No. 22-6690

IN THE
SUPREME COURT OF THE UNTED STATES

STEVEN VERNON BIXBY,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections, LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Institution Secure Facility,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

CAPITAL CASE
PETITIONER'S QUESTION PRESENTED

Whether 28 U.S.C. § 2253 (c)(1), F.R.A.P. 22(b), and this Court's decisions in *Miller-El v. Cockrell,* 537 U.S. 322 (2003), *Barefoot v. Estelle,* 463 U.S. 880 (1993), and its progeny require a certificate of appealability to issue when a three-judge panel of a court of appeals is split as to whether the issue is debatable among jurists of reason? (Petition, p. i).

LIST OF PARTIES

Respondents agree with Petitioner that the caption reflects all the appropriate parties.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.2 and Supreme Court Rule 14.1 (b)(iii), Respondent points out two deficiencies in Petitioner's listing of related proceedings. First, the action in the Fourth Circuit was not a denial of habeas relief, but a denial of certificate of appealability. Second, in addition to the denial of panel rehearing, the Fourth Circuit Court of Appeals also denied Petitioner's petition for rehearing *en banc*. Consequently, Respondents submit the following listing for the Fourth Circuit appeal:

> *Bixby v. Stirling,* COA Case No. 21-5, Order denying certificate of appealability issued April 29, 2022, (Doc. 53), petition for rehearing *en banc* denied August 5, 2022, (Doc. 62), petition for panel rehearing denied August 31, 2022, (Doc. 71).
>
> [2254 action, appeal from district court, D.S.C.]

CAPITAL CASE
BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Steve Vernon Bixby is under two death sentences in South Carolina for the murders of Deputy Danny Wilson and State Constable Donnie Ouzts.

Bixby has had ample opportunity to contest his guilt and sentences and to investigate and re-investigate defenses. He had a bifurcated trial; a direct appeal; a post-conviction relief action and appeal; and also review by the district court under the deferential standards set out in 28 U.S.C. § 2254. However, the Fourth Circuit denied him a certificate of appealability. It is this denial of a certificate Bixby asks the Court to review. However, the premise for his error lacks factual support and the general principle lacks record development. Essentially, Bixby contends that one judge is authorized to grant a certificate. Perhaps. There are several statutes and rules that would have to be synthesized to reach that conclusion and that was not argued, explored and ruled upon below. If Bixby is correct in his "one judge" theory (which is not clear comparing applicable statutes with the Federal Rules of Appellate Procedure and Fourth Circuit local rules), Bixby has not been subjected to an incorrect application of the rule. There was no dissent from the panel decision to deny the certificate, rather Bixby is relying solely on the dissent from the denial of rehearing.

Respondents submit the issue is theoretical, undeveloped and this case presents a faulty vehicle to attempt to resolve the question presented. Additionally, Bixby touches upon collateral concerns such as the propriety of pursuing a claim of

"ineffective assistance of habeas counsel" and the parameters, if any, for habeas counsel performance. Even his underlying claims from the state litigation for which he wants a certificate have not been cleanly identified. This case lacks a clear basis for resolution of not only the issue presented, but the ancillary arguments Bixby makes clutters the focus. Again, Bixby fails to present a good vehicle to resolve the complaints he asserts. For all these reasons, the petition should be denied.

CITATIONS TO OPINIONS BELOW

The April 29, 2022 Fourth Circuit Court of Appeals' Order denying a certificate of appealability is unpublished but available at 2022 WL 4494130 (4th Cir. Apr. 29, 2022), *reh'g denied* (Aug. 31, 2022), and provided in the petition appendix at 1a. The District Court of South Carolina's March 1, 2021 order denying habeas relief is unreported but available at 2021 WL 783660 (D.S.C. Mar. 1, 2021), and provided in the petition appendix at 5a.

JURISDICTIONAL STATEMENT

The petition was filed within the time granted in this Court's order extending the standard 90 days. Bixby claims jurisdiction is invoked under 28 U.S.C. § 1254(1). (Pet. 1).

STATUTORY PROVISIONS INVOLVED

Respondents contend that the relevant statutory provision is found in 28 U.S.C. § 2253, in this relevant portion:

> **(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; …
>
> **(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

And also in 28 U.S.C. § 2254(i): "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding raised under section 2254."

STATEMENT OF THE CASE

Bixby murdered two men based on strong held beliefs that he was constitutionally in the right to defend a small strip of property by taking two lives. The murders occurred because Bixby believed the State was unconstitutionally taking a portion of his mother and father's property in Abbeville, South Carolina for a road widening project. He decided to fight back. Bixby and his father, Arthur, took up arms, murdered two men, and shot at twelve other individuals. Bixby maintained that he was in the right. These beliefs, to be sure, were part and parcel of what led to the violence.

Bixby explained to a friend of his by letter that neither he nor his father were wrong, asserted they "did nothing outside the law," and noted rather chillingly that "[h]ad [he] known that [other officers] were going to open fire after they got the deputy's body I would have gotten five or six" as "[t]hey were less than 7-feet away and never saw us." (ECF No. 21-11 at 329-30). Bixby maintained that he and his father had simply "defended our rights" as "guaranteed under the constitution," and

complained that his family must "pay the price for their illegal activities, not at all the way our founding fathers had imagined our freedoms would turn out…." (ECF No. 21-11 at 353-54; see also J.A. 190).

Though strong, the beliefs were not based on delusion. As forensic psychiatrist Dr. Richard Frierson testified at the post-conviction relief hearing:

> … if they were delusional, they would be unique to Mr Bixby And we -- I spoke with his mother, I've spoken with his father. This belief system is one that was shared by the whole family. He received a piece of fan mail after this happened that believed he had done the right thing, he was just defending the property.
>
> So there's a whole segment of our society that has these beliefs And I would, all of a sudden, have to label all of those people severely mentally ill and delusional … And that's not the case.

(ECF No. 23-8 at 415).

At trial, his defense team included seasoned South Carolina trial attorneys and a noted criminal defense litigator from a Washington D.C. law firm. With the aid of experts and with ample funding, trial counsel investigated Bixby's background and mental status for the penalty phase presentation. Counsel argued that Bixby was under the influence of his family, that he had undergone "forcible indoctrination," and with a low IQ and "frontal lobe impairment," was more susceptible to influence. (See ECF No. 22-3 at 114-18). Still, the jury concluded death was the appropriate sentence.

During the state post-conviction relief action, Bixby claimed trial counsel did not do enough in investigation of his social history and mental state. (J.A. 19-20). After full proceedings again reviewing the evidence of his background and differing opinions

by experts, the state post-conviction relief court determined Bixby failed to show error and prejudice.

Pursuant to Supreme Court Rule 15.2, Respondent asserts that Statement of the Case Section "A" in the Petition is contested. More rightly termed argument than neutral statement, two particular assertions referenced as facts must be addressed.

After considering a new investigation into social history, the state court determined that the new presentation was mostly a repackaging of the evidence known at the trial level. (J.A. 67-69). However, the "poverty" assertion made in the state post-conviction relief action that Bixby repeats here, (see Pet. at 4), was dependent on "the Bixbys' report of income to the government" which the state court found was seriously undermined given "the Bixbys were severely anti-government," and by the fact that trial counsel had actually visited the home in New Hampshire where the Bixbys were originally from, the house was of "decent-size," and the family "appeared to have a fairly average standard of living." (J.A. 68-69). Rejection of the poverty description was reasonable based on the record.

Also, the state judge found the new brain scan evidence offered – subject to criticism in the medical community and for differing results based on control groups which made the opinion suspect – at any rate did not change or call into question any portion of the evidence presented at trial. (J.A. 59-63). Relying on this Court's guidance in *Bobby v. Van Hook*, 558 U.S. 4, 11-13 (2009), the state post-conviction relief court resolved that Bixby's trial counsel did not "fail to act while potentially powerful mitigating evidence stared them in the face," rather the investigation was reasonable,

with additional details adding little to the narrative. (J.A. 70-73). But Bixby's reliance upon the assertion of a "neuroscientist" opinion that "identified brain damage," (see Pet. 6-7), does not fully square with the record at this point. While there was testimony given on this point, still, the opinion was rejected as unsound – the methods utilized for the opinion were not widely accepted in the medical community, and the opinion was subject to criticism based on admitted weaknesses in the method, particularly control group variables. (J.A. 60).

Even so, Bixby's crafted narrative under the heading "Statement" does not directly bear on the legal question presented. Consequently, while Respondents bring the more egregious incorrect factual statements in Bixby's petition to this Court's attention, further analysis would needlessly detract from the issue this Court must ultimately consider, and, as such, is not further discussed item by item. (See Supreme Court Rule 15.2 (potential waiver by non-correction of assertions when erroneous assertions affect "consideration of a question presented"). Instead, Respondents offer this counter statement based upon the state court records:

A. State Court Procedural History: Trial, Direct Appeal and State Post-Conviction Relief.

Charges and Trial

Bixby was indicted on one (1) count of conspiracy to commit murder; one (1) count of kidnapping; two (2) counts of murder; one (1) count of possession of a firearm or knife during the commission of a violent crime; and twelve (12) counts of assault with intent to kill. The State sought the death penalty for the murder of Deputy Danny Wilson and the murder of State Constable Donnie Ouzts. A jury trial began on

February 14, 2007. E. Charles Grose, Esq., William Nettles, Esq., Tara Schutlz, Esq., and Mark MacDougall, Esq., represented Bixby. (ECF No. 21-7 at 371). On February 18, 2007, the jury returned a verdict of guilty as charged. (ECF No. 22-1 at 214-16).

On February 21, 2007, after a separate sentencing proceeding, the jury found the following statutory circumstances in aggravation in reference to the murder of Deputy Wilson: 1) murder of a state or local law enforcement officer during or because of the performance of his official duties; 2) two or more persons murdered by the defendant by one act or pursuant to one scheme or course of conduct. As to Constable Ouzts, the jury found: 1) the murder of an officer of the Court during or because of the exercise of his official duty; 2) the murder of state or local law enforcement officer during or because of the performance of his official duties; and 3) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. (ECF No. 22-3 at 143-144). The finding of any one of these statutory aggravating circumstances for each victim (*i.e.,* eligibility to consider death), allowed the jury to consider whether a death sentence was appropriate, (*i.e.,* selection of sentence). See S.C. Code § 16-3-20(B). The jury assessed death was the appropriate punishment. (ECF No. 22-3 at 144-45). The trial judge thereafter imposed a death sentence for each murder; five (5) consecutive ten (10) year sentences for the assault with intent to kill convictions; a consecutive five (5) year sentence for conspiracy; and seven (7), concurrent, ten (10) year sentences for the remaining assault with intent to kill convictions. (ECF No. 22-3 at 151-53; 157-59).[1]

[1] As a matter of state law, sentences could not be imposed for the weapon and kidnapping convictions. See S.C. Code § 16-23-490 (A) (for weapon conviction, "[t]his five-year sentence does not apply in cases where the death penalty … is imposed for the violent crime."); S.C. Code § 16-3-910 (for kidnapping, "imprisoned for a period not to exceed thirty years unless sentenced for murder…").

Direct Appeal

Robert Dudek, Deputy Chief Appellate Defender of the South Carolina Office of Appellate Defense, represented Bixby on appeal along with Appellate Defender LaNelle DuRant. Counsel raised thirteen (13) issues on appeal including these issues which Bixby references in the petition before this Court:

(Guilt phase)

1.

> Whether the court erred by ruling defense counsel could no longer *voir dire* jurors to assure that they understood murder that [sic] was the intentional killing of another human being without excuse since the court's ruling denied appellant his right under *Morgan v. Illinois* to identify death prone unqualified jurors?

…

(Penalty Phase)

12.

> Whether appellant's death sentence should be reversed pursuant to South Carolina Code § 16-3-25(C)(1) because the court admitted a professionally prepared videotape of Deputy Wilson's funeral which was manipulated to elicit an outpouring of sympathy since this introduced an arbitrary factor into the sentencing hearing in violation of the Eighth Amendment to the United States Constitution, and above statute?

(See J.A. 1464-68 [Magistrate's Summary of Direct Appeal Issues]).

The Supreme Court of South Carolina affirmed in *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010). Bixby then petitioned this Court to consider these two issues. (J.A. at 1468). This Court denied the petition on April 25, 2011. *Bixby v. South Carolina*, 563 U.S. 963 (2011).

State PCR Action

John Mills, Esq. and Dan Westbrook, Esq., were appointed to represent Bixby in

the PCR action. Counsel filed a fifth amended application on November 24, 2012, making the following allegations of note regarding claims in this action:

> 10-11(c) Appellate counsel raised in the appellate brief, but failed to adequately brief, the application of a procedural bar that the South Carolina Supreme Court prevented review of the claim that voir dire was unduly restricted. The procedural bar in question had never been applied to bar review in circumstances similar to Applicant's and appellate counsel was ineffective for failing to adequately brief this issue prior to the Petition for Rehearing or Petition for Writ of Certiorari to the United States Supreme Court. Moreover, appellate counsel failed to adequately brief the substance of the claim that trial counsel was unduly limited in voir dire of the jury because the trial judge stopped trial counsel from defining murder for the potential jurors and refused to do so himself.
>
> …
>
> 10-11(h) Trial counsel unreasonably failed to adequately investigate and present during the guilt and penalty phases evidence of Mr. Bixby's mental health and functioning, retain and provide mental health professionals with the information necessary to conduct competent mental health evaluations of Mr. Bixby, and present the effects of Mr. Bixby's deficits on his behavior throughout his life and in and around the time of the crime and arrest.
>
> …

(ECF # 23-2, pp. 13-23; see also J.A. 1470 and 1472).

An evidentiary hearing was held on December 10-13, 2012, with additional testimony taken on March 21, 2013. (J.A. 12). At the December 2012 hearing, trial counsel Nettles and Grose each testified for Bixby, as did Ruben Gur, Ph.D., Wendell Rhodes, Judy Copland, Rebecca Kendig, Ph.D., and Shawn Agharkar, M.D. The State then called Richard Frierson, M.D. and Marla Domino, Ph.D., to present testimony regarding Bixby's mental health allegations. At the March 2013 hearing, the State presented two additional mental health experts, Dr. Donna Schwartz-Watts and Dr. Helen Mayberg, and Bixby re-called Dr. Gur in rebuttal. On January 9, 2015, the PCR

judge, Judge McMahon, after receipt of post-hearing briefs from each party, issued a written Order of Dismissal. (J.A. 12).

As to the alleged ineffective assistance of appellate counsel, the state court concluded that the Supreme Court of South Carolina found the issue procedurally barred even though appellate counsel argued against its application, and also found that the claim, if heard, would not afford relief on the merits. (J.A. 31). The court also rejected several arguments on the scope and correctness of the state procedural bar; and finally resolved there was, at the end of the day, no prejudice to Bixby in selection as the jury process was fair. (J.A. 32-37). He concluded that Bixby had failed in his burden of proof under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

As to mental health investigation, the state post-conviction relief court considered the scans and opinion from Dr. Ruben Gur, but resolved that "whatever the value the scan analysis could be (keeping in mind that dysfunction was already proven and the scans were read as within normal limits by the radiologists), is greatly undercut by the uncertainty of reliable results and the rejection of schizophrenia by the forensic psychiatrists both for the defense and the State." (JA 63). He concluded that Bixby had failed in his *Strickland* burden of proof.

PCR counsel continued representation on appeal, filing a petition for writ of certiorari in the Supreme Court of South Carolina on October 5, 2015, which raised the following issues relevant to this action:

> 2. Whether the PCR court erred in failing to find trial counsel's ineffective assistance as prejudicial where they failed to provide Dr.

> Ruben Gur with the brain imaging they obtained specifically for Dr. Gur's assessment, an assessment that would have uncovered brain damage that likely affected Mr. Bixby's ability to control his actions during the offense.
>
> …
>
> 9. Whether the PCR court erred in failing to find appellate counsel ineffective for inadequately briefing the application of a procedural bar that prevented this Court from reaching the merits of whether Mr. Bixby had an adequate opportunity to voir dire prospective jurors about their ability to meaningfully consider a sentence of life, where the trial court had prevented counsel for Mr. Bixby from providing an accurate definition of murder for the jurors.

(J.A. 1474-76). On March 7, 2017, the Supreme Court of South Carolina denied the petition. (J.A. 1477). Again, Bixby then sought review from this Court, raising an issue alleging counsel failed to present testimony from a "crucial expert." This Court denied certiorari by Order dated October 16, 2017.

B. Federal Habeas History.

Bixby was appointed counsel for habeas proceedings. (J.A. 91-91). Counsel filed a petition, and the State filed a return and moved for summary judgment based on the state court record. (JA 1238; J.A. 1330 and 1332). In a report spanning 141 pages, the United States Magistrate detailed the state proceedings and the arguments made, and ultimately recommended that the district court grant the motion for summary judgment, and dismiss the petition without a hearing. (J.A. 1597). The district court thereafter granted Respondents' motion. (J. A. 1699-1742). Habeas counsel filed a motion to alter or amend, which was denied on all grounds apart from the requested ruling on the certificate of appealability. (J.A. 1744-64 and 1774-76). On March 1, 2021, the district court issued an amended opinion denying a certificate. (J.A. 1777-1820). Bixby appealed. (J.A. 1821).

Habeas counsel was initially appointed to continue representation on appeal (COA4 Doc. 2). The first briefing order in the case was issued on March 31, 2021. (COA4 Doc. 5). Upon motion of habeas counsel, Bixby was appointed new counsel for purposes of the appeal. (COA4 Docs. 7 and 8). On May 4, 2021, counsel moved to remand to the district court for new 28 U.S.C. § 2254 proceedings in order to present additional claims. (COA4 Doc. 18). That was denied. (COA4 Doc. 30). After a series of extensions for filing the informal brief, counsel then moved to stay the appeal to file a Rule 60 motion in the district court. (COA4 Doc. 40). That motion was denied, as well. (COA4 Doc. 45). Bixby filed his informal brief on March 1, 2022. (COA4 Doc. 52).

On April 29, 2022, the panel denied the certificate without dissent. (COA4 Doc. 53). Bixby petitioned for rehearing and rehearing *en banc*. (COA4 Doc. 55). The Court of Appeals denied rehearing *en banc* on August 5, 2022. (COA4 Doc. 62). The panel denied rehearing on August 31, 2022, with Judge Harris dissenting. (COA4 Doc. 71).

Separately, but relatedly, Bixby filed his Rule 60, Fed.R.Civ.P., motion in the district court on February 28, 2022. (ECF No. 164). The district court denied the motion on July 22, 2022, finding that the motion must be "construed as an unauthorized successive habeas petition," and denied a certificate of appealability. (ECF No. 185 at 9). The appeal from that denial is still pending in the Fourth Circuit as of this writing.

REASONS WHY THE PETITION SHOULD BE DENIED

Bixby offers a question that would have this Court address multiple statutes, rules and practices which have never been applied, argued or decided in Bixby's case. He fails to offer a clear, developed issue for this Court's consideration. Moreover, because this issue was never tested below, Bixby has not shown the Fourth Circuit would apply the provisions in a way this Court should correct. In essence, there are statutory provisions and rules of procedure that this Court would need to review and compare to address the issue, then make what is essentially an advisory ruling. Further complicating review, Bixby adds an ancillary complaint to address going to what guarantees, if any, are there of effective assistance of Section 2254 counsel. In so complaining, Bixby also makes a dire prediction that without this Court's intervention, "no federal court [will] have ever considered the full picture of Mr. Bixby's life and assessed the constitutionality of the [state] proceedings…." (Pet. 3). This grossly overlooks the restriction on federal habeas review this Court has repeatedly underscored. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) ("habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction…");. *Id.*, at 101 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.") (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). The following discussion shows that Bixby fails to present the Court with a good vehicle to decide the question presented.

A. Congress assigned the responsibility for determining decision panels to the individual appellate courts pursuant to 28 U.S.C. § 46, and the Fourth Circuit followed its Local Rules in considering whether to issue a certificate of appealability.

28 U.S.C. 2253(c)(1) provides that a certificate of appealability must be granted by either "a circuit justice or judge" to appeal from a "final order" in federal habeas corpus actions under 28 U.S.C. § 2254. From this instruction, Bixby argues that, since one justice "voted" for rehearing, he was entitled to a certificate. That is an academic question here as the vote to deny a certificate was from a unanimous panel:

> Upon consideration of the appellant's preliminary brief filed pursuant to this Court's Local Rule 22(a), the Court denies a certificate of appealability and dismisses the appeal.
>
> Entered at the direction of Judge Agee with the concurrence of Judge Diaz and Judge Harris.

Bixby v. Stirling, No. 21-5, 2022 WL 4494130, at *1. Further, this disposition is consistent with 28 U.S.C. § 46, 28 U.S.C. § 2254 and the Fourth Circuit's Local Rules.

28 U.S.C. § 46(a) provides that "[c]ircuit judges shall sit on the court and its panels in such order and at such times *as the court directs*." (emphasis added). In complement, Rule 22(b)(2), Fed.R.App.P., provides: "[a] request [for a certificate of appealability] addressed to the court of appeals may be considered by a circuit judge or judges, *as the court prescribes*." (emphasis added). In its Local Rule 22(a)(1)(A), the Fourth Circuit directs that the request be submitted to a panel, and if the panel grants the certificate, a briefing order follows. Local Rule 22(a)(3) sets out that, whether a panel is considering a request for a certificate, or expansion of a certificate, if one judge of the panel "is of the opinion that the applicant has made the showing required"

then "the certificate will issue." However, in the notes to that provision, the Fourth Circuit recognizes Rule 27(c), Fed. R. App. P., limits the authority of one judge to act alone:

> A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

In noting that separate Rule in regard to Local Rule 22(a)(3), the Fourth Circuit also concludes that its use of panels is consistent with Rule 27(c), Fed.R.App.P. Additionally, it is consistent with Rule 22(b)(2), Fed. R. App. P., which leaves whether the "request" shall be "considered by a circuit judge or judges" to the discretion of the court of appeals.

Further, the panel process is also consistent with the structure provided in 28 U.S.C. § 46(c) setting out that matters may be decided "by a court or panel of not more than three judges," and Section 46(d), in that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." This Court has instructed that under the statute, "a court of appeals case may be decided by a panel of three judges," and, since "two judges constitute a quorum," an opinion may be issued if "they agree." *Yovino v. Rizo*, 586 U.S. ___, 139 S. Ct. 706, 709 (2019).

In sum, the statutory authority and federal rules worked together to allow the court of appeals to decide matters in a panel of three. While Petitioner suggests a circuit split (though he includes the Fourth Circuit in the circuits that recognized a

one-judge vote, see Pet. 14), the requisite factual scenario to demonstrate a real controversy is sorely missing. Bixby had failed to show any impropriety to address, even if one accepts his position as correct.

B. Bixby has not challenged the Fourth Circuit on the interplay between Fed. R. App. P. 27(c), Fed. R. App. P.22(b)(3), and 28 U.S.C. § 2253(c)(1) with the Local Rules; thus, he has not properly developed the issue for this Court's review.

There is no record on this point for the Court to consider. Bixby argued in his opening brief to the Fourth Circuit that he was entitled to a certificate under the standard of Section 2253(c). (Doc. 52 at 34, citing *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 327 (2003) (quoting 28 U.S.C. §2253(c)(2))).[2] He did not object to the ruling on the basis that only one judge needed to make that ruling, or argue that the decision was in conflict with the Local Rules, or that the Local Rules were in conflict with Section 2253(c)(1). Bixby's position was not presented and ruled upon. The record is undeveloped and the issue remains essentially not ripe for this Court's consideration.

Again, Bixby relies on a dissent to the denial of *rehearing*. There was no dissent in the order denying the certificate. That one judge may wish to *reconsider* (though not necessarily change) his or her vote upon review of a petition for rehearing does not automatically satisfy the appellant's burden of "ma[king] a substantial showing of the denial of a constitutional right." U.S.C. § 2253 (c)(2). Bixby's reliance on this point is

[2] Bixby suggests the Court of Appeals' panel acted rashly by reference to a decision "[a]fter filing his opening brief, but before the State could respond…." (Pet. at 13). Consistent with Local Rule 22(a), a "preliminary briefing order" was issued February 1, 2022. (Doc. 47). That order provided only for the filing of a brief by Bixby, and expressly noted: "If the court grants a certificate of appealability, the clerk will issue a final briefing order scheduling the filing of a response brief and any reply brief." (Doc. 47). This is consistent with Local Rule 22(a) which sets out that "[t]he preliminary briefing order shall neither require nor authorize a brief from the appellee…." Bixby is wrong to suggest the panel acted without waiting for a response brief.

untenable. Additionally, this does not help him demonstrate his asserted "circuit split." Bixby suggests a circuit split over recognition of how many judges are necessary to grant a certificate, not for a ruling on rehearing procedure. Again, Bixby has failed to present the Court with a real controversy.

C. Bixby's collateral issues involve the procedure for testing the quality of representation in capital cases reviewed under 28 U.S.C. § 2254, which does not involve a constitutional right that could support a certificate of appealability.

Bixby also attacks the quality of representation provided by appointed habeas counsel in the district court. However, Bixby's predicted dire consequences – that a state death sentence will be shuttled through federal habeas review without a critical review of federal habeas counsel error, (Pet. at 3) – complains of the assumed denial of a right he does not have. Additionally, it appears Bixby suggests a new layer of review not anticipated by Congress in the limited litigation allowed under the Antiterrorism and Effective Death Penalty Act (AEDPA). And much like the actual issue presented, the facts of record are against him.

First, the district court found counsel was qualified to accept the appointment. In the Order of April 28, 2017, the United States Magistrate Judge assigned the matter reviewed the qualifications and made the appointment as follows:

> … the court declines to appoint Mr. Shoemake and Mr. Hurley. Rather, in keeping with this District's Plan for Implementing the Criminal Justice Act, the court appoints two attorneys from the District's CJA Death Penalty Panel Attorney List – Miller Williams Shealy, Jr., of Mount Pleasant, South Carolina, as Lead Counsel and William H. Monckton, VI, of Myrtle Beach, South Carolina, as Second Chair. As members of the death penalty CJA panel, Shealy and Monckton have certified that they are members in good

> standing of the federal bar of this District and that they are eligible and willing to provide representation under the CJA. In addition, as a member of the District's first-tier, or lead counsel, death penalty CJA list, Shealy has certified that he has been admitted to practice in this District for at least five years and has not less than three years experience handling felony cases. Thus, the court finds that Shealy and Monckton are qualified to represent Petitioner under § 3599.

(COA4 Doc. 22-4 at 3).[3] Notably, the Fourth Circuit *also appointed the same counsel* initially on the appeal. (COA4 Doc. 2). On April 2, 2021, counsel moved to be relieved, and for new counsel, not for inability, but based on the following assertion:

> Messrs. Shealy and Monckton were appointed previously in the district court. *Neither is available to continue the representation* in the appeal of this matter at this time. Mr. Bixby has been made aware of *counsel's intention to move for substitution* of counsel and been informed of counsel who will be proposed to substitute. He is in full agreement with the motion to substitute.

(COA4 Doc. 7 at 2) (emphasis added). It was not until the motion for remand and later motions to suspend the appeal to file a Rule 60 motion that allegations of ineffective assistance were pressed. Though Bixby is currently appealing the denial of his Rule 60 motion, it is of no little impact that the district court acknowledged its prior comments in the order at issue here that criticized appointed counsel, (see Pet. at 12), but resolved: "The fact remains that habeas counsel filed a timely § 2254 petition raising numerous grounds for relief, timely filed a response in opposition to Respondents' motion for summary judgment, and filed objections to the Magistrate Judge's report

[3] Respondents would also add that Mr. Shealy is a professor who teaches criminal law, criminal procedure and evidence at the Charleston School of Law, with prosecution experience specifically in capital litigation, as well as defense experience generally. The listing of his experience may be found at https://www.charlestonlaw.edu/teams/miller-shealy/

and recommendation, all of which were resolved when this Court, where appropriate under law, ruled upon Petitioner's habeas claims on the merits." *Bixby v. Stirling*, No. 4:17-CV-954-BHH, 2022 WL 2905509, at *4 (D.S.C. July 22, 2022).

And to be sure, the court did criticize habeas counsel, but a close review of many of those comments, (Petitioner reviews particular comments at pp.11-13 of the Petition), shows a reasonable reading that the court rejected the concept of the error by a court adopting language or argument from a party – a suggestion made in the objections. (See J.A. 1785-86, citing Objections). And, while "significant conflict[s] of interest" will satisfy the "'interest of justice'" standard this Court set out in *Martel v. Clair,* 565 U.S. 648, 663 (2012), and some general inquiry into representation may be allowed to determine the necessity of substitution, *id.*, at 662 and n. 3, nothing establishes a right to review general effectiveness of habeas counsel.[4] True, Bixby contends habeas counsel abandoned him, but, with the record clear that counsel filed timely, substantive documents, and timely objections, the assertion appears little more than a vehicle to present or raise different claims than those raised by qualified, appointed counsel. That is a claim expressly barred by 28 U.S.C. § 2254(i) and 28 U.S.C. § 2244(b)(2) limitations on successive actions. But once again, there is a separate appeal now pending in the Fourth Circuit more focused on that issue.

Even so, the argument lobbies for a sweeping change to create some equitable after-the-fact-of representation test. (See Pet. at 17-19). That is not only an affront to

[4] To the extent Petitioner complains the district court did not act in light of actions Bixby perceives as "ineffective" or even "abandonment," the district court – we now know by the assertions in the order denying the Rule 60 motion – did not perceive the actions to reach that level. 2022 WL 2905509, at *4. Bixby has never indicated a conflict or other impediment to representation.

finality, but completely unnecessary where habeas counsel was qualified and represented Bixby throughout the district court proceedings.

D. Bixby's arguments also rest on misapprehension concerning the restrictive nature of AEDPA review.

Bixby's additional dire forecast that as a result of the denial of a certificate, no federal court will have reviewed "the full picture of Mr. Bixby's life and assessed the constitutionality of the proceedings" in state court, (Pet. at 3), grossly misstates the restricted review under AEDPA and ignores the deference due to state proceedings.

Congress placed sharp limitations on a federal court's review of state criminal convictions and sentencing under 28 U.S.C. § 2254:

> AEDPA's standard is intentionally " ' "difficult to meet." ' " *White v. Woodall,* 572 U.S. ——, ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (quoting *Metrish v. Lancaster,* 569 U.S. ——, ——, 133 S.Ct. 1781, 1786, 185 L.Ed.2d 988 (2013)). We have explained that " 'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White,* 572 U.S., at ——, 134 S.Ct., at 1702 (some internal quotation marks omitted). "And an 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.,* at ——, 134 S.Ct., at 1702 (same). To satisfy this high bar, a habeas petitioner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Woods v. Donald, 575 U.S. 312, 316 (2015). Essentially, "[f]ederal habeas courts must defer to reasonable state-court decisions" in Section 2254(d) review. *Dunn v. Reeves*,

594 U.S. ___, ___, 141 S. Ct. 2405, 2407 (2021). Bixby appears to be under the misapprehension that the federal courts sitting in habeas can review the facts and decisions for "confidence" in the result which is without doubt incorrect. *Shinn v. Kayer*, 592 U.S. ___, 141 S. Ct. 517, 523 (2020) (reversing where lower court appeared to treat reasonableness inquiry as "a test of its confidence in the result it would reach").

Further, even if this Court should remand to the Fourth Circuit to reconsider whether a certificate should be issued, in argument before this Court, Bixby is not clear on what issues, in his opinion, warrant review. Though Bixby criticizes habeas counsel for not raising certain issues –ineffective assistance of appellate counsel issue based on voir dire and an evidence issue, (see Pet. 8-9), these are the issues Bixby set out in his brief in the Fourth Circuit:

> (1) Whether §3599 counsel's essential abandonment of Mr. Bixby, and the lower courts' failures to ensure his statutory right to counsel and right to one fair habeas proceeding, require reversal and the reopening of his federal habeas corpus proceedings.
>
> (2) Whether trial counsel provided ineffective assistance per *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny by failing to adequately investigate, develop, and present readily available mitigating evidence, including evidence of Bixby's brain damage.
>
> (3) Whether Bixby is entitled to relief where counsel provided ineffective assistance by failing to object to an inferred malice instruction that violated Bixby's constitutional rights.

(COA4 Doc. 52 at 13-14).

There is little to support that a certificate should be issued on any the issues actually raised in the Fourth Circuit opening brief.

The first cannot meet the definitional requirements for a certificate: "A

certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). According to Bixby's own presentation, his claim rests on a statutory provision. A certificate should be issued on such an argument.

The second was resolved by the state court's meticulous weighing of the evidence and credibility determinations. As noted above, while there was testimony given on this point, the opinion was rejected as unsound or of little credible value – the methods utilized for the opinion not widely accepted in the medical community and the opinion was subject to criticism based on admitted weaknesses in the method, particularly control group variables. (J.A. 60). The careful evaluation process based on facts of record will nearly completely insulate such a finding. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("deciding whether factual findings are fairly supported by the record. 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court").

And lastly, the third issue fares little better. That issue, though it presents a cognizable Sixth Amendment claim, the deficiency and prejudice rests on interpretation of state law. The state post-conviction relief court carefully reviewed the argument based on the developments in state law. (See J.A. 1725-30). It is unlikely that the Fourth Circuit would interpret state law to obtain a different result. *See generally Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

Lastly, though Bixby oft repeats that this is a capital case deserving of detailed review, Respondents do not see a denial of that review. A certificate is available but never mandatory. "Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). To that end, the certificate process serves as an essential gatekeeper function. *Id.,* at 893. Notably, the district court – on which Bixby heavily relies to show habeas counsel was inadequate –had the opportunity to fully review and consider the merits of the action, likewise found no basis to grant a certificate. Bixby, like other litigants, is bound by Congressional limitations. *See, e.g., Brown v. Davenport*, 596 U.S. ____, 142 S. Ct. 1510, 1520 (2022) ("When Congress supplies a constitutionally valid rule of decision, federal courts must follow it.").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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