NO. 22-1234

In the
Supreme Court of the United States

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

Petitioners,

v.

SAMMIE LOUIS STOKES,

Respondent.

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

BRIEF IN OPPOSITION

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****CAPITAL CASE****

QUESTIONS PRESENTED

1. Did the Fourth Circuit abuse its discretion in concluding that the State forfeited its 28 U.S.C. § 2254(e)(2) objection by failing to raise it on appeal and affirmatively relying on evidence that the State now asserts was barred by § 2254(e)(2)?

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

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INTRODUCTION

Sammie Stokes was sentenced to death without representation by competent counsel. Stokes suffered an exceptionally traumatic childhood marred by abuse and extreme deprivation—the "kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)). In that traumatic history, any reasonably competent lawyer would have found an abundance of mitigating evidence that might well have persuaded jurors to spare Stokes' life. Yet his trial counsel neither investigated that evidence thoroughly nor presented any of it at sentencing. As a result, the jury heard only the worst about Stokes, a one-sided presentation with no counterbalancing mitigation evidence. Stokes' collateral counsel then inexplicably failed to raise a mitigation-based claim in state post-conviction proceedings, which excuses Stokes' procedural default of that claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).

The Fourth Circuit granted Stokes habeas relief, which meant only that the State would have to either grant him a new sentencing hearing with constitutionally adequate counsel or resentence him to life in prison. Instead of accepting that decision, the State attempted to resurrect, in a rehearing petition, an objection it had long ago abandoned in the district court and never even mentioned on appeal: that 28 U.S.C. § 2254(e)(2) prohibited an evidentiary hearing on the merits of Stokes' ineffective-assistance claim. In response, Stokes pointed out the obvious: The State had failed to preserve that objection. The Fourth

Circuit denied rehearing and refused to stay the mandate.

After the Fourth Circuit denied the State's rehearing petition and while the State's petition for certiorari was pending, this Court addressed § 2254(e)(2) in *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022). The Court then issued an order granting the State's petition in this case, vacating the Fourth Circuit's decision, and remanding the case for further consideration in light of *Shinn*. Consistent with that GVR order, the Fourth Circuit requested supplemental briefing from the parties and held oral argument on whether the *Shinn* issue had been preserved. In a thorough, well-reasoned opinion, the panel held that the State had forfeited the issue by failing to raise it on appeal and by inviting the panel to rely on the allegedly improper evidence to reject Stokes' claim on the merits. Accordingly, the panel reinstated its prior decision and again ordered resentencing.

The State's main argument in its latest petition is that the Fourth Circuit "shockingly defie[d]" this Court's GVR order by undertaking a preservation analysis. Pet. 2–3. That argument betrays a fundamental misunderstanding of this Court's GVR practice. As every court of appeals has long recognized, and as Justices of this Court have emphasized, GVR orders are not determinations on the merits and do not purport to resolve factbound issues of preservation. The Fourth Circuit had every right to address the State's forfeiture on remand—indeed, it had an obligation to do so.

The State's further contention that the Fourth Circuit's forfeiture analysis "is simply wrong," Pet. 3, is a plea for factbound error correction—one all the more unconvincing because it involves an issue that is "left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). In any event, the Fourth Circuit's analysis is correct. Even apart from the State's abandonment of the § 2254(e)(2) issue in the district court, the State failed to raise the issue in its 100-page brief on appeal. Not only that—the State affirmatively invited the court to rely on the allegedly improper evidence to reject Stokes' claim on the merits. The Fourth Circuit's refusal to overlook that blatant forfeiture is perfectly reasonable. Indeed, giving the State a do-over would have amounted to a perverse double standard—enforcing Stokes' counsel's inadvertent forfeiture (of a meritorious ineffective-assistance claim) while excusing the State's apparently strategic relinquishment (of the *Shinn* issue)—all so the State could execute a man who had never received a fair sentencing.

Apart from the forfeiture issue, the State raises a jumble of factbound objections to the Fourth Circuit's *Strickland* analysis. The State does not identify any circuit split, any conflict with this Court's precedent, or any other issue that warrants this Court's review. And the Fourth Circuit's carefully reasoned decision remains correct on the merits. As that court rightly observed in its decision on remand, the State's arguments that it "misapplied the *Strickland* test … rest in large part on mischaracterizations of our analysis." App. 26 n.7. This Court should deny review.

STATEMENT OF THE CASE

A. Stokes' Social History

Sammie Louis Stokes was born on December 21, 1966. Growing up in Branchville, South Carolina, he faced extraordinary adversity, even by the standards of that community. Stokes' mother, Pearl, was known as an aggressive, verbally abusive alcoholic who was often too drunk to care for him. App. 40; *see also* JA2528, JA2552, JA2558, JA2868–69, JA3116–19. Stokes and his sister Sara sometimes stole food from neighbors just to have something to eat. App. 40. On some weekends, they stayed with their grandmother, who ran a brothel out of her home. *Id.* When Stokes was nine years old, his father died suddenly on the front lawn, where Stokes saw his body. App. 40–41.

Pearl lived with a man, Richard, who was also a notorious drunk. App. 40; JA2528, JA2553. Richard was violent and abusive. App. 41. He beat Pearl regularly, often in front of the children. *Id.*; *see also* JA2552, JA2528. On one occasion, he threw Pearl to the ground and stomped on her face, breaking her jaw. App. 41; *see also* JA2558, JA3117. On another, he broke a liquor bottle over her head. App. 41; *see also* JA2552.

The children, too, experienced physical and sexual abuse. Stokes received whippings with an electrical cord. App. 41. Richard also regularly had sex with Sara. *Id.*; *see also* JA2552. When Stokes was 11 or 12, his babysitter sexually abused him. App. 41. When he was 13, he saw his mother on the couch, intoxicated, as she lapsed into a coma and then died,

leaving him parentless. *Id.* Stokes and his sister then lived unsupervised with Richard. *Id.*

According to the child development expert retained by Stokes' federal habeas counsel, Dr. James Garbarino, Stokes experienced an extremely traumatic childhood that impaired his future emotional regulation and social adaptation. App. 42. Applying the CDC's standard for measuring childhood adversity, Dr. Garbarino found that Stokes was exposed to more childhood adversity than 999 out of 1,000 Americans. App. 42 n.1.

B. The Crime

In 1998, while completing a prison sentence for assault, Stokes agreed to carry out the murder of his cellmate's girlfriend, Connie Snipes, for $2,000. On the day of the crime, Snipes agreed to accompany Stokes and his childhood friend, Norris Martin, into the woods, where she thought the three of them were going to murder someone else (Doug Ferguson). App. 42–43. The plan was a ruse. Stokes and Martin each raped Snipes and then each shot her once in the head, killing her. App. 43.

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

C. The Trial

The trial court appointed Thomas Sims as Stokes' lead counsel and Virgin Johnson as second chair. App. 44. Although former prosecutors, they had limited death-penalty experience and virtually no experience preparing a mitigation defense. *Id.*

Trial was bifurcated into a guilt phase and a penalty phase. Given Stokes' confession, his conviction in the guilt phase was essentially guaranteed. Hence, trial counsel's main task was to prepare for the penalty phase. Yet counsel waited six months before starting that work and began the mitigation investigation only six weeks before trial. App. 44; *see also* JA2507–25. They hired a receptionist as their investigator even though she had no experience, and they devoted only 45 hours to the investigation. App. 44.

That investigation, meager as it was, uncovered several red flags about Stokes' early life. App. 66 n.9. For example, the investigation revealed that Stokes' parents were alcoholics, that Stokes and his sister were frequently left unsupervised, and that Stokes' mother was regularly abused. JA2529, JA2553–54, JA2947, JA2868–69, JA3116–19. During the penalty phase, however, trial counsel declined to present any witnesses—such as Stokes' family members, a social worker, or a psychologist—who could speak to that adversity or explain how it may have affected Stokes. The reason for this omission, trial counsel later claimed, was their assumption that the predominantly "African-American" jury would lack sympathy for Stokes' "poor upbringing." App. 67 (quoting JA3524).

Instead of presenting mitigation evidence, trial counsel put on a single witness: "prison adaptability expert" James Aiken. Aiken testified only that a prison could "manage" Stokes by using "lethal force" if necessary. App. 46–47, 170; *see also* JA1320–21. Aiken offered no opinion that Stokes was actually capable of adapting to life in prison. The State highlighted the weakness of Aiken's testimony in closing argument, noting that if a man is "adapting to prison, you don't have to punish him." App. 47 (quoting JA1365–66).

Meanwhile, the State called 12 witnesses as part of its case in aggravation. *Id.* Norris Martin testified in graphic detail about the violence of the Snipes murder, and another witness testified about Stokes' role in the later murder of Doug Ferguson. *Id.* The State also called Stokes' ex-wife, Audrey Smith, to testify about a time Stokes had assaulted her—an incident for which Sims had successfully prosecuted Stokes before returning to private practice. App. 112–15.

In closing argument, the State emphasized the lopsidedness of the evidence: "Have you heard one piece of evidence favorable to Sammie Stokes that maybe you should consider a life sentence?" JA1370. In response, having failed to present any evidence of Stokes' childhood trauma, Stokes' counsel was left to plead for life based on Stokes' "remorse." JA1382.

Still, the jury apparently contemplated sparing Stokes' life. The jurors sent a note to the court requesting information about the privileges Stokes would have if he lived in a maximum-security prison.

JA1405. But ultimately the jury returned a death sentence. App. 48.

Of the six statutory aggravating factors alleged by the State to establish eligibility for the death penalty, the jury rejected two—the ones associated with the State's allegations that Stokes tortured Snipes and murdered Ferguson. JA1390, JA1406–07.

Stokes' convictions and death sentence were affirmed on direct appeal. App. 106–07.

D. State Post-Conviction Proceedings

In October 2001, Stokes filed an application for post-conviction relief ("PCR") in state court. His petition included an ineffective-assistance claim based on trial counsel's failure to develop and present mitigating evidence, as well as a claim that Sims had a conflict of interest because he had prosecuted Stokes for the Smith assault. App. 49; *see also* JA2887, JA3245.

The court appointed as PCR counsel Keir Weyble and Robert Lominack, who filed an amended application in May 2002 adding several more claims. App. 49. They also deposed trial counsel and hired new experts and a new mitigation investigator, who uncovered new evidence showing that Stokes had a traumatic childhood marked by extreme neglect, dysfunction, and abuse. *Id.*; *see also* JA2552, JA2557–58, JA2868, JA3114–19. Despite this compelling new evidence, in August 2004, PCR counsel filed another amended application dropping the mitigation claim. In its place they added an Eighth Amendment intellectual-disability claim. They ultimately abandoned that claim after Stokes was found

competent. App. 49. But even after the intellectual-disability claim failed to pan out, PCR counsel never attempted to revive the mitigation claim. *See, e.g.*, JA2918, 2992, 3262, 3371.

The PCR court denied Stokes' application in October 2010. App. 49. The South Carolina Supreme Court and this Court both denied review. *Id.*

E. Federal Habeas Proceedings

In March 2016, Stokes filed a federal habeas petition. As relevant here, he raised three claims: (1) trial counsel were ineffective for failing to develop and present mitigating evidence, (2) trial counsel were ineffective for relying on Aiken as their only penalty-phase witness and failing to prepare him properly, and (3) Sims labored under a conflict of interest that adversely affected his performance. App. 52.

Because the first two claims were not exhausted in state proceedings, the magistrate judge held an evidentiary hearing to determine whether there was good cause for the default under *Martinez*. App. 52–53. Stokes' trial counsel testified that they declined to pursue mitigation because "there were African-Americans" on the jury who they assumed would be unsympathetic. JA3471–72. PCR counsel, for their part, acknowledged that they had no valid reason for abandoning the mitigation claim. App. 58–59; *see also* JA2918, JA3017.

The magistrate judge's report recommended denying all relief. App. 50. The district court adopted the report with modifications, holding that PCR counsel did not perform deficiently in abandoning the mitigation claim and that, in any event, Stokes had

not been prejudiced by counsel's failure to present mitigation evidence. App. 153, 163. The court also denied relief on the Aiken claim and the conflict-of-interest claim. App. 50.

The Fourth Circuit reversed. The panel first concluded that "PCR counsel's failure to develop and present a claim based on trial counsel's mitigation efforts" amounted to ineffective assistance, establishing good cause for Stokes' default. App. 52. Proceeding to the underlying claim, the panel concluded that trial counsel were ineffective on two independent grounds. First, trial counsel failed to conduct an adequate mitigation investigation. And second, even based on what trial counsel knew at the time, the decision not to present any meaningful mitigation evidence was objectively unreasonable. App. 65–67. Because that meritorious claim by itself entitled Stokes to a new sentencing, the court did not reach his other claims.

The State petitioned for rehearing en banc. In its petition, the State tried to a revive an argument it had briefly mentioned to the magistrate judge, but which it had neither included in its briefs before the Fourth Circuit panel nor mentioned at oral argument. The State argued that 28 U.S.C. § 2254(e)(2) precluded the district court from holding an evidentiary hearing on the merits of Stokes' ineffectiveness claim, and thus the Fourth Circuit panel should not have considered any evidence outside the state-court record in ruling on Stokes' ineffective-assistance claim. CA4 Dkt. 81-1 at 14–15. In response, Stokes pointed out that the State had forfeited the issue by not raising it before the panel and by urging the panel to rely on that same

evidence to reject Stokes' claim on the merits. CA4 Dkt. 84 at 4–5. No judge called for a vote on the State's petition, and the petition was denied.

The Fourth Circuit denied the State's motion to stay its mandate pending the filing of a petition for certiorari (CA4 Dkt. 90), and the Chief Justice denied the State's application for a stay or recall of the mandate (No. 21A61 (Oct. 22, 2021)). While the State's petition for certiorari was pending, the Court decided *Shinn*. The Court then issued a summary order granting the State's petition, vacating the Fourth Circuit's decision, and remanding for further consideration in light of *Shinn*.

On remand, the Fourth Circuit requested supplemental briefing regarding any issues the parties deemed relevant, including whether the State had preserved the *Shinn* issue. After hearing oral argument, the Fourth Circuit held that the State had "forfeited the argument by not raising it on appeal and instead using evidence from the hearing" to advocate rejecting Stokes' claims on the merits. App. 10. The court therefore did not reach the question (which it acknowledged was "anything but clear") whether the State had preserved the issue in the district court. App. 12 & n.5. The court also declined to exercise its discretion to excuse the State's forfeiture. App. 19–26. Accordingly, the court reinstated its *Strickland* decision. The State sought a stay of the mandate pending its petition for certiorari, which was denied, and then filed its petition.

REASONS FOR DENYING THE PETITION

The State fails to present any issues worthy of this Court's review. Its petition urges this Court to wade into a dense factual record to resolve case-specific questions of no meaningful importance to other litigants or lower courts. The State makes no real attempt to identify a circuit split, and the questions presented turn on the application of well-established legal principles to case-specific facts—the routine business of the lower courts.

Moreover, the Fourth Circuit's decision is correct. Regarding the preservation issue, the court applied traditional rules of waiver and forfeiture—as it was obliged to do following this Court's GVR—and it relied on the familiar principle that parties (including appellees) forfeit issues by failing to brief them. If the State had wanted to press its § 2254(e)(2) objection, it had to raise it on appeal, because Stokes expressly asked the Fourth Circuit to reach the merits of his ineffective-assistance claim and grant him relief based on evidence outside the state-court record. Instead, the State joined Stokes in inviting the panel to consider that evidence in order to rule on the merits of Stokes' claim. Only after the panel sided with Stokes on the merits did the State change tack and raise the § 2254(e)(2) issue in a petition for rehearing. The Fourth Circuit did not abuse its discretion by refusing to indulge that sandbagging.

Regarding the *Strickland* issue, the Fourth Circuit correctly held—and the State no longer contests—that Stokes' trial counsel performed deficiently by failing to conduct an adequate mitigation investigation and failing to present any

mitigation evidence. The Fourth Circuit also correctly held that Stokes' PCR counsel were ineffective for neglecting to develop and present a mitigation-based ineffective-assistance claim. As PCR counsel themselves acknowledged, they had no good reason for abandoning that powerful claim in favor of other, much weaker claims. And the Fourth Circuit correctly held that trial counsel's failures prejudiced Stokes because, if the jury had heard the compelling mitigation evidence that was available, there is a "reasonable probability that at least one juror would have struck a different balance" and voted to spare Stokes' life. *Wiggins*, 539 U.S. at 537.

In sum, the petition fails to satisfy any of the traditional criteria for certiorari. And there is no error in the decisions below—let alone "any error … so apparent as to warrant the bitter medicine of summary reversal." *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., joined by Alito, J., dissenting).

I. The Forfeiture Issue Is Unworthy of Review.

A. The Fourth Circuit Complied with This Court's GVR Order.

Seeking to manufacture a basis for certiorari, the State accuses the Fourth Circuit of "defy[ing]" this Court's remand instruction. Pet. i, 3, 15. That accusation is baseless. It rests on a misunderstanding of this Court's GVR practice and a dramatic overreading of this Court's summary order vacating the Fourth Circuit's prior decision "for further consideration in light of *Shinn v. Martinez-Ramirez*." Pet. ii.

The Fourth Circuit complied with that order. As the panel correctly observed, "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." App. 24. In the wake of a new precedent, this Court often issues GVR orders in dozens of pending cases. This Court does not thereby take a position on other issues, such as preservation, that may affect the outcome on remand in each case. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (rejecting petitioner's attempt to "find support" in a GVR order because a GVR order is "not a 'final determination on the merits'" (quoting *Henry v. City of Rock Hill,* 376 U.S. 776, 777 (1964) (per curiam))); *Dick v. Oregon*, 140 S. Ct. 2712, 2712 (2020) (mem.) (Alito, J., concurring) (emphasizing that GVR order was "not deciding or expressing a view on whether the question was properly raised below but [was] instead leaving that question to be decided on remand"); *Barnes v. Alabama*, 578 U.S. 994, 994 (2016) (mem.) (Thomas, J., concurring) (noting that GVR order did "not reflect any view" regarding "whether petitioner's asserted entitlement to retroactive relief is properly presented in the case" (quotation marks omitted)).

Accordingly, courts of appeals routinely assess preservation following a GVR. *See United States v. Burnette*, 423 F.3d 22, 23 & n.2 (1st Cir. 2005); *Sniado v. Bank Austria AG*, 378 F.3d 210, 212–13 (2d Cir. 2004) (per curiam); *Fontroy v. Owens*, 23 F.3d 63, 66 (3d Cir. 1994); *United States v. Vanegas*, 612 F. App'x 664, 666 (4th Cir. 2015) (per curiam); *United States v. Kennedy*, 137 F. App'x 685, 687 (5th Cir. 2005) (per curiam); *United States v. Cavett*, 304 F. App'x 458, 459

(7th Cir. 2008); *United States v. Norman*, 427 F.3d 537, 539 (8th Cir. 2005); *United States v. Samora-Sanchez*, 143 F. App'x 90, 92 (10th Cir. 2005); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (per curiam); *Texas v. United States*, 798 F.3d 1108, 1116, 1119 (D.C. Cir. 2015).

The Fourth Circuit thus broke no new ground when, in a thorough opinion, it concluded that the State had forfeited the *Shinn* issue. That disposition was consistent with this Court's GVR order.

B. The State's Forfeiture Arguments Request Factbound, Splitless Error Correction.

Addressing the State's forfeiture arguments "would require a deeply factbound analysis of the procedural history unique to this protracted litigation" and "would provide little guidance to litigants or the lower courts." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015). The State barely attempts to argue that the Fourth Circuit's decision conflicts with precedent of this Court or other courts of appeal. Nor does the State claim that the issue is one of exceptional importance.

The State suggests that the Fourth Circuit's forfeiture analysis is inconsistent with this Court's resolution of a forfeiture issue in a footnote in *Shinn*. *See* Pet. 23–24 (citing 142 S. Ct. at 1730 n.1). In fact, that footnote confirms that the Court "treated § 2254(e)(2) as a non-jurisdictional provision subject to the ordinary rules of forfeiture." App. 18. This Court acknowledged "the State's forfeiture" and exercised its

"discretion to forgive" that forfeiture based on case-specific circumstances. 142 S. Ct. at 1730 n.1.

The Fourth Circuit was not bound to exercise its discretion in the same way, let alone in materially different circumstances. As the panel explained, this case "is different than *Shinn* in important respects." App. 22–23. In *Shinn*, the State had "'inadvertent[ly]'" neglected to raise the issue in the district court but *had* raised it on appeal, and the Ninth Circuit had considered it. *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 211 (2006)); *Shinn*, 142 S. Ct. at 1730 n.1. Here, in contrast, the record "suggests that the State strategically withheld the defense or chose to relinquish it." App. 23 (quotation marks omitted) (quoting *Day*, 547 U.S. at 211). The State demonstrated its awareness of the issue by initially raising it before the magistrate judge, but then declined to raise it before the district judge or the appellate panel, even though Stokes' opening brief requested relief on the merits based on the allegedly improper evidence. *See* CA4 Dkt. 36 at 29–64, 107. In fact, the State's brief affirmatively invited the panel to rely on that evidence to rule on the merits. *See* App. 21. Only after the panel did so—and ruled *against* the State—did the State attempt to backtrack and argue that § 2254(e)(2) barred consideration of that evidence. The Fourth Circuit acted well within its discretion in declining to excuse that "sandbagging." App. 19 (quoting *Hillman v. IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001)).

The State does not identify a single case from another circuit holding that a finding of forfeiture is inappropriate in circumstances like those presented

here. It makes a passing reference to "cases from the Second, Third, Sixth, Tenth and Federal Circuit[s]" cited in Judge Quattlebaum's dissent. Pet. 20 (citing App. 34). But the Second, Sixth, and Tenth Circuit cases stand only for the universally acknowledged proposition that "a court of appeals *may* affirm the district court on any grounds supported by the record"—not that it *must* do so. App. 33 (emphasis added) (citing *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995)); *see also Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1283 (2d Cir. 1994); *Kennedy v. City of Villa Hills*, 635 F.3d 210, 214 n.2 (6th Cir. 2011). And the Third and Federal Circuit cases hold only that, where the appellant's requested relief would result in a remand for further merits proceedings, the appellee need not raise all its merits arguments on appeal but can reserve some arguments to raise on remand if necessary. *See Eichorn v. AT&T Corp.*, 484 F.3d 644, 657–58 (3d Cir. 2007); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 953–54 (Fed. Cir. 1997). Here, in contrast, Stokes' appeal sought a favorable ruling on the merits of his claim, meaning that if the panel granted his requested relief, the § 2254(e)(2) issue would not be "open for the District Court to address on remand." *Eichorn*, 484 F.3d at 657. If the State wanted to preserve that issue, it had an obligation to raise it as a basis for rejecting Stokes' requested relief—not hide it away like a timebomb to explode as soon as the panel released its opinion.

Indeed, every one of the circuits identified by the State recognizes that "[e]ven appellees waive arguments by failing to brief them." *United States v. Ford*, 184 F.3d 566, 578 n.3 (6th Cir. 1999); *see also,*

e.g., *Griswold v. Coventry First LLC*, 762 F.3d 264, 274 n.8 (3d Cir. 2014); *Haynes Trane Serv. Agency v. Am. Standard, Inc.*, 573 F.3d 947, 963–64 (10th Cir. 2009); *Kao Corp. v. Unilever U.S., Inc.*, 441 F.3d 963, 973 n.4 (Fed. Cir. 2006); *Norton v. Sam's Club,* 145 F.3d 114, 117–18 (2d Cir. 1998). It is the State's contrary view that is out of step with the uniform practice of lower courts. And even if the State could identify some variation among the circuits, this Court has long held that preservation is a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton*, 428 U.S. at 121.

C. The Forfeiture Decision Is Correct.

Although the splitless and factbound nature of the forfeiture issue is reason enough to deny review, the Fourth Circuit's analysis is also correct. It is undisputed that the State was aware of the § 2254(e)(2) argument well before *Shinn*. In fact, the State initially raised a version of that argument before the magistrate judge. *See* App. 12 n.5; JA2862. Yet the State failed to obtain a ruling on the issue in the district court. It is also undisputed that the State did not raise the issue on appeal. *See* App. 32 (Quattlebaum, J., dissenting) (acknowledging that "[the State] certainly could have raised the issue" but "did not" do so). Although the State belatedly raised the argument in a petition for rehearing en banc, courts generally do not entertain arguments raised for the first time in a rehearing petition. App. 13; *see Easley v. Reuss,* 532 F.3d 592, 594 (7th Cir. 2008) (per curiam) (collecting cases). That rule applies to appellants and appellees alike. *See Squaw Valley Dev.*

Co. v. Goldberg, 395 F.3d 1062, 1063 (9th Cir. 2005) ("We reject the argument because it is made for the first time in [appellee]'s petition for rehearing"); *Hightower v. Tex. Hosp. Ass'n*, 73 F.3d 43, 44 (5th Cir. 1996) (similar).

The State's forfeiture began in the district court. After initially objecting to the scope of the magistrate's evidentiary hearing, the State fell silent on the issue, and the magistrate's report considered evidence outside the state-court record in addressing "the merits of the underlying ineffective assistance of trial counsel claim." JA3721. Yet the State did not mention § 2254(e)(2) in its response to Stokes' objections to the report. Instead, the State itself relied on evidence outside the state-court record to defend the magistrate's ruling on "the merits of the underlying claim" and urged the district court to adopt the magistrate's report in its entirety. JA3801, JA3804. The State thus never sought or obtained a ruling from the district court on the § 2254(e)(2) issue.[1]

The State doubled down on that strategy on appeal. Not only did it fail to cite § 2254(e)(2) in its oversize briefing or at oral argument; it also "*relied extensively on the evidence produced during the evidentiary hearing* to argue that Stokes's underlying claim lacked merit." App. 21. The State argued that

[1] As the Fourth Circuit noted, "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." App. 12 n.5. But the panel decided that it "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." *Id.*

even if Stokes' default could be excused under *Martinez*, the court should affirm because Stokes "had a full opportunity to present the merits of his claim at an evidentiary hearing" (which the State did not suggest was improper) and failed to "prove his case under *Strickland*." CA4 Dkt. 55-1 at 71.

The State has no good explanation for keeping § 2254(e)(2) up its sleeve. The State now says it "merely argued in support of the district court's ruling that Stokes failed to show cause and prejudice" because that was "the only ruling available for appeal." Pet. 16–17. But as the State acknowledges, the magistrate concluded that "the underlying claim lacked merit," and the district court held that the claim was not even "substantial." *Id.* And on appeal, Stokes not only challenged the ruling that his claim was defaulted—he also argued that he should prevail on the merits of that claim. *E.g.*, CA4 Dkt. 36 at 11, 14. He did not seek a remand for the district court to analyze the merits (which would not have made sense because the district court had already done so); he instead asked that his death sentence be "vacated." *Id.* at 107. The State thus had ample notice that the Fourth Circuit might reach the merits. Yet instead of objecting to that possibility under § 2254(e)(2), the State embraced it.

Perhaps recognizing the weakness of its preservation argument, the State suggests that it did not need to preserve its § 2254(e)(2) objection at all because § 2254(e)(2) "limits the power of federal courts" and is therefore impervious to waiver or forfeiture. *See* Pet. 23–27 (emphasis omitted) (quoting

App. 36). The Fourth Circuit rejected that argument, and for good reason.

As the panel observed, this Court "has long rejected the notion that all mandatory prescriptions, however emphatic, are … properly typed jurisdictional." App. 16 (quoting *Gonzales v. Thaler*, 565 U.S. 134, 146 (2012)). Congress has established myriad "threshold condition[s]" that regulate the timing and scope of habeas review. *Id.* (quoting *Thaler*, 565 U.S. at 143). A provision qualifies as jurisdictional, however, only if it clearly "speak[s] in jurisdictional terms." *Id.* (quoting *Thaler*, 565 U.S. at 142–43). Other limits on a court's authority are at most "[m]andatory claim-processing rules," which "may be waived or forfeited." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 (2017). That principle applies with full force to "AEDPA's statute of limitations" and "other threshold constraints on federal habeas petitioners." *Wood v. Milyard*, 566 U.S. 463, 472 (2012); *see also Schiro v. Farley*, 510 U.S. 222, 229 (1994). Courts are "permitted, but not obliged" to excuse the forfeiture of such constraints. *Day*, 547 U.S. at 209.

Statutory context reinforces this conclusion. As the Fourth Circuit noted, a neighboring AEDPA provision says that "[a] State shall not be deemed to have waived the exhaustion requirement … unless the State, through counsel, expressly waives the requirement." App. 17–18 (quoting 28 U.S.C. § 2254(b)(3)). That proviso, which is missing from § 2254(e)(2), shows that Congress knows how to restrict the normal rules of waiver and forfeiture when it wants to.

The State has no meaningful response. It does not seriously argue that § 2254(e)(2) speaks in jurisdictional terms. That § 2254(e)(2) "limits the power" of the courts in some way, Pet. 24., does not distinguish it from a host of other procedural rules that confine and channel judicial review. Nor is § 2254(e)(2) akin to the AEDPA standard of review, which courts have treated as non-waivable because the standard of review is an "unavoidable legal question." *See* Pet. 26–27. In contrast, § 2254(e)(2) merely regulates what evidence can be considered and for what purpose. It is no more "part of the structure of review," Pet. 26, than any other evidentiary rule.

The State's own cited cases confirm that § 2254(e)(2) is subject to waiver and forfeiture. In *Williams v. Norris*, the Eighth Circuit found no forfeiture because the State "objected to an evidentiary hearing." 576 F.3d 850, 860 (8th Cir. 2009). Although the court also said it would have "exercise[d] [its] discretion" to excuse any forfeiture, *id.*, that statement only confirms that § 2254(e)(2) objections are forfeitable. As discussed above, the same goes for this Court's decision to forgive any forfeiture in *Shinn*. If § 2254(e)(2) could not be forfeited, there would be nothing to forgive.

The Fourth Circuit also had ample justification for concluding that on the facts of this case, excusing the State's forfeiture would not have served "the interests of justice." App. 19 (quoting *Day*, 547 U.S. at 210). The State asked the court to "rubber-stamp an unconstitutional death sentence" based on "an evidentiary limitation the State knew might apply but invited [the court] to ignore on appeal." App. 22. As

the court rightly concluded, "[i]f excusing the State's forfeiture in this scenario best served 'the interests of justice,' justice would be a hollow word indeed." *Id.* (citation omitted) (quoting *Day*, 547 U.S. at 210).

II. The *Strickland* Issue Is Unworthy of Review.

The State's recycled *Strickland* question fares no better. The State does not contend that the Fourth Circuit's reinstated decision creates a circuit split, and the panel's factbound application of *Strickland* comports with this Court's precedent.

A. The State's *Strickland* Arguments Request Factbound, Splitless Error Correction.

The State's failure to allege a split is unsurprising because the *Strickland* question turns on the factbound application of settled law. Applying the well-established *Strickland* standard, the Fourth Circuit held that trial counsel's failure to adequately investigate and develop a mitigation defense based on Stokes' traumatic childhood constituted ineffective assistance. This Court has long recognized that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quotation marks omitted).

Time after time, the Court has emphasized the importance of such evidence and held that trial counsel fall short of constitutional standards when

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

B. The *Strickland* Decision Is Correct.

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

1. Trial Counsel Performed Deficiently.

The panel found trial counsel's performance deficient on two distinct grounds: First, their "investigation was inadequate"; and second, their "decision to withhold all personal mitigation evidence was unreasonable." App. 65. The State makes no sustained effort to challenge either ground; its petition contends only that *postconviction* counsel was not deficient and that trial counsel's failures were not prejudicial. *See* Pet. 27, 31. Each ground is independently sufficient to justify the Fourth Circuit's conclusion.

1. Start with counsel's slipshod investigation. Given Stokes' written confession, counsel knew that securing strong mitigation evidence was essential. *See* App. 65–66. But counsel did not begin mitigation efforts until shortly before trial, and their inexperienced investigator started interviewing potential witnesses less than three weeks before trial. *See id.*; JA2527–45. Trial counsel did not personally conduct any follow-up interviews or otherwise try to develop the investigator's findings. App. 66. And they ultimately spent only 45 hours in total preparing for the penalty phase. *See* App. 65–66; JA2507–21, JA2522–25. Even though counsel had virtually no experience preparing a mitigation defense, *see* JA3454–57, 3507, they consulted no experienced attorneys or mitigation experts. App. 65. Furthermore, despite red flags pointing to a troubled childhood, trial counsel "failed to pursue the indications of extreme childhood trauma, neglect, and abuse." App. 66 n.9. As the Fourth Circuit concluded, "[i]n a capital murder trial where mitigating the death penalty was the central issue in the defense, such an investigation is objectively unreasonable." App. 66 (citing *Wiggins*, 539 U.S. at 523–25).

The inadequacy of trial counsel's investigation is also underscored by their testimony that they thought Stokes had simply experienced a "poor upbringing" comparable to "struggles" that "a lot of us had." App. 67 (quoting JA3524). If counsel had acquired anything like adequate familiarity with Stokes' upbringing, they would have realized that Stokes experienced far more than run-of-the-mill poverty. Indeed, interviews with people from Stokes' town confirmed that they considered his upbringing

unusually difficult even for their community. *See* JA3220, JA3214.

2. The Fourth Circuit correctly held that counsel's "subsequent decision to withhold the personal mitigation evidence they did have was also objectively unreasonable." App. 67. Given the State's aggravating evidence, trial counsel should have known that mitigating evidence would be critical to persuading at least one juror to spare Stokes' life. In such a case, the decision to present *no* mitigation defense whatsoever is an extraordinary one that demands a commensurate justification.

Yet trial counsel's own testimony shows that the decision to abandon a mitigation defense was based on little more than crude stereotypes and faulty reasoning. Johnson questioned how he could "go to a jury … particularly African-American" and highlight Stokes' "poor upbringing" as a reason to "overlook" the brutality of his crime. JA3524–25. The State accepts this explanation at face value. *See* Pet. 29–30. But counsel's assumption that South Carolina jurors in the 1990s, especially Black jurors, would scoff at mitigation evidence was unreasonable. *See* App. 70–71. The idea that a troubled childhood can have lasting psychological effects is not an invention of the twenty-first century. Nor is it dependent on race. Indeed, ten years before Stokes' trial, this Court referred to "the belief, *long held by this society*, that defendants who commit criminal acts that are attributable to a disadvantaged background … may be less culpable than defendants who have no such excuse." App. 71 (quoting *Penry*, 492 U.S. at 319).

Moving beyond trial counsel's testimony and into the realm of post hoc rationalization, the State speculates that counsel wanted to avoid undercutting a strategy of "shifting blame to Martin." Pet. 29 (emphasis omitted). But trial counsel never raised that concern, and the State cites no record evidence that it factored into counsel's decision not to present mitigation evidence. *Cf. Wiggins*, 539 U.S. at 526–27 (state's invocation of a "'strategic decision' … to justify counsel's limited pursuit of mitigating evidence resemble[d] more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations").

In any event, the suggestion makes no sense on its own terms. The State's theory appears to be that calling mitigation witnesses would have opened the door to testimony about Stokes' childhood bullying of Martin. *See* Pet. 29; App. 80–81 (citing JA2529). But in South Carolina, there is no danger of "opening the door" by presenting mitigation evidence. As PCR counsel explained, the State "doesn't have to wait for a door to be opened to put on evidence of a defendant's purported bad character" because it can introduce that evidence on its own. JA3301.

Here, prosecutors showed no interest in presenting evidence about Stokes' childhood relationship with Martin. If they had wanted to go down that road, they could easily have elicited such testimony from Martin himself or other witnesses. And the impact of such testimony would have been negligible because Stokes' behavior toward Martin as a child would have been of limited probative value about their relationship as adults.

2. Stokes' PCR Counsel Performed Deficiently.

The Fourth Circuit also correctly held that PCR counsel's performance was objectively unreasonable, again for two distinct reasons. First, it held that although PCR counsel's investigation improved on trial counsel's, "their investigation was nevertheless inadequate because they ignored the valuable leads they uncovered" and "did not retain an expert capable of applying their investigator's findings." App. 56–57. Second, it held that "[b]eyond the investigation's shortcomings," "PCR counsel's abandonment of the mitigation claim was objectively unreasonable." App. 59, 63; *see* App. 23–27. The State's petition ignores the first of these two grounds, either of which is independently sufficient. *See* Pet. 27–30.

1. While PCR counsel's development of mitigation evidence improved on trial counsel's cursory investigation, it still fell short of professional standards. The adequacy of an investigation depends not only on the "quantum of evidence already known" but also on whether that evidence "would lead a reasonable attorney to investigate further." App. 54–55 (quoting *Wiggins*, 539 U.S. at 527). Here, despite numerous red flags calling for a full-fledged mitigation inquiry, counsel conducted "essentially no investigation beyond [their] investigator's interviews" and, "perhaps most consequentially," failed to "retain an expert capable of applying their investigator's findings"—someone who could take the raw materials of the investigation and translate them into powerful scientific testimony about the psychological effects of Stokes' traumatic childhood. App. 57. Without an

expert to perform that critical role, counsel failed to make the required "efforts to discover *all reasonably available* mitigating evidence." *Id.* (quoting *Wiggins*, 539 U.S. at 524). Indeed, when asked about the failure to hire an expert, Lominack acknowledged "embarrassment" at how he handled cases "early in [his] career" and testified that the omission reflected his lack of experience and fell short of the professional "standard of care." App. 58 (quoting JA2621).

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

2. Even "[b]eyond the investigation's shortcomings," PCR counsel had no good reason for abandoning a strong mitigation-based ineffectiveness claim in favor of a bevy of meritless claims. App. 59–60. By PCR counsel's own admission, their abandonment of the mitigation claim resulted from "distract[ion]," inexperience, and carelessness rather than strategic assessment. App. 60; *see also, e.g.*, JA2918 ("I don't recall having a specific reason[.]"); JA3031 ("[T]o be blunt, I'm not sure we were that thoughtful about it."). Counsel admitted that they lost sight of the mitigation claim because they became distracted by the "shiny object" of the intellectual-disability claim. JA3259. But nothing stopped them from pursuing both claims simultaneously, or at least "revisit[ing]" the mitigation claim after they abandoned the intellectual-disability claim. JA3262.

Even if PCR counsel's decision to drop the mitigation claim in favor of other claims could

somehow be construed as strategic, it was objectively unreasonable because the mitigation claim was "clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *see* App. 61–62 & n.7. In their final application, PCR counsel omitted the mitigation claim but raised *seven* other claims. JA1760–63. Of those seven claims, four (including the intellectual-disability claim) were so weak that counsel later abandoned them without a ruling, and two more were obviously meritless because (among other reasons) they faulted appellate counsel for failing to raise unpreserved issues. App. 62 & n.7. The weakness of these claims reinforces PCR counsel's testimony that they had no strategic reason for dropping the far stronger mitigation claim.

The State makes little attempt to rebut the Fourth Circuit's analysis. Instead, it urges deference to the district court's finding that PCR counsel "made an intentional decision to withdraw the [mitigation] claim." Pet. 28. But whether counsel's decision to drop the claim was in some sense "intentional" is irrelevant; the question is whether they made a reasonable strategic decision based on an adequate investigation and a proper assessment of the claim's merit. As the Fourth Circuit explained, "intentionality does not guarantee reasonableness." App. 55.

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

testimony in which PCR counsel agreed that "'there had to be a reason'" they withdrew the mitigation claim. App. 61 n.6 (quoting JA3840–41). That snippet cannot remotely bear the weight the district court placed on it. For one thing, counsel explained exactly what the "reason" was: they became "unreasonably hyper-focused on the intellectual-disability claim to the exclusion of a more general mitigation claim." JA2992; *see also* JA2918, 3259, 3358. For another, that "reason" did not explain counsel's failure to revisit the mitigation claim *after* the intellectual-disability claim fizzled out, which counsel admitted was neither intentional nor strategic but inadvertent. *See, e.g.*, JA2908, 3262.[2]

Considering the record as a whole, it is clear that whatever "reason" PCR counsel may have had for not pursuing the mitigation claim—whether inattention or inexperience—was, as PCR counsel put it, not a "real strategic reason." App. 61 (quoting JA3031).

3. Trial Counsel's Failures Were Prejudicial.

1. The Fourth Circuit correctly acknowledged that prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 65

[2] The State also suggests that PCR counsel's decision to abandon the mitigation claim "demonstrated reasonable strategy" because their investigation revealed "evidence detrimental to shifting blame to Martin." Pet. 29–30 (emphasis removed). But as discussed above, there is no evidence that trial counsel's decision to forgo mitigation stemmed from a blame-shifting strategy, and even if there were, that decision would have been objectively unreasonable. *See* pp. 26–27, *supra*.

(quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The Fourth Circuit also correctly applied that standard to the facts of this case.

The record here easily demonstrates prejudice. Stokes' life story contained an abundance of compelling mitigation evidence, but due to counsel's serious errors, the jury heard *none* of it. As a result, the jurors heard only aggravating evidence and "nothing that would humanize [Stokes] or allow them to accurately gauge his moral culpability." *Porter*, 558 U.S. at 41. Even then, the jury apparently contemplated sparing Stokes' life, sending the court a note that asked about the privileges Stokes would have in prison. JA1405. If trial counsel had presented a competent mitigation defense, there is at minimum "a reasonable probability" that "at least one juror" would have struck a different balance "when appraising Stokes' moral culpability and deciding on death." App. 72 (quotation marks omitted).

The State suggests that the "callousness" of the murder Stokes committed "sets this case apart." Pet. 32. But callous acts of violence are typical in death-penalty cases, which are "confined … to a narrow category of the most serious crimes." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). The whole point of social-history mitigation is to explain how trauma, abuse, and neglect can result in such callousness.

The Fourth Circuit's analysis was consistent with—indeed, compelled by—this Court's precedent. This Court has repeatedly found prejudice due to failures to present mitigation evidence in capital sentencing proceedings, even in cases involving brutal murders and substantial aggravating evidence. For

example, in *Rompilla*, the defendant stabbed a bar owner and set him on fire; the jury found (unlike here) that the murder involved torture; and the defendant had a history of violent felonies, including rape. 545 U.S. at 377–38, 383. Yet this Court concluded that it "goes without saying" that counsel's failure to present evidence of Rompilla's troubled childhood was prejudicial. *Id.* at 393; *see also Wiggins*, 539 U.S. at 514 (defendant drowned a 77-year-old woman "in the bathtub of her ransacked apartment"); *Williams*, 529 U.S. at 418 (Rehnquist, J., concurring in part and dissenting in part) (defendant beat a man to death, "savagely beat an elderly woman," set fire to a home, and committed other violent crimes (quotation marks omitted)). Notably, in *Williams* the Court found prejudice even while applying AEDPA deference, which is "not in operation when," as here, "the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

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

First, the State contends that the Fourth Circuit "misconstru[ed]" South Carolina law on what aggravating evidence may be considered by the jury. Pet. 32–35. But this Court's "custom on questions of state law" is "to defer to the interpretation of" the regional court of appeals. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). There is no reason to depart from that custom here, where the State's argument is devoted entirely to a single footnote in the Fourth Circuit's decision. *See* App. 72 n.10.

Moreover, the State mischaracterizes the footnote. The Fourth Circuit did not announce any holding about South Carolina law. Rather, the court observed that, at the eligibility phase of Stokes' capital sentencing, the jury had specifically declined to find certain aggravating facts the State had sought to prove—namely, that Stokes tortured Snipes or murdered Ferguson. As a result, the Fourth Circuit explained, it was unreasonable for the district court to assume that the jury had turned around and credited that same evidence at sentencing. Although the jury was *permitted to consider* that evidence, its refusal to find a charged aggravator reflected a weakness in the prosecution's case.

In any event, the Fourth Circuit's prejudice analysis did not turn on that point. Even without the aggravators the jury rejected, the court readily acknowledged that "the State's aggravation case was extensive" and that Stokes' crime included "horrific elements." App. 72–73 & n.10 (quotation marks omitted). Yet the court also recognized "the likely influence of dramatic mitigation evidence on a jury that heard dramatically little about the defendant." App. 75. That unusually strong mitigation evidence, the court concluded, was "enough to outweigh even the upsetting and extensive aggravating evidence." *Id.* (citing *Wiggins*, 539 U.S. at 537).

Second, the State argues that any mitigating evidence in this case would have been double-edged. Pet. 36–37. For one thing, the State says, discussing Stokes' background would have "allow[ed] the evidence of [his] domination and abuse of Martin" to undermine a supposed defense strategy to shift

responsibility for the crime to Martin. Pet. 36. As discussed above, however, the argument is meritless. The mitigation evidence would not have opened the door to harmful testimony about Stokes' relationship with Martin because (1) the State could have elicited that testimony anyway, and (2) any impact of such testimony would have been minimal. *See* pp. 26–27, *supra*.

The State also contends that evidence about Stokes' traumatic childhood would have suggested that Stokes was unusually "likely to commit violent acts." Pet. 36. Of course, mitigation evidence offered to explain a defendant's criminality also has the potential to underscore the defendant's dangerousness. Yet this Court has repeatedly found prejudice from counsel's failure to develop and present such evidence. And here, the jury heard plenty of other evidence of Stokes' dangerousness; what it did not hear was *any* evidence that could *explain* Stokes' violent behavior.

Third, the State claims that the Fourth Circuit "diminished Stokes' burden of proving prejudice." Pet. 37. The court did no such thing. As noted above, the Fourth Circuit stated the well-established standards for evaluating *Strickland* prejudice. Ignoring all that, the State selectively quotes a single sentence in which the court noted that "[t]he addition of just some meaningful mitigating evidence could be enough to sway one juror against death." App. 73. But as the opinion makes clear, the court did not assume that just any mitigating evidence would suffice. Rather, as this Court's precedent commands, the panel carefully considered whether the compelling

evidence here had a "reasonable probability" of swaying at least one juror to spare Stokes' life. App. 71–72, 75–76 (quoting *Strickland*, 466 U.S. at 694).

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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