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

REPLY BRIEF FOR PETITIONERS

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Stokes cannot deny that South Carolina afforded him qualified postconviction counsel, adequate funding, and ample time for case development; yet he failed to pursue a mitigation claim in his state court action. It is not that postconviction counsel never investigated, or never asserted the mitigation claim; they intentionally *withdrew* the allegation *after* independent and extensive investigation. Stokes also cannot deny that if 28 U.S.C. § 2254(e)(2)'s prohibition applies to defaulted claims presented in federal habeas corpus proceedings through *Martinez*[1] – as this Court has said it does – then there is no basis to sustain the windfall relief granted to him. In response to the petition, Stokes repeatedly embraces and restates the factual and legal errors in the majority opinion – errors that run roughshod over this Court's precedent and Section 2254. But embracing error, no matter how strongly, does not insulate the error from review.

Critically, the Fourth Circuit majority was granted the opportunity to address the multiple errors by way of this Court's remand with directions to consider *Shinn v. Ramirez*.[2] Rather than doing so, the

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

2 596 U.S. ___, 142 S. Ct. 1718 (2022). Approximately one month after the opinion here, the Fourth Circuit adhered to the limitation and refused to consider evidence not in the state court record. *Juniper v. Davis*, No. 16-2, 2023 WL 3050984, at *3-4 (4th Cir. Apr. 24, 2023) (after holding case for decision in *Shinn v. Ramirez,* finding, "petitioner pursuing a *Martinez* claim based on

majority strained to find forfeiture, even though the State had prevailed at each level prior to the Fourth Circuit. Relying on generalities and hyperbole to oppose the petition, Stokes argues that this Court should look the other way – allow the majority to unfairly announce a finding of forfeiture that does not fairly reflect the facts of record or fairly apply *Shinn* or *Strickland v. Washington*[3] or state law. It is a bold position considering this Court's remand, made even bolder by considering that Stokes cannot avoid two critical facts:

- The *only* federal court to directly misuse evidence from the federal hearing was the Fourth Circuit;

- The majority, contrary to *Shinn*, concluded that once the evidence was admitted at a federal hearing, it was available for any purpose, then reinstated its pre-*Shinn* error-filled first opinion.

The majority's errors are crystal clear and call for supervisory corrective action. Supreme Court Rule

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the ineffectiveness of state habeas counsel must rely *only* on the evidence developed during trial or while the petitioner was represented by that very same counsel, unless he can satisfy the strict standards of § 2254(e)(2)" and the petitioner's argument fails because the state court record does not contain the facts upon which he wished to rely). This inequitable treatment remains unexplained.

3 466 U.S. 668 (1984)

10(a). The petition presents a case that allows this Court to not only correct, but also instruct the lower federal courts on the necessity of correctly applying the limitations on federal courts reviewing state criminal judgments. The brief in opposition does not show otherwise.

I. Stokes has not called into doubt the Fourth Circuit Majority's Error on Remand.

To attempt to counter the State's petition, Stokes heavily relies on generalities and "dramatic " language. (BIO at 13-15). Neither shows the petition should be denied.

Stokes generally asserts that it was the Fourth Circuit's right to find the State's reliance on the Section 2254(e)(2)'s bar forfeited. (See BIO 19). After *Shinn*, the only way the majority could use the prohibited evidence for merits review – for the first time on appeal – was by finding waiver or forfeiture. It settled on forfeiture *at the appeal level* – a revealing conclusion. The majority conceded there could be no waiver as the State raised the issue in the district court. (App. 20-21).

Notably, Stokes is at a loss for justifying forfeiture considering *Holland v. Jackson*, 542 U.S. 649 (2004), where this Court found no preservation error – Stokes simply does not engage with this precedent. The situation, though, is remarkably similar as shown by this passage in the Warden's reply brief:

> … Warden Holland has never directly raised the evidentiary issue presented in this petition, because it did not become an issue until the Sixth Circuit exceeded its evidentiary bounds to reach the result in this case. …

Holland v. Jackson, 2004 WL 1149244, Reply Brief of Petitioner, 3-4.

Moreover, the Fourth Circuit briefing order was rather telling given the assumption made:

> First, given that the state did not raise the same argument that was raised and decided in *Shinn*, did the state waive the 28 U.S.C. § 2254(e)(2) issue….

(USCA4 Appeal 18-6, Doc. 100). That does not tend to show that the court of appeals intended to take a fresh look at procedure with an open mind. Perhaps in recognition of the obvious, the majority does not quote its own language in full but rephrases to describe the briefing request as "whether the State waived the § 2254(e)(2) argument decided in *Shinn* by failing to raise it during earlier proceedings." (App. 9).

Further, the cases Stokes lists in support of his argument actually support Petitioner by reflecting their *inapplicability* to the history here. (See BIO at 14-15). While the majority sought to find forfeiture of an issue not lost in the district court, Stokes cites cases (many allowing plain error review regardless) that underscore critical preservation is at the *district court level* and by *the appellant*. See *United States v.*

Burnette, 423 F.3d 22, 23 (1st Cir. 2005) (appellant failed to preserve either claim in the district court and inadequately briefed issue); *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (denying a remand "to re-amend" appellant's complaint"); *Fontroy v. Owens*, 23 F.3d 63, 66 (3d Cir. 1994) (remanding to district court to determine waiver); *United States v. Vanegas*, 612 F. App'x 664, 666 (4th Cir. 2015) (failed to "timely present" claim in district court); *United States v. Kennedy*, 137 F. App'x 685, 687 (5th Cir. 2005)(would review only "for plain error" where no "objection was raised in the district court"); *United States v. Cavett*, 304 F. App'x 458, 459–60 (7th Cir. 2008) (appellant failed to raise issue); *United States v. Norman*, 427 F.3d 537, 539 (8th Cir. 2005) (appellant failed to raise issue); *United States v. Samora-Sanchez,* 143 F. App'x 90, 92 (10th Cir. 2005) (same); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (considering issue was not raised in appellant's briefs "or in the suggestion for rehearing en banc that he filed"); and *Texas v. United States*, 798 F.3d 1108, 1114 (D.C. Cir. 2015) ("failure to follow the rules in district court can doom a party's case").

The upshot: procedural posture may be considered on remand, but it is expected to be considered fairly, on the record with emphasis on treatment in the district court. The majority's murky and extensive wrangling regarding procedure,[4]

4 Consider that this Court easily dispatched the notion of forfeiture in a footnote. 142 S. Ct. at 1730. To attempt to justify its rejection of an additional sustaining ground the majority twists and turns over multiple pages. A true principle rarely needs overexplaining. The simplest answer is the correct one, there is no waiver or forfeiture.

demonstrates the reality here is the majority faulted the State for prevailing on the default and not preventatively arguing in the brief to save the majority from its later occurring error – misusing the evidence for the first time on appeal.[5] Finding forfeiture in these circumstances is not just wrong, it is flat wrong.

Stokes, try as he might, has not identified a single reason to find the State was "sandbagging" (the majority), or setting a "timebomb" (for the majority), or keeping an argument "up its sleeve" (to presumably use against the majority), as he so colorfully asserts. (See BIO at 16-17 and 20).[6] Such legal maneuverings

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5 Curiously, the majority never considered remand to the district court for consideration of the merits in the first instance instead of an appellate court's decision of the merits for the first time on appeal. It appears to be simply because faithful application of AEDPA limitations would result in denial of relief and the majority disagreed with that result. See App. 25 (observing the difficulty in obtaining relief if 2254(e)(2) is applied). *Shinn*, too, answers the majority's conundrum, but in the exact opposite way: "…expansion of factfinding in federal court, whether by *Martinez* or other means, conflicts with any appropriately limited federal habeas review. … such intervention is also an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them. Federal courts, years later, lack the competence and authority to relitigate a State's criminal case." 142 S. Ct. at 1739. In that same vein, Stokes's argument that the State was asking the court of appeals to "rubber-stamp an unconstitutional death sentence" and ignore the evidence, (BIO 22), is a complaint on the statutory restriction, not abandoned review.

6 Stokes also echoes the same incorrect assertion used by the majority – the State invited a merits review on appeal. (BIO at 12). Again, his arguments rests on general reference to the

generally indicate a hope to delay – that is just the opposite of what the State would want.[7] But neither does the State wish to argue merits alone when the default is the only ruling by the district court.[8] At any rate, Stokes largely fails to meaningfully engage in the sound, specific arguments that reveal the majority's erroneous finding of forfeiture, but that does not diminish the record which squarely supports the petition's arguments as demonstrated.[9]

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evidence from the federal hearing, not the specific context in which it was referenced. He cannot deny the record support set out in the petition that the State properly referenced only the default analysis. (Pet. at 17-18).

7 Moreover, Stokes asserts the State was looking for a "do-over" that "would have amounted to a perverse double standard," essentially enforcing Stokes default of his claim, but excusing the State's forfeiture of an additional sustaining ground. (BIO at 3). Of course, the immediate problem with his argument is that he concedes the default. According to the district court, the new evidence did not excuse the default. Only the majority found the new evidence excused the default. But, as explained in the petition, it is not "perverse" in anyway to apply the limitations that AEDPA demand. (Pet. at 23-25).

8 Stokes also asserts erroneously that Stokes echoes the same incorrect assertion used by the majority – the State invited a merits review on appeal. (BIO at 12). Again, Stokes rests on any reference to the evidence from the federal hearing being allowed. He cannot deny the record support set out in the petition that the State properly referenced that evidence in defending the default analysis by the district court. (Pet. at 17-18).

9 Stokes sets up a straw man argument on whether Section 2254 is not waivable (or subject to forfeiture), then asserts the State has no response. (BIO 22). Stokes again misses the point

Even so, the more subtle yet key issue here is the blurring of evidence for default analysis compared to evidence for the underlying claim analysis.[10] In arguing the Fourth Circuit did not have to consider *Shinn* at all due to the [faulty] finding of forfeiture, Stokes again misses the point. He urges the Court to assume that the remand instruction was settled by waiver or forfeiture; however, the majority erred as a matter of law in its assumption that the new evidence, *once received*, is available for both a default and merits analysis, which was expressly rejected in *Shinn*. (Pet. at 18-19).

The Fourth Circuit treated the evidence as all-in for any purpose. (See App. 9). That is contrary to other circuits. Indeed, the Fifth Circuit has identified a split in the circuits, noting *Stokes*, as to whether "evidence outside the state record is admissible in *Martinez* claims for the limited purpose of establishing

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clearly made in the petition that Section 2254(e)(2) is a limitation on federal courts. (Pet. at 24-25). For that, Stokes had no response.

10 Returning to generalities once more, Stokes falls back on a "factbound" case assertion. (BIO 23). Yet, the only reason the case could possibly be termed "fact-bound" is *due to the very legal error at issue*. Here, the majority threw off its AEDPA chains and improperly engaged in "fact-bound" evaluation when *Shinn* shows that is wrong. As argued, the legal errors largely subsume the factual disputes. At any rate, as Justice Scalia once wrote, "The only way this Court can ensure observance of Congress's abridgment of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law." *Cash v. Maxwell*, 565 U.S. 1138 (2012)(Scalia, J., dissenting from denial of certiorari). That general assertion in this case does not help Stokes.

an excuse for procedural default, even in the wake of *Ramirez* and *Twyford*." *Mullis v. Lumpkin*, 70 F.4th 906, 911 and n. 5 (5th Cir. 2023) ("*Compare Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 723 (3d Cir. 2022) (holding *Shinn* did not abrogate the circuit's holding that AEDPA does not forbid factual development regarding excusing procedural default), *with Stokes v. Stirling*, 64 F.4th 131, 136 (4th Cir. 2023) (concluding *Shinn* prohibits the introduction of new evidence in support of *Martinez* claims)."). This is yet another reason to clarify the reach of *Shinn*.

II. Stokes has not called into doubt the Fourth Circuit Majority's Error on the Merits Apart from *Shinn v. Ramirez*.

Stokes' misapprehension of law and fact does not stop with *Shinn* and the state's arguments defending the default, but even goes to the *Strickland* test itself – he claims the State no longer contests trial counsel deficiency. (BIO at 12). That is incompatible with the petition and record as demonstrated. (Pet. at 27-38. Notably an argument on lack of prejudice follows what *Strickland* expressly states: "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. Disposing of the error by lack of prejudice here avoids needless fact review. And as to the lessening of Stokes's burden of showing prejudice under *Strickland*, he appears to rely on quotation of language and does not engage in discussion of the erroneous application. (BIO at 35-36).

Stokes does try, however, to push back on the majority's error regarding state capital sentencing law. The majority misused statutory aggravating circumstances to limit the evidence in aggravation. (App. 72-73 n 10). Stokes suggests this Court defer to the error,[11] (BIO at 33), but that's not likely since this Court would also have to ignore its own precedent interpreting the state law. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) ("the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances"). (See Pet. at 33).

Further, Stokes tries to soften the majority's discarding major aggravation evidence (and criticizing the district court's consideration of the evidence, (see App.73-73), to bring it more in line with considering the evidence, rather than weighing specific aggravators, (BIO at 34), but he has no response for the clearly expressed intention of the treatment – not to give "little" weight, but "no" weight, (App. 73 n. 10).

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11 That the Circuit is presumed to know the state law is, not only a generality, but also the Fourth Circuit has not spoken with one voice on the state law at issue. Older cases generally correctly reflect procedure; however, recent cases, including this one, misstated South Carolina law and tie the statutory aggravating circumstance (eligibility) to determining whether the case was "highly aggravated" for purposes of selecting the sentence. *See Williams v. Stirling*, 914 F.3d 302, 318–19 (4th Cir. 2019), (describing "one aggravating factor" as the "solitary aggravating evidence"). The Fourth Circuit righted itself in *Mahdi v. Stirling*, 20 F.4th 846, 904–05 (4th Cir. 2021) (describing "'sheer magnitude of the aggravating evidence'")((quoting *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997)).

Further, it is disingenuous to suggest that the "single" footnote explanation somehow makes omitting consideration of the brutality of the crimes and a second murder "okay" in the prejudice analysis. (See BIO at 33). While Stokes correctly notes that most capital cases have horrible facts, (see BIO 32), he offers no reason (and certainly no legal basis) to ignore them.

As to the "double edged" nature of the evidence, Stokes merely counters that the State has an independent right to submit aggravating evidence. (BIO at 35). True but unrelated. The point is the defense would provide *more* evidence in aggravation that the State did not yet have. It would see that should be a path defense counsel would wish to avoid.

Further still, Stokes incongruously argues how important, and sympathy evoking, upbringing and trauma evidence is *for him,* but urges no sympathy for more evidence of Stokes's abuse of Norris Martin. (See BIO at 25-27). Stokes even goes so far as to call Stokes's treatment of Martin mere "childhood bullying." (BIO at 27). That is an unjustified attempt to marginalize sexual assault and dominance that began in childhood and continued throughout adulthood on a vulnerable individual of slow intellectual functioning. (App. 29, 81, 83). Stokes's dismissal of this while puffing the importance of his own background (sans the accompanying negatives) is so inconsistent as to deflate any credibility to his assertions. *Wong v. Belmontes*, 558 U.S. 15 (2009).

CONCLUSION

In light of the foregoing, and the arguments in the petition, this Court should grant the petition, summarily reverse, and affirm the district court's denial of relief, or alternatively, reverse with directions to remand to the district court for consideration of the petition on the state court record consistent with *Shinn* and 28 U.S.C. § 2254(e)(2).

Respectfully submitted,

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