – a person whom he never represented. There were no divided loyalties in the matter. The simple fact of the former prosecution did not provide proof of a conflict of interest." App. 2176. The PCR court further credited Sims' testimony "that he was aware of the [S]tate's intent to use the Audrey Smith indictment and conviction in the penalty phase," "that he fought to keep the evidence out," and that he denied ever telling Petitioner that the evidence would not be admitted. App. 2391–93.

- Alternatively, the PCR court determined Petitioner made a knowing waiver of a conflict of interest, finding "Sims's earlier prosecution arose from an independent action and was unrelated to the present prosecution of Stokes. It was already a matter of record concerning the earlier conviction for the Audrey Smith incident. . . . Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware – based upon the credible testimony of Virgin Johnson [–] that he could have somebody else represent him and he stated no. This Court finds that the Applicant waived his right to have

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Smith's) testimony against Petitioner at his capital trial. This is highlighted by the fact that the PCR court's order summarizes and compares Smith's testimony from the 1991 ABWIK trial and the 1999 capital trial and Sims' testimony regarding same.

counsel other than Thomas Sims represent him." App. 2177, 2183.

In reaching the above findings, the PCR court summarized the facts relating to Sims' 1991 prosecution of Petitioner, Smith's testimony at the 1991 trial and Sims' direct examination of her, Smith's testimony at the 1999 capital trial and Sims' cross-examination of her, and the PCR testimony of Sims and Johnson. App. 2163–67, 2169–73.

The Court finds the PCR court's conclusion that no actual conflict existed was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Initially, the Court emphasizes it does not take lightly the alleged conflict at issue and the fact that Sims' prior prosecution of Petitioner was never raised in open court and never brought to the trial court's attention during any phase of the proceedings. It goes without saying that the obvious and prudent course would have been for Sims to have immediately brought the potential conflict to the trial court's attention and placed Petitioner's knowing and voluntary waiver on the record. The Court further recognizes the unique distinction in this case is not only that Petitioner was previously prosecuted by one of his attorneys, but also that the prior conviction was used against him as aggravating evidence and that the victim from the prior prosecution (his ex-wife, no less) testified against him in aggravation. However, the Court cannot ignore Sims' and Johnson's PCR

testimony and the PCR court's credibility findings regarding it.

As both Sims and Johnson testified, they met with Petitioner before trial and squarely addressed the conflict issue by discussing with him the fact that Sims had previously prosecuted him, that Petitioner was incarcerated due to this prosecution, and that the 1991 ABHAN conviction *and* Audrey Smith's testimony would be presented as aggravating evidence at trial. Notably, Sims told Petitioner in unequivocal terms that "I'm the one who prosecuted you, sent you to jail," after which Petitioner said he still wanted Sims as his attorney. Sims also made it clear to Petitioner that he could have another lawyer besides him. Moreover, Sims and Johnson testified that Petitioner was aware of Sims' prior prosecutorial role and that Petitioner *never* indicated to them that he wanted Sims relieved as counsel.

Significantly, the PCR court heard Sims' and Johnson's testimony and found them both credible, and this Court is mindful that a federal habeas court cannot overturn a state court's credibility findings absent "stark and clear" error. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)). "Indeed, 'federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'" *Id.* (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)). The Court discerns no stark and clear error in the PCR court's credibility findings that Sims and Johnson both discussed the conflict issue with Petitioner and that Petitioner waived any

potential conflict. *See, e.g.*, *Vinson v. True*, 436 F.3d 412, 418 (4th Cir. 2006) (rejecting a conflict claim where the petitioner's second-chair counsel was suing lead counsel, in part because the petitioner "was fully informed by counsel of the details of the conflict and was told he could obtain alternate counsel, but that he decided to continue with . . . his counsel").

Petitioner argues the record "remains silent on whether Mr. Stokes waived his right to conflict-free counsel with a complete understanding of the full implications of the waiver." Pet.'s Objs. at p. 7. He asserts the PCR court's conclusion regarding waiver is unreasonable. *Id.* at pp. 7–10.[20] "To establish in habeas corpus a deprivation of their constitutional right to effective assistance of counsel, [p]etitioners must show that they did not intentionally, knowingly, and voluntarily relinquish this right." *Gilbert v. Moore*, 134 F.3d 642, 653 (4th Cir. 1998). A "habeas petitioner carries the burden of showing the absence of a valid waiver of conflict-free counsel." *Id.* Importantly, "the question whether the accused waived his rights *is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights*." *Id.* (internal quotation marks omitted and emphasis added). Here, the PCR court determined—after finding

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[20] Petitioner further argues the record does not indicate he actually knew before trial that Sims would be cross-examining Smith (rather than just the 1991 ABHAN conviction being admitted). Pet.'s Objs. at p. 7. This assertion is simply incorrect because, as summarized above, both Sims and Johnson testified they discussed with Petitioner the strong possibility that Smith herself would testify at trial about the facts giving rise to the 1991 ABHAN conviction. *See* App. 1867–88, 1891–92, 1895, 1910–11, 1913.

Sims' and Johnson's testimony credible—that Petitioner was apprised of the potential conflict by both trial counsel, knew he could have Sims removed as counsel if he wanted, and knowingly and voluntarily waived any potential conflict with full knowledge of it by keeping Sims as his lawyer. Given this credibility-driven determination, the Court cannot conclude the PCR court's (1) finding of no conflict and (2) determination that Petitioner waived any potential conflict after speaking with his lawyers were contrary to or unreasonably applied Supreme Court precedent or were an unreasonable determination of the facts.[21] *See* 28 U.S.C. § 2254(d); *see, e.g.*, *Gilbert*, 134 F.3d at 653 (finding habeas petitioners represented by a single attorney at trial "failed to establish that they did not

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[21] To the extent Petitioner claims his waiver is invalid because the trial court never inquired into a possible conflict of interest, that argument lacks merit. *See Fullwood v. Lee*, 290 F.3d 663, 690 (4th Cir. 2002) ("Fullwood claims that he is entitled to relief . . . because there was no inquiry by the trial court into a possible conflict of interest. The Supreme Court, however, recently rejected the idea that a habeas petitioner is automatically entitled to relief when the trial court fails to make an inquiry mandated by *Cuyler*. *See Mickens v. Taylor*, 535 U.S. 162, 172–73 (2002).").

Furthermore, the Court notes the PCR court never actually found an *actual* conflict of interest but still made an alternative finding of waiver. App. 2177–83. The Fourth Circuit has indicated it is appropriate to discuss waiver when addressing the first prong of the *Cuyler* test. *See, e.g.*, *Vinson*, 436 F.3d at 417–18 (discussing conflict and waiver together); *Hester*, 679 F. App'x at 284 (same). *But see Gilbert*, 134 F.3d at 652–53 (treating waiver separately from the conflict analysis). In any event, the Court finds the PCR court's alternative finding that Petitioner made "a knowing waiver of a conflict of interest," App. 2177, was not contrary to or an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

intentionally, knowingly, and voluntarily waive their right to conflict-free counsel"; and relying in part on trial counsel's PCR testimony that he discussed the conflict issue with his clients before trial); *Hester v. Ballard*, 679 F. App'x 273, 284 (4th Cir. 2017) ("Any 'actual conflict of interest' that may have existed . . . was rendered null by [a] knowing and voluntary waiver of the conflict . . . , and the state habeas court's conclusion was, accordingly, not an unreasonable application of clearly established law.").

To reiterate, "the *possibility* of conflict is insufficient to impugn a criminal conviction," and "a defendant must establish that an *actual* conflict of interest" existed. *Cuyler*, 446 U.S. at 350 (emphases added). Petitioner has not demonstrated an *actual* conflict and therefore has not satisfied the first prong of the *Cuyler* test. *See, e.g.*, *Hester*, 679 F. App'x at 284–85 (finding the state court did not unreasonably apply *Cuyler* in finding no actual conflict where trial counsel had previously represented a prosecution witness); *Chandler v. Lee*, 89 F. App'x 830, 839–41 (4th Cir. 2004) (finding "that while [trial counsel]'s prior representation of [a key prosecution witness] created a *potential* conflict of interest, there was never an *actual* conflict"). However, even assuming *arguendo* the existence of an actual conflict, Petitioner's claim still fails because he cannot show an adverse affect.

2. Adverse Effect

Cuyler's second prong (that an actual conflict "adversely affected" the lawyer's performance) requires a habeas petitioner to satisfy three requirements, referred to as the "*Mickens* factors." *See Stephens*, 570

F.3d at 209–12. A petitioner must "(1) identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued, (2) show that this strategy was objectively reasonable under the facts of the case known to the attorney at the time, and (3) show that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Woodfolk*, 857 F.3d at 553 (internal quotation marks omitted); *see Mickens*, 240 F.3d at 361 (articulating this three-part test). "The adverse effect inquiry is often fact dependent, mandating due deference to the factfinder," and as mentioned above, "the actual conflict and adverse effect inquiries frequently are intertwined." *Id.*

The PCR court made the following findings relevant to the Court's adverse effect inquiry:[22]

- Sims and Johnson both gave credible testimony. App. 2163, 2173, 2389–90.
- Regarding Audrey Smith's testimony and the use of the 1991 ABHAN conviction at trial, the PCR court found: "[W]ith at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail.

[22] Petitioner argues the PCR court made no findings regarding adverse effect "other than an implicit denial." Pet.'s Objs. at p. 5. However, as the bulletpoints below indicate, the PCR court did in fact make such findings and specifically found no adverse effect. *See, infra*, App. 187 ("There is no showing that the prior prosecution adversely affected [Sims'] representation of Stokes based upon this state witness (Audrey Smith) . . . ."). Also, as mentioned above, "the actual conflict and adverse effect inquiries frequently are intertwined." *Woodfolk*, 857 F.3d at 553.

> Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction. There is no showing that the prior prosecution ***adversely affected*** his representation of Stokes based upon this state witness (Audrey Smith) – a person whom he never represented. There were no divided loyalties in the matter. The simple fact of the former prosecution did not provide proof of a conflict of interest." App. 2176 (emphasis added).

- The PCR court further credited Sims' testimony "that he was aware of the [S]tate's intent to use the Audrey Smith indictment and conviction in the penalty phase," "that he fought to keep the evidence out," and that he denied ever telling Petitioner that the evidence would not be admitted. App. 2391–93.

As explained below, the Court concludes the PCR court's finding of no adverse effect was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

The first *Mickens* factor requires Petitioner "to identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued." 240 F.3d at 361. Petitioner argues Sims failed to thoroughly cross-examine Smith to elicit discrepancies

between her testimony at the 1991 trial and the 1999 capital sentencing proceeding.[23] *See* Pet.'s Objs. at pp. 3–6. Even assuming this strategy was plausible, Petitioner still fails to satisfy both the second and third *Mickens* factors.

Regarding the second *Mickens* factor, Petitioner's proposed defense strategy of vigorous cross-examination was not objectively reasonable given the facts available to Sims at the time of trial. *See* 240 F.3d at 361. "To demonstrate objective reasonableness, the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances." *Stephens*, 570 F.3d at 209 (brackets and internal quotation marks omitted). As indicated above, Sims' brief cross-examination of Smith did not contest the underlying facts of the 1991 ABHAN conviction but instead focused on the letters Petitioner had written her from prison in which he "ask[ed her] about being [her] friend" and "trying to get his head straight." App. 1142–44. The PCR court credited Sims' testimony that he knew Audrey Smith would testify, that Petitioner's letters would be introduced at trial, and that he planned to address these matters by attempting to show remorse. App. 1867–68 (Sims' testimony); App. 2163, 2168, 2170 (PCR court order). Because Sims' trial strategy was to show Petitioner's remorse for what he had done to Smith, it would have been objectively unreasonable for him to have exhaustively cross-examined and attacked her about testimony in which she described for the jury Petitioner's assault upon her.

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[23] The R & R identifies these alleged discrepancies. *See* R & R at pp. 108–09.

The fact remained that Petitioner had choked Smith with an extension cord until she passed out, and Smith reaffirmed the essential facts underlying that proven, prior conviction. A contrary approach would have undermined Sims' defense theory of remorse. As the Magistrate Judge aptly observed, "[a]n attempt to have more aggressively cross-examined Smith on those points could have hindered Sims's attempts to show Petitioner's remorse or could have spurred even more detailed testimony on the previous incidents." R & R at p. 112. Accordingly, Petitioner fails to satisfy the second *Mickens* factor.

As for the third *Mickens* factor, Petitioner has not established Sims' failure to pursue the alternative strategy—thoroughly cross-examining Smith about discrepancies in her 1991 testimony and 1999 testimony—was linked to the alleged actual conflict. *See* 240 F.3d at 361. Petitioner argues there is a "dramatic difference" in how Petitioner's defense attorney in the 1991 trial cross-examined Smith and in how Sims cross-examined her at the 1999 sentencing phase. Pet.'s Objs. at pp. 4–6. This argument is akin to comparing apples and oranges; a defense attorney contesting his client's guilt in a non-capital trial is in an entirely different position than a capital defender striving to get his client a life sentence and having to dampen the effect of a prior conviction. Furthermore, the PCR court credited Sims' testimony that he "fought" to keep out the 1991 ABHAN conviction and that his prior prosecution of Petitioner for the assault against Smith did not affect how he cross-examined her. App. 1876, 1880–90, 1869, 1906 (Sims' testimony); App. 2163, 2168, 2170–71 (PCR court order). The PCR

court also credited Johnson's testimony that he never sensed Sims was hesitating to act on Petitioner's behalf because of the 1991 conviction. App. 1911–12 (Johnson's testimony); App. 2163, 2168, 2173 (PCR court order). Again, Petitioner has not shown "stark and clear" error in these credibility findings, *see Cagle*, 520 F.3d at 324, nor has he rebutted them by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Stephens*, 570 F.3d at 211 (applying § 2254(e)(1) to a *Mickens* factor). In short, there is no evidence in the record to support a finding that Sims' purportedly inadequate cross-examination of Smith resulted from his prior prosecution of Petitioner. Accordingly, Petitioner fails to satisfy the third *Mickens* factor, and thus cannot establish the alleged conflict of interest adversely affected Sims' representation. And again, Petitioner offered no live testimony of his own at the PCR hearing to dispute Sims' or Johnson's testimony.[24]

3. Conclusion

The Court finds the state PCR court's rejection of Petitioner's conflict of interest claim was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Accordingly, the Court denies relief on Ground Three.

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[24] *See Milledge v. State*, 811 S.E.2d 796, 800 (S.C. 2018) ("The PCR applicant bears the burden of proving his allegations by a preponderance of the evidence." (citing Rule 71.1(e), SCRCP, and *Frasier v. State*, 570 S.E.2d 172, 174 (S.C. 2002))).

II. *Martinez Claims*—Grounds Six and Seven

Petitioner brings his procedurally defaulted claims, Ground Six and Seven, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and the Magistrate Judge permitted discovery and held an evidentiary hearing on these claims. The Court notes that as in the state PCR proceedings, Petitioner in the federal *Martinez* hearing did not offer any of his own live testimony to dispute or contradict what his counsel discussed with him regarding any of the issues raised herein.

A. Applicable Law

1. *Martinez*

"*Martinez* provides a narrow exception to the general rule, stated in *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991), that errors committed by state habeas counsel do not provide cause to excuse a procedural default." *Gray v. Zook*, 806 F.3d 783, 788 (4th Cir. 2015). The *Martinez* Court held:

> **Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.**

566 U.S. at 17 (emphasis added).[25] The *Martinez* Court explained the approach for reviewing such a claim:

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

Id. at 15–16 (emphasis added). Thus, "when a State requires a prisoner to raise an ineffective-assistance-of-

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[25] *"Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it 'qualifie[d] *Coleman* by recognizing a narrow exception' that applies only to claims of 'ineffective assistance of counsel at trial' and only when, 'under state law,' those claims 'must be raised in an initial-review collateral proceeding.'" *Davila v. Davis*, 137 S. Ct. 2058, 2065–66 (2017) (quoting *Martinez*, 566 U.S. at 9, 17). "This limited qualification of the *Coleman* rule was based on the fact that when an 'initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.'" *Fowler v. Joyner*, 753 F.3d 446, 460 (4th Cir. 2014) (quoting *Martinez*, 566 U.S. at 11). "[F]or states like [South Carolina]—where a petitioner can only raise an ineffective assistance claim on collateral review—*Martinez* announced that federal habeas counsel can investigate and pursue the ineffectiveness of state habeas counsel in an effort to overcome the default of procedurally barred ineffective-assistance-of-trial-counsel claims." *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013); *see State v. Felder*, 351 S.E.2d 852, 852 (S.C. 1986) ("This Court usually will not consider an ineffective assistance of counsel issue on appeal from a conviction.").

trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim" if "appointed counsel in the initial-review collateral proceeding[—]where the claim should have been raised[—]was ineffective under the standards of *Strickland*[.[26]]" *Id.* at 14. The Fourth Circuit has expounded on the requirement of a "substantial" claim:

> Regarding the requirement that there be a "substantial" claim, the Supreme Court held that a prisoner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318. Relatedly, to show ineffective assistance, the petitioner must make a "substantial" showing with respect to both counsel's competency (first-prong *Strickland*) and prejudice (second-prong *Strickland*).
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> As to the specific elements of the ineffective assistance claim, a petitioner must make a substantial showing of incompetency, i.e., that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Further, the petitioner must make a substantial showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, i.e.,

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[26] *Strickland v. Washington*, 466 U.S. 668 (1984).

> that there was a substantial, not just conceivable, likelihood of a different result.

Teleguz v. Zook, 806 F.3d 803, 815 (4th Cir. 2015) (ellipsis, some internal quotation marks, and some internal citations omitted).

> To summarize, then, *Martinez* held that a federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the "cause" for default "consist[s] of there being no counsel or only ineffective counsel during the state collateral review proceeding"; (3) "the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim"; and (4) state law "requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding."

Fowler, 753 F.3d at 461 (internal quotation marks and alteration in original) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)).

In short, "[t]o invoke *Martinez*, [a petitioner] must demonstrate that state habeas counsel was ineffective or absent, and that the underlying [ineffective-assistance-of-trial counsel] claim is substantial." *Porter v. Zook*, 898 F.3d 408, 438 (4th Cir. 2018). Significantly, "because a petitioner raising a *Martinez* claim never presented the claim in state court, a

federal court considers it de novo, rather than under AEDPA's deferential standard of review." *Gray*, 806 F.3d at 789.[27]

2. *Strickland* Test

Claims of ineffective assistance of counsel must be reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must show counsel's performance was deficient and fell below an objective standard of reasonableness. *Id.* at 687–88. Second, the petitioner must show prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Regarding the deficiency prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

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[27] *Martinez* is inapplicable in South Carolina PCR actions. *See Robertson v. State*, 795 S.E.2d 29, 34, 37 (S.C. 2016); *Kelly v. State*, 745 S.E.2d 377, 377 (S.C. 2013).

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Regarding the prejudice prong, "[w]hen a defendant challenges *a death sentence* such as the one at issue in this case, 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."[28] *Id.* at 695 (emphasis added). "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* "In jurisdictions such as South Carolina, where a jury must return a unanimous verdict . . . , the prejudice prong of *Strickland* is met where 'there is a reasonable probability that at least one juror would have struck a different balance.'" *Hope*, 857 F.3d at 524 (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Applying this framework, the Court will now consider Petitioner's *Martinez* claims raised in Grounds Six and Seven.

B. Ground Six (Mitigating Evidence Claim)

Petitioner alleges in Ground Six that "[t]rial and collateral counsel were ineffective to the prejudice of [Petitioner] by failing to investigate, develop[,] and present any mitigation evidence." ECF No. 75 at p. 5.

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[28] In contrast, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Specifically, Petitioner claims trial counsel were ineffective for failing to investigate and present mitigating evidence regarding his history and background. *See* Pet.'s Objs. at pp. 10–32; ECF No. 75 at pp. 5–32; ECF No. 96 at pp. 1–9; ECF No. 172 at pp. 45–84. Petitioner faults PCR counsel for failing to pursue this ineffective-assistance-of-trial-counsel claim in the state PCR proceedings, and thus seeks to bring the claim in this Court pursuant to *Martinez*.

1. Facts[29]

Trial counsel called one witness to testify in mitigation during the penalty phase: James Aiken, a prison adaptability expert who opined Petitioner could serve a life sentence without causing undue risk of harm to other inmates or staff.[30] App. 1387–1429. Although trial counsel had hired a mitigation investigator and assembled additional witnesses to testify in mitigation, they ultimately did not call any other witnesses besides Aiken or present any other mitigating evidence.

In 2001, Petitioner filed his initial PCR application asserting a single ground for relief: that trial counsel were ineffective for "[f]ail[ing] to present mitigating evidence." App. 1714–19.

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[29] The R & R thoroughly summarizes the facts relevant to Petitioner's claim in Ground Six, and the Court briefly recaps them here.

[30] Petitioner contests trial counsel's presentation of Aiken's testimony in Ground Seven, which is addressed below.

In 2002, Keir Weyble and Robert Lominack were appointed as PCR counsel, *see* Tr.[31] 57, 368, and they filed an amended PCR application raising three claims, including that trial counsel were ineffective for "fail[ing] to investigate and present available mitigating evidence during the sentencing phase." App. 1720–22; Pet. Ex. 40. PCR counsel investigated the mitigation claim by, *inter alia*: reviewing the trial transcript and trial counsel's file, *see* Tr. 31, 371–72; obtaining funding for experts and service providers including a private investigator, a penalty phase investigator, a neuropsychologist, and a forensic pathologist/forensic entomologist, *see* Resp. Exs. 11 & 12; retaining and meeting with their mitigation investigator Tracy Dean, who interviewed Petitioner, family members, and acquaintances and prepared summaries of those interviews, *see* Tr. 39, 54, 380–81; Pet. Ex. 43; Resp. Exs. 13–20, 22; speaking with the neuropsychologist (Dr. Robert Deysach) and the psychiatrist (Dr. Donna Schwartz-Watts) that trial counsel had retained before trial, *see* Tr. 34–36, 489–90; and deposing Sims, who testified at his 2003 deposition that he had originally planned to present evidence showing Petitioner had AIDS and "at some point because of this condition, he's going to be a vegetable," that the AIDS evidence would dovetail with Aiken's prison adaptability testimony (i.e., Petitioner's past history of violence in prison would be a non-issue because of his deteriorating physical condition), that he explained this strategy to Petitioner, and that at the

[31] "Tr." refers to the transcript of the evidentiary hearing before the Magistrate Judge. *See* ECF Nos. 204–07.

last minute Petitioner "absolutely refused" to allow trial counsel to introduce the AIDS evidence because Petitioner did not want his family or the jury to hear it. App. 1755–56, 1774–78; *see, e.g.*, App. 1775 (Sims: "Just as we got ready to start presenting that evidence, Sammie then said, no, I don't want it coming in. I don't want it coming out.").

In 2004, PCR counsel filed a second amended PCR application raising seven grounds for relief but specifically removing and omitting the mitigation claim. App. 1782–86; Pet. Ex. 44. Notably, after filing the second amended PCR application, PCR counsel sent letters to trial counsel informing them that the "application does not contain any allegations of ineffective assistance of trial counsel." Pet. Ex. 45. The mitigation claim was not further pursued in the state PCR proceedings.[32]

At the federal *Martinez* evidentiary hearing, Petitioner called his trial counsel and PCR counsel to testify concerning the mitigating evidence claim in Ground Six. *See* Tr. 27–235 (Lominack), 366–537 (Weyble), 578–630 (Sims), 631–54 (Johnson), 656–70 (Hackett). Petitioner also presented testimony from the neuropsychologist (Dr. Deysach) and the social worker (Dr. Augustus Rodgers) that trial counsel had retained before Petitioner's trial. *See* Tr. 538–50 (Rodgers), 550–66 (Deysach). Finally, Petitioner presented

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[32] Lominack temporarily left the practice of law after filing the second amended PCR application, but he later returned and was reappointed to represent Petitioner. Susan Barber Hackett was appointed to replace Lominack during his absence.

testimony from Dr. James Garbarino, an expert in childhood trauma and developmental psychology retained for purposes of this § 2254 action. *See* Tr. 237–353. Besides the testimony, the Magistrate Judge received into evidence exhibits from Petitioner and Respondent. *See generally* ECF No. 200 (exhibit list). The Court has thoroughly reviewed all this evidence in reaching its decision.

2. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Six. R & R at pp. 136–81. Initially, the Magistrate Judge concludes Petitioner fails to establish that PCR counsel's performance (i.e., abandoning the mitigation claim) was deficient, and this alone prevents him from overcoming the procedural default of Ground Six pursuant to *Martinez*. *Id.* at pp. 138–58. Nevertheless, the Magistrate Judge further concludes Petitioner's underlying ineffective-assistance-of-trial-counsel claim lacks merit because trial counsel were not deficient and because Petitioner has not shown resulting prejudice. *Id.* at pp. 158–81. Petitioner objects to these conclusions. *See* Pet.'s Objs. at pp. 10–32.

3. Analysis

Having carefully studied the arguments and evidence pertaining to Ground Six, the Court concludes Petitioner is not entitled to habeas relief for two reasons: (1) he has not shown PCR counsel's decision to abandon the mitigation claim was unreasonable; and more significantly, (2) he cannot show *Strickland*

prejudice resulting from trial or PCR counsel's performance.

a. PCR Counsel's Performance

As indicated above, a court considering a *Martinez* claim need not always evaluate trial counsel's performance and may alternatively deny relief if it finds "that the attorney in the initial-review collateral proceeding did not perform below constitutional standards," *Martinez*, 566 U.S. at 16, meaning "the standards of *Strickland v. Washington*." *Id.* at 14. Here, the Court finds PCR counsel's decision to abandon the mitigation claim in favor of other claims was objectively reasonable, and therefore Petitioner fails to show PCR counsel were deficient.

PCR counsel specifically raised a mitigation claim and two other claims when they filed the amended PCR application. However, after investigating the mitigation claim to some extent, they specifically omitted it from the second amended PCR application and presented seven other claims instead. Their contemporaneous 2004 letters to Sims and Johnson—specifying Petitioner was not pursuing any ineffective assistance claims in PCR—underscores their intentional withdrawal of the claim. Although PCR counsel obviously could have pursued the mitigation claim and raised as many claims in PCR as they wanted, they, as capital habeas counsel, chose to pursue the claims they thought would enable Petitioner to obtain relief, such as the conflict claim discussed in Ground Three.

"As commonly happens in post-conviction proceedings," PCR counsel initially attempted to "f[a]ll on [their] sword for [their] former client" during direct examination at the *Martinez* evidentiary hearing. *Dugas v. Coplan*, 428 F.3d 317, 346 n.39 (1st Cir. 2005) (Howard, J., dissenting); *see* R & R at pp. 152–53 (summarizing specific instances of Lominack's and Weyble's testimony). However, under cross-examination by the State, Weyble testified as follows:

> Q: Well, a claim of failure to present mitigation evidence against trial counsel and an *Atkins*[33] claim, they're not mutually exclusive.
>
> A: No.
>
> Q: You could have raised both of those claims.
>
> A: That's correct.
>
> Q: And you admit the *Atkins* claim is cleaner.
>
> A: Cleaner could mean one thing to you and one thing to me. It is more discrete. It is.
>
> Q: Okay. And the conflict claim is more discrete.
>
> A: Yes.
>
> Q: And there had to be a reason that you withdrew it, correct?
>
> A: True.

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[33] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Q: If you thought it was a strong claim, the IAC [ineffective assistance of counsel] claim, at the time, if you had thought it was a strong claim, would you have presented it?

A: Yes.

Q: If you thought you could obtain relief for Mr. Stokes from a death sentence on this claim, you wouldn't have dropped it, would you?

A: I can't imagine we would have.

Tr. 502–03 (emphasis added). The Magistrate Judge found this portion of Weyble's testimony credible, and having reviewed the transcript de novo, the Court agrees. *See generally United States v. Boatrite*, 165 F. Supp. 3d 484, 489 (N.D.W. Va. 2016) ("Where a party objects to a magistrate judge's credibility determinations, the district court must conduct a *de novo* determination on credibility, but the court need not rehear the contested testimony in order to carry out the statutory command to make the required determination under § 636. *United States v. Raddatz*, 447 U.S. 667, 674 (1980). . . . A magistrate judge's credibility determinations based on live testimony are entitled to deference where they are supported by the record as a whole." (internal quotation marks omitted) (collecting cases)); *cf. Alexander v. Peguese*, 836 F.2d 545, 1987 WL 30215, at *1 (4th Cir. 1987) (unpublished table decision) (indicating a district court "must review a magistrate's credibility determinations" by "considering the actual testimony" and may do so by

"listening to a tape or reading a transcript of the hearing" (citing *Wimmer v. Cook*, 774 F.2d 68, 76 (4th Cir. 1985))).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S. at 690 (counsel is 'strongly presumed' to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.* at 6. Here, PCR counsel focused on the issues they thought would afford Petitioner relief from his death sentence, and they reasonably abandoned the mitigation claim as Weyble credibly testified. Thus, PCR counsel were not deficient in their representation of Petitioner.

b. *Strickland* Prejudice

Although Petitioner devotes the majority of his objections to Ground Six, he focuses primarily on the *performance* of trial counsel and PCR counsel and only briefly addresses the *prejudice* prong of *Strickland*. *See* Pet.'s Objs. at pp. 10–32. The Court notes:

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether

> counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. ***If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.***

466 U.S. at 697 (emphasis added); *see, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 19–28 (2009) (declining to resolve whether trial counsel was deficient because the petitioner could not show prejudice); *Buckner v. Polk*, 453 F.3d 195, 202 (4th Cir. 2006) (same). Here, the Court need not resolve whether trial counsel's performance was deficient because Petitioner cannot establish prejudice.[34]

To show prejudice, Petitioner must demonstrate a reasonable probability that at least one juror would have voted against the death penalty had the jury heard the additional available mitigating evidence concerning his history and background. *See Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 537; *Wong*, 558 U.S. at 19–20. "To assess that probability," the Court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it

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[34] Given this disposition of Ground Six, the Court need not resolve Petitioner's objections concerning trial counsel's performance or the Magistrate Judge's credibility findings regarding their testimony.

against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)). A *Strickland* prejudice analysis requires the Court to "consider the totality of the evidence before the . . . jury." 466 U.S. at 695.

i. Available Mitigating Evidence

Again, Petitioner's only mitigating evidence during sentencing was Aiken's prison adaptability testimony (fully summarized in Ground Seven below) that Petitioner could serve a life sentence without posing undue risk of harm to other inmates or staff. Petitioner claims the jury should have heard mitigating evidence concerning his history and background, asserting the files of both trial and PCR counsel "contain copious evidence, in the form of interviews and records, revealing that Mr. Stokes suffered from an extremely chaotic background marked by parental instability, poverty, addiction, violence, and profound trauma." ECF No. 75 at p. 81. Such evidence includes, *inter alia*, that both of Petitioner's parents died by the time he was thirteen; that his mother and stepfather were notorious, abusive, and neglectful alcoholics; and that he struggled in school with no intervention. *See* Pet.'s Objs. at pp. 10–11.

Petitioner further claims the jury should have heard about the cumulative impact that these and other aspects of his background are known to have on behavioral outcomes, and to support this claim, he presented the testimony and report of Dr. James

Garbarino, an expert in childhood trauma.[35] The R & R thoroughly summarizes Dr. Garbarino's testimony, *see* R & R at pp. 32–44; in brief, Dr. Garbarino interviewed Petitioner, reviewed various materials relating to his background, and testified that Petitioner "was very damaged by the nature of his upbringing" and that "the kind of damage that he experienced is very consistent with the terrible nature of the crime that he committed." Tr. 248. Dr. Garbarino also prepared a report with the following summary:

> Sammie Stokes is a damaged human being. He did not choose this damage. Rather, it resulted from the adverse, traumatic, and psychologically toxic nature of his family and social environment during childhood and adolescence. Central to this dynamic being abandoned by his mother when he was a young child. This maternal rejection proved to be a developmentally catastrophic psychological trauma that has dominated his life and his relationships ever since. As a result, the best way to understand him is as "an untreated traumatized child inhabiting an adult's body." This accounts for his serious problems with pro-social decision making ("executive functioning") and appropriately managing his feelings ("affective regulation"). His chronic mental health issues, substance abuse, and issues of acting out

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[35] Petitioner objects to the Magistrate Judge's treatment of Dr. Garbarino's testimony, *see* Pet.'s Objs. at pp. 28–30. For purposes of its prejudice analysis, the Court will assume Dr. Garbarino's testimony qualifies as available mitigating evidence.

> violently and antisocially can be traced to his adaptation to extreme adversity, and being the victim of physical and psychological maltreatment (abuse and neglect) during childhood. He has experienced pervasive problems with interpersonal relations that have limited his ability to take advantage of whatever positive opportunities have been made available to him and contributed to the crime for which he is being sentenced. Nonetheless, he has demonstrated a capacity to live safely within a controlled prison environment—as he did for a period of five years prior to his release in 1998.

Pet. Ex. 49 at p. 3.

ii. Aggravating Evidence

The State presented extensive aggravating evidence during sentencing. *See generally* App. 1113–1379. First, there was the murder for which Petitioner was on trial. One evening while Petitioner was in state prison "chilling out watching T.V.," his cellmate James Roy Toothe came into the room upset and cursing about how Connie Snipes had caused Toothe's daughter to be taken away by social services. Toothe said that he and his mother Pattie Syphrette wanted Snipes dead so Syphrette could obtain custody of his daughter, and that Petitioner would "be paid well" if he did the job. Over the following weeks, Petitioner spoke to and corresponded with Syphrette, who agreed to pay Petitioner $2,000 and provide a gun to kill Snipes. Petitioner was released from prison in May 1998, and after he told Norris Martin about the deal with Syphrette, Martin indicated his desire to participate.

On May 22, 1998, Syphrette drove Petitioner, Martin, and Snipes down a dirt road in Branchville, South Carolina, and then Petitioner and Martin walked with Snipes into the woods on the premise that they were going to kill somebody else—Doug Ferguson. Once in the woods, Petitioner informed Snipes that it was she who Syphrette wanted dead. Thereafter,

> 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.

Stokes, 548 S.E.2d at 203 (footnotes omitted). Martin testified Snipes was screaming, crying, and moaning when Petitioner cut her breasts, and the State's forensic pathologist testified Snipes' injuries were consistent with having been scalped, having had the nipple area cut from each breast, and having had the entire vaginal area cut out. The pathologist further testified that "[i]t definitely would have been painful" if Snipes were alive when her nipples were cut off, and that she also had incise wounds on her hands that would have been "very painful" and a stab wound on her neck that also would likely have been painful. The

jury saw autopsy photographs of Snipes' mutilated and decomposed body.[36]

Petitioner and Syphrette eventually killed Ferguson a few days later, and the jury heard about the horrific circumstances of his murder. When Petitioner was still in prison, he sent Syphrette two gold rings and a watch to hold for him until his release, but Ferguson apparently stole these items. Ferguson had lived with Syphrette, Snipes, and Snipes' newborn son Brian during the spring of 1998. After Snipes' body was found and reported on the news, Syphrette told Petitioner that she was worried Ferguson would talk to police and that they needed "to do something with Doug." On May 28 (six days after Snipes' murder), Syphrette picked up Ferguson from another location and drove him to her home where Petitioner was waiting. Brian Snipes and Faith Lapp (Syphrette's friend and neighbor) were also there. Ferguson hugged and kissed baby Brian and then sat down on the couch, whereupon Petitioner entered the room wearing latex gloves telling Ferguson he was going to teach him a lesson for having stolen his rings and watch. Syphrette said they should tie up Ferguson with duct tape. According to Lapp, Ferguson started crying while being taped up and begged

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[36] The jury found four statutory aggravating circumstances: (1) Snipes' murder was committed while in the commission of criminal sexual conduct; (2) Snipes' murder was committed while in the commission of kidnapping; (3) Petitioner murdered Snipes for himself or another for the purpose of receiving money or a thing of monetary value; and (4) Petitioner caused or directed another to murder Snipes as an agent or employee of another person. *See generally* S.C. Code § 16–3–20. Based on these aggravating circumstances, the jury recommended the death penalty.

Petitioner and Syphrette not to shoot him. Ultimately, Petitioner and Syphrette wrapped duct tape around Ferguson's entire body and head, thereby suffocating him. Petitioner also punched Ferguson in the face and drew blood. Later that day, police arrived at Syphrette's residence to serve a warrant and found Petitioner hiding under a bed and Ferguson's duct-taped body. To perform the autopsy, the State's pathologist had to cut layers of tape from Ferguson's body. The pathologist testified that Ferguson's face was wrapped with multiple layers of duct tape and that he was conscious during the taping and died from suffocation due to the tape covering his nose and mouth. The pathologist further testified a suffocating person unable to breath experiences a great deal of pain before passing out. The jury saw autopsy photographs of Ferguson's body both before and after the duct tape was removed.

Petitioner confessed to both murders in a lengthy letter that was read to the jury during sentencing. He concluded the letter—which was replete with profanity and described the murders in a largely apathetic fashion—by stating, "there's no excuse because we all have choices in life."

The State also presented evidence of Petitioner's future dangerousness, including his criminal history consisting of three prior ABHAN offenses, two committed against his former wife Audrey Smith and the other committed against an inmate.[37] Smith

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[37] "[I]nformation concerning prior criminal convictions [is] admissible as additional evidence during the sentencing or

testified as the State's first witness during sentencing, and she described Petitioner's assaults on her in November 1987 and December 1990. During the 1987 assault, Petitioner came to Smith's apartment asking for a glass of water, told her to turn around, and put a knife to her throat. After a struggle during which Petitioner cut both of Smith's hands, he held her hostage in a hot attic at knifepoint while her family looked for her, threatening to kill her children if she made a sound. When it was dark, Petitioner took Smith outside and put her in a ditch; when Smith yelled for her brother, Petitioner stabbed her three times in the back and took off running. Petitioner was convicted and sentenced for this assault.

During the 1990 assault, Petitioner came to Smith's house, told her he had something to tell her, and took her on a walk in the afternoon. Petitioner gave her a letter that stated he was going to kill her that night. Petitioner took the letter back and led her into the woods, where he pulled out a knotted extension cord that he put around her neck. Smith passed out and woke up later that night, and she was in the hospital for several weeks. Petitioner was convicted and sentenced for this assault.

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resentencing phase of a capital trial under [the South Carolina death penalty] statute." *State v. Plath*, 313 S.E.2d 619, 623 (S.C. 1984). "[T]he State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). "The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment." *Id.* at 163.

During Smith's testimony, the State published numerous letters that Petitioner wrote her from prison. In these letters, Petitioner indicated he was struggling with thoughts of killing her and reminded her that he would eventually get out of prison and search for her.

Regarding Petitioner's third ABHAN offense, the State presented evidence showing he was in a prison restroom when he attacked another inmate—Jackie Williams—by slashing Williams' face with a box cutter. The jury also saw photographs of Williams' injured face. Petitioner was convicted and sentenced for this assault.

Finally, the State presented evidence that Petitioner assaulted another inmate while he was in jail awaiting trial. During this assault, Petitioner hit the inmate multiple times with his fist, and the inmate did not strike Petitioner. Jail officials placed Petitioner on lockdown as a result of the incident.

iii. Aggravating Evidence vs. Mitigating Evidence

Having reweighed "the entire body of mitigating evidence" (i.e., Aiken's prison adaptability testimony and the additional evidence about Petitioner's traumatic background) "against the entire body of aggravating evidence," *Wong*, 558 U.S. at 20, the Court concludes Petitioner fails to show *Strickland* prejudice. The aggravating evidence in this case was overwhelming. "It is hard to imagine expert testimony and additional facts about [Petitioner's] difficult childhood outweighing the facts of [Snipes'] murder. It becomes even harder to envision such a result when the

evidence that [Petitioner] had committed another murder [of Ferguson]—the most powerful imaginable aggravating evidence—is added to the mix." *Id.* at 27–28 (internal citation omitted). And the additional evidence of Petitioner's ABHAN offenses further tips the scale against him. *See, e.g., Morva v. Zook*, 821 F.3d 517, 532 (4th Cir. 2016) ("Even the most sympathetic evidence in the record about Morva's troubled childhood and mental health does not outweigh the aggravating evidence presented at trial." (internal footnote omitted)).

Simply put, all the mitigating evidence does not outweigh all the aggravating evidence presented at trial, and Petitioner has not shown a reasonable probability that at least one juror would have voted against the death penalty had it heard the additional mitigating evidence in question. Because Petitioner fails to show *Strickland* prejudice, his underlying claim of ineffective assistance of trial counsel is not substantial and thus is procedurally defaulted. *See Martinez*, 566 U.S. at 14. The Court denies relief on Ground Six.

C. Ground Seven (Prison Adaptability Expert)

Petitioner alleges in Ground Seven that his "Sixth Amendment right to the effective assistance of counsel was violated when his trial counsel offered an expert witness not suitable for the case and failed to prepare[] that witness." ECF No. 75 at p. 32. Specifically, Petitioner argues trial counsel's decision to present prison adaptability expert James Aiken had negative consequences because: Aiken had never met or spoken

to Petitioner; Aiken failed to point out Petitioner had not committed an infraction during the last four-and-a-half years prior to his release; and the State was able to introduce additional aggravating evidence and undermine Aiken's testimony by using it against Petitioner. *See* Pet.'s Objs. at pp. 32–39; ECF No. 75 at pp. 32–36; ECF No. 96 at pp. 10–15; ECF No. 172 at pp. 84–94. Petitioner faults PCR counsel for failing to raise this ineffective-assistance-of-trial-counsel claim in the state PCR proceedings, and therefore seeks to bring the claim in this Court pursuant to *Martinez*.

1. Facts

As previously mentioned, trial counsel called Aiken as Petitioner's sole witness during the sentencing phase. App. 1387–1429. Aiken, a former prison warden, testified as an expert in the area of prison adaptability, and on direct examination by Sims, he opined that "[t]his individual can be incarcerated in the South Carolina Department of Corrections for the remainder of his life without causing undue risk o[f] harm to other inmates, staff[,] or the general community," and that "I do not see anything in this profile that would indicate that the South Carolina Department of Corrections was not capable of adequately managing this individual." App. 1397–98. Aiken explained he reached these conclusions after reviewing "all of" Petitioner's prison records and the disciplinary violations that Petitioner had committed while incarcerated, including the assault against another inmate resulting in an ABHAN conviction. App. 1393–1401. Aiken noted Petitioner's record reflected incidents of fighting in prison, but explained that "prison is a violent place" and that the

Department of Corrections "took very deliberate actions" to deal with the assault. App. 1399–1400.

On cross-examination by the State, Aiken acknowledged he had never spoken to Petitioner but asserted he chose not to because he formed his opinion the way a prison warden would—by reviewing Petitioner's official record and making decisions based on that record. App. 1405. Aiken reiterated "this particular record . . . indicates to me very clearly that he can [be] housed in the correctional environment for the remainder of his life without causing undue risk of harm to staff, inmates as well as the general public." App. 1405–06. Aiken further testified "this individual, Mr. Stokes, should be housed in a maximum security facility for the remainder of his life" and that maximum security houses "[t]he most volatile, dangerous inmates." App. 1410. The State also asked Aiken about Petitioner's three prior ABHAN convictions, namely the 1988 and 1991 ABHAN convictions involving Petitioner's former wife Smith and the 1993 ABHAN conviction involving inmate Jackie Williams. App. 1406–19. When questioned about the specifics of the 1993 ABHAN conviction and how it affected his opinion, Aiken explained that prison adaptability encompasses "managing" prisoners who commit infractions and that Petitioner would be housed in a maximum security environment. App. 1411–12. Aiken clarified, "I'm not saying that he will not have any problems adapting. . . . What I'm saying is that if that [violent] behavior is demonstrated, the Department of Corrections can adequately deal with that situation."

App. 1414.[38] Aiken further testified that the Department of Corrections could "effect lethal force" if necessary and that he himself had ordered inmates killed because they did not follow rules. App. 1408, 1414. When asked how he would classify Petitioner based on his convictions for murder, rape, and kidnapping, Aiken stated Petitioner would "remain in maximum custody" and "will never be able to go down to medium or minimum security as long as he lives. There is no behavior that he can demonstrate that will bring him out of maximum security." App. 1425. Finally, Aiken reiterated Petitioner would be placed in a prison where the probability of him assaulting another inmate was "minuscule." App. 1426–27.

During the *Martinez* evidentiary hearing before the Magistrate Judge, both Sims and Johnson recalled offering Aiken to testify about prison adaptability. Tr. 591, 646, 653. When shown a copy of Petitioner's prison records, Sims acknowledged that "something important for James Aiken to know about" would have been the fact that Petitioner had not had an infraction for several years prior to his 1998 release. Tr. 592. However, Sims testified his impression of Aiken's testimony was "[t]hat [it] was a very strong statement," particularly Aiken's testimony that corrections officials would kill Petitioner if necessary to control him. Tr.

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[38] The State also drew Aiken's attention to other disciplinary violations including an incident where Petitioner and another inmate assaulted an older inmate and an incident in jail where Petitioner struck another inmate. App. 1415–16, 1420–22. Aiken acknowledged these incidents appeared in Petitioner's record, and indicated he formed his opinion after reviewing all documentation. App. 1415–16, 1420–22.

605. Johnson likewise recalled this specific portion of Aiken's testimony. Tr. 653 ("[T]hat made my heart grieve for Sammie more because Mr. Aiken said, yes, we can control him, because if he acts up, we'll kill him."). Lominack and Weyble also testified about their decision not to raise a claim concerning Aiken, *see* Tr. 53–54, 393–94, and the Magistrate Judge found their testimony credible. R & R at pp. 182–84.

2. Magistrate Judge's R & R & Petitioner's Objections

The Magistrate Judge recommends denying relief on Ground Seven. R & R at pp. 181–92. Initially, the Magistrate Judge concludes Petitioner fails to establish that PCR counsel's performance (i.e., failing to raise in PCR an ineffective assistance claim regarding Aiken's testimony) was deficient, and this alone prevents him from overcoming the procedural default of Ground Seven pursuant to *Martinez*. *Id.* at pp. 182–84. Nevertheless, the Magistrate Judge further concludes Petitioner's underlying ineffective-assistance-of-trial-counsel claim lacks merit because trial counsel were not deficient and because Petitioner has not shown resulting prejudice. *Id.* at pp. 184–92. Petitioner objects to these conclusions. *See* Pet.'s Objs. at pp. 32–39.

3. Analysis

Petitioner alleges "trial counsel's decision to put [Aiken] on, in this situation, was ineffective." Pet.'s Objs. at 34. As previously explained, this claim is procedurally defaulted and Petitioner must show cause to excuse the default by demonstrating that the underlying claim of ineffective-assistance-of-trial

counsel is "substantial." *Martinez*, 566 U.S. at 1318. Petitioner cannot make that showing because, as explained below, he fails to demonstrate trial counsel were ineffective under *Strickland*.

a. Deficient Performance

Petitioner fails to show trial counsel were deficient for calling Aiken as a witness. Again, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688, and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Specifically, "[t]he choice of what type of expert to use is one of trial strategy and deserves a heavy measure of deference." *Fulks v. United States*, 875 F. Supp. 2d 535, 598 (D.S.C. 2010) (internal quotation marks omitted). Regarding Petitioner's claim that Aiken was an unsuitable witness because he had never met or spoken to Petitioner, Aiken's very testimony belies this assertion. Aiken (a former warden himself) testified he formed his opinion the way a prison official would—not by interviewing the prisoner himself but by reviewing the prisoner's official record and the infractions/violations recorded therein. In fact, Aiken flatly stated he chose not to interview Petitioner and still "d[id]n't care to" because Petitioner's prison record "very clearly" gave him all the information needed to form his opinion. App. 1405–06.

Moreover, to the extent Petitioner challenges trial counsel's alleged failure to have Aiken testify that Petitioner had not committed a disciplinary infraction during the last several years before his release in 1998 (the last infraction being in July 1993), this claim lacks

merit for several reasons. First, this challenge is a classic example of wanting to review counsel's performance with "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Second, Aiken's expert method entailed review of what Petitioner's prison record contained, not what it did not. Third, Aiken actually confirmed that "the last thing [he] kn[e]w about any problems in the Department of Corrections" was "July 28, 1993," App. 1418–19, and the jury was aware through previous evidence that Petitioner had been released from prison in May 1998. *See, e.g.*, App. 1296 (Petitioner's letter to police stating, "I got out in May, '98.").

The Court also disagrees with Petitioner's claims that trial counsel failed to fully prepare Aiken for his testimony and that the State exploited Aiken's testimony to introduce additional aggravating evidence such as the specifics of the 1993 ABHAN conviction involving Jackie Williams. To begin with, the State had already introduced evidence of Petitioner's assault on Williams during its case-in-chief, *see* App. 1146–55, and Aiken's testimony was not the first time this evidence came up. Moreover, Aiken indicated early on in his direct examination that he formed his opinion after reviewing *all* of Petitioner's prison records. App. 1396–97. Sims also drew Aiken's attention to examples of incidents involving violence in prison—including the ABHAN conviction resulting from Petitioner's assault

on an inmate—because Sims likely contemplated the State's focusing on such incidents during cross-examination. Of course Sims did not ask about every instance of violence and did not linger too long on this subject, as he took the pragmatic approach of having Aiken confirm that prison officials could adequately manage Petitioner despite his imperfect prison record.

Notably, as discussed in Ground Six above, trial counsel originally planned to present Aiken's testimony in conjunction with evidence of Petitioner's AIDS and deteriorating physical condition to show Petitioner's prior violence in prison would be a non-issue going forward, but Petitioner "absolutely refused" at the last minute to allow trial counsel to present the AIDS evidence.[39] App. 1774–78. Thus, trial counsel were

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[39] The trial record corroborates this fact, as the following occurred during a bench conference with the trial court immediately before the penalty phase:

> MR. SIMS: Your Honor, I've had an opportunity to have a conversation in regards to certain - - - what we felt to be certain mitigating factors regarding a medical condition of my client. He has informed me that he does not want us to pursue that as a medical condition and as a mitigating circumstance in this matter. And if the Court would inquire of him if that is, in fact, the case.
>
> THE COURT: Mr. Stokes, is that correct?
>
> MR. STOKES: Yes, sir.
>
> THE COURT: You know you have a right to have your attorneys go into that?

forced to reshuffle their strategy for sentencing, and "[Petitioner]'s recasting of the pros and cons of trial counsel's decision amounts to Monday morning quarterbacking." *Stamper v. Muncie*, 944 F.2d 170, 178 (4th Cir. 1991); *see also Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Notably, Petitioner did not offer his own live testimony to dispute or contradict what Sims discussed with him.

MR. STOKES: Yes, I do, I understand.

THE COURT: And you do not want them to do it?

MR. STOKES: No, sir. Thank you.

THE COURT: Thank you.

SOLICITOR: Your Honor, just to make the record clear, the matter that Mr. Sims was talking about, I think the record should reflect that it was [a] matter of trial strategy and that Mr. Sims wanted to get into that situation but he was unable to do that and his client has been fully informed.

MR. SIMS: Yes, sir.

THE COURT: That's correct. . . . All right, now, we have on the record the defendant's wish to waive certain submissions on the record concerning mitigating circumstances.

App. 1085–87.

The manner in which trial counsel presented Aiken's testimony—having Aiken focus on Petitioner's adaptability to prison yet still account for Petitioner's history of fighting in prison in anticipation of the State's cross-examination—was objectively reasonable and a "sound trial strategy." *Strickland*, 466 U.S. at 689; *see United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004) ("The decision whether to call a defense witness is a strategic decision demanding the assessment and balancing of perceived benefits against perceived risks, and one to which [a court] must afford enormous deference." (internal quotation marks and ellipsis omitted)). Petitioner has not shown trial counsel's presentation of Aiken's testimony regarding prison adaptability "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and therefore Petitioner has not satisfied the first *Strickland* prong. *See, e.g.*, *Thomas v. Taylor*, 170 F.3d 466, 473 (4th Cir. 1999) ("[B]ecause we find no fault with trial counsel's preparation and presentation of expert [] testimony at sentencing, we reject appellant's [] ineffective assistance claim.").

b. Prejudice

Petitioner also fails to show *Strickland* prejudice. First, after being cross-examined, Aiken told the solicitor, "I do not feel intimidated at all," App. 1428, and maintained throughout the entirety of his testimony—both direct and cross—that the Department of Corrections could adequately manage Petitioner in a maximum security environment for the rest of his life. While acknowledging Petitioner's prior history of violence in prison, Aiken still emphasized

prison officials could deal with such behavior to reduce the probability of Petitioner assaulting another inmate to a "minuscule" level. Aiken elaborated that prison officials could segregate extremely violent inmates to "a prison within a prison," and even kill an inmate if necessary. App. 1408, 1414. Both Sims and Johnson recalled nearly eighteen years later the powerful effect of such stark testimony.

The fact that Aiken provided mitigating evidence is obvious because the trial court charged the jury as follows:

> A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which serves the same purpose, that is, to reduce the degree of the guilt of the offense or reduce the punishment that should be fairly imposed. **An example of these which you may consider if found in the evidence would include the following, which the defendant asserts and *should be found in the evidence, and that is, the defendant is adaptable to prison.***

App. 1483 (emphasis added). Notably, during its deliberations, the jury sent a note asking the trial court the following questions: "Define maximum security prison for life in prison without parole. [W]hat privileges does one have? Define maximum security prison for the death penalty. What privileges does one have?"[40] App. 1492. Thus, as reflected by the trial

[40] The trial court answered the question by telling the jury, "The only comment I can make in regard to your inquiry, ladies and

court's instruction and the jury's inquiry, Aiken's opinion regarding prison adaptability operated as a mitigating circumstance considered by the jury. As the Magistrate Judge shrewdly observed: "[w]hile additional aggravating evidence may have come out through Aiken's testimony, his opinion about Petitioner's ability to adapt to prison and the prison's ability to control Petitioner was mitigating." R & R at p. 192.

In sum, Petitioner has not shown a reasonable probability that, but for trial counsel's presentation of Aiken's testimony, the result of sentencing would have been different. *See Strickland*, 466 U.S. at 694–95. Petitioner has therefore not satisfied *Strickland*'s prejudice prong.

c. Conclusion

The Court finds Petitioner's underlying claim of ineffective assistance of trial counsel is not substantial, and therefore must reject it as procedurally defaulted. *See Martinez*, 566 U.S. at 15–16 ("When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial . . . ."); *see, e.g.*, *Richey v. Cartledge*, 653 F. App'x 178, 186 (4th Cir. 2016) ("Richey's underlying ineffective-assistance claim is . . . not substantial and must be rejected for

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gentlemen, is to say this. That you, the jury, must base your decision on the evidence in the record." App. 1492.

procedural default.").[41] The Court denies relief on Ground Seven.

Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Cases. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484–85. In this case, the Court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right."

Conclusion

For the foregoing reasons, the Court overrules Petitioner's objections and adopts the Magistrate Judge's R & R [ECF No. 218] *as modified herein*.

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[41] Because the Court finds the underlying claim is insubstantial, it follows that PCR counsel were not ineffective for failing to raise it.

Accordingly, the Court **GRANTS** Respondent's motion for summary judgment [ECF No. 160] and **DENIES AND DISMISSES** Petitioner's § 2254 petition in its entirety *with prejudice*. The Court **DENIES** a certificate of appealability because Petitioner has not made "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Florence, South Carolina
September 28, 2018

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge