No. 20-6166

IN THE
SUPREME COURT OF THE UNTED STATES

BRAD KEITH SIGMON,

Petitioner,

v.

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

Respondents.

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

BRIEF OF RESPONDENTS

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1. Capital defendant Brad Sigmon presented additional mitigation evidence uncovered during a *Martinez* investigation that addressed the same general subject matter presented at the sentencing phase of trial in greater depth and detail. Did the Fourth Circuit, in a decision that widened an existing circuit split, violate this Court's directives on the Sixth Amendment's right to effective counsel when it rejected Sigmon's *Martinez* evidence as cumulative, and as a matter of law insubstantial, simply because it covered similar topics as those presented at trial?

2. In considering whether to grant an evidentiary hearing on a *Martinez* claim, does the requirement that evidence be substantial merely require a showing of some merit, as suggested by this Court, or must the reviewing court be convinced of a reasonable probability of a different outcome before allowing such a hearing?

LIST OF PARTIES

Respondents agree with Petitioner that the caption reflects the parties to the proceeding; however, on or about July 11, 2019, Death Row inmates were relocated to Broad River Correctional Institution from Kirkland Correctional Institution. Pursuant to Supreme Court Rule 35(3), Respondents have listed Michael Stephan, Warden of Broad River Road Correctional, as the correct party warden in this matter.

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Brad Keith Sigmon, is under a death-sentence in South Carolina for a brutal double murder. After denial of relief in state collateral proceedings where he was represented by qualified and experienced attorneys, Sigmon turned to the federal courts for relief. He claimed his collateral counsel was deficient and his new claims should be heard, but the lower courts – considering his new evidence – rejected his argument for cause to excuse the default. Now nearing the end of federal habeas proceedings, and having failed to obtain any relief from the lower federal courts, he petitions this Court for further review. However, Sigmon presents questions to this Court that cannot support relief, and fail as a matter of law.

Sigmon argues his habeas proceedings were not fair because the federal courts have not properly evaluated his ineffective assistance mitigation claim presented under *Martinez v. Ryan,* 566 U.S. 1 (2012). However, he contests only the determination of whether his *Martinez* ineffective-assistance-of-trial-counsel claim was "substantial." Sigmon fails to acknowledge that a "substantial" claim is but one part of the required showing. Under *Martinez,* he is required to show *two* things: (1) counsel in the state collateral proceeding was ineffective; and (2) the proposed ineffective-assistance-of-trial-counsel claim is "substantial" defined as having "some merit." 566 U.S. at 14. Both the district court and the Fourth Circuit determined he failed to do so. This Sigmon does not appeal. It is a fatal flaw in any request for relief. Even so, the record in this particular case supports that Sigmon failed to show trial counsel's investigation was anything other than reasonable. Though Sigmon

asserts he has more mitigation to present, simply showing something "more" has turned up years after the trial has never been enough to establish per se deficient performance by counsel.

Further, Sigmon fails to acknowledge that the grant of an evidentiary hearing in district court is discretionary, and is, in some cases, barred by statute. See 28 U.S.C. § 2254(e)(2). Contrary to Sigmon's suggestion, this Court in *Martinez* did not guarantee a federal court hearing in carving out the equitable exception to procedural default. Sigmon's claimed circuit split is illusionary – whether a hearing is necessary is case-specific and fact-specific. To point to different results merely shows that the lower federal courts are giving individual review to the cases presented. That does not constitute a split in application of the law.

The questions presented also fail for lack of factual support. Both the district court and the Fourth Circuit did not merely find his additional mitigation evidence was of the same general type as presented at sentencing and therefore non-prejudicially cumulative; rather, each court considered the new affidavits in context of the actual evidence presented at sentencing. The lower federal courts correctly applied this Court's precedent. Sigmon does not.

Finally, the history of this case, which is lengthy, shows at least three detailed investigations, a jury trial and sentencing, direct appeal, post-conviction relief, post-conviction relief appeal, an attempted successive post-conviction relief action, review by a federal magistrate, review by a federal district court judge, and review by the Fourth Circuit Court of Appeals. Sigmon has not been denied qualified counsel,

funding, or ample opportunity to challenge the fairness of his conviction and sentencing process. The need for finality is at its apex, and the petition, which lacks a solid legal basis for its questions presented, should be denied.

CITATIONS TO OPINIONS BELOW

The district court's September 30, 2018 order denying habeas relief is unreported, but available at 2018 WL 4691197 (D.S.C. Sept. 30, 2018), and is reproduced in the petition appendix. (App. 52a-102a). The April 14, 2020, published opinion of the Fourth Circuit affirming the district court's denial of habeas corpus relief, is reported at 956 F.3d 183 (4th Cir. 2020). Like the district court order, the Fourth Circuit opinion is similarly reproduced in the petition appendix. (App. 1a-48a).

JURISDICTION

The Fourth Circuit's opinion affirming the denial of habeas relief was entered April 14, 2020. Sigmon's timely petition for rehearing en banc was denied on May 27, 2020. (App. 50a). Sigmon invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). (Petition at 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

This case also involves portions of 28 U.S.C. § 2254 (e)(2), which provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –
…

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; ***and***

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(emphasis added).

STATEMENT OF THE CASE

In 2001, Sigmon bludgeoned David and Gladys Larke to death in the couple's family home. The murders stemmed from Sigmon's obsession with the Larke's daughter – an attempt to neutralize the parents "so he [could] get ahold of Becky" who was then living with the Larkes. His weapon, a baseball bat which he used to deliver multiple devastating blows to each victim's head. Trial counsel presented a hefty mitigation case through fourteen witnesses, both experts and lay witnesses; yet, for this brutal, senseless crime, a jury of Sigmon's peers sentenced him to death. After a direct appeal, Sigmon sought state post-conviction relief ("PCR"). For years, Sigmon stayed in PCR, developing claims with the assistance of two well-qualified, experienced attorneys, along with state funding to aid in preparing his collateral challenge. Ultimately, relief was denied. An appeal netted only affirmance.

Sigmon then turned to the federal district court seeking habeas relief under 28 U.S.C. § 2254. With fresh counsel to review and investigate once again to uncover any missed claims, Sigmon offered new affidavits from several witnesses – some of them family members previously interviewed – who recalled, presumably for the first

time, additional background and character information that they hope would make a difference. Sigmon alleged PCR counsel were ineffective for not discovering and presenting the information. He claimed *Martinez* would allow him to avoid the procedural default bar. But rather than staying in habeas to litigate, Sigmon asked to stay his federal proceedings and return to state court to exhaust his new found claim. He was allowed to do so, over an objection the stay would unduly delay without just cause as the state action would be dismissed as untimely and improperly successive. And it was dismissed as just that, but only after a substantial delay of nearly three years. On return, the federal court accepted Sigmon's new affidavits to fairly assess his *Martinez* argument, but found Sigmon failed to carry his burden. He failed to show a claim of substantial merit, and, critically here, also failed to show trial or PCR counsel were deficient in investigation. *Sigmon v. Stirling*, 2018 WL 4691197, at *21 (D.S.C. Sept. 30, 2018). (App. 91a). The Fourth Circuit correctly applied *Martinez* and agreed with the district court that in light of the mitigation case presented at trial, Sigmon's new evidence was largely cumulative; that he failed to show deficiency in trial counsel's investigation; and, that he failed to show ineffective assistance of PCR counsel. *Sigmon v. Stirling,* 956 F.3d 183, 199-201 (4th Cir. 2020). (App. 24a – 26a). The Fourth Circuit also found, with one judge dissenting, no abuse of discretion in the district court denying an evidentiary hearing to further develop the *Martinez* claim evidence. *Id.,* at 201 and 204. (App. 26a and 33a).

This summary is meant to serve as an introduction to the prior litigation. However, additional specifics are included below to more comprehensively review the

breath and detail of the prior litigation in support of Respondents' assertions that Sigmon has been granted fair opportunity, several times, to litigate his case.

A. Facts of the double murder and investigation of the crime.

On April 27, 2001, at approximately 8:00 a.m., Petitioner Brad Sigmon entered the home of sixty-two (62) year old David Larke, surprised Mr. Larke in his kitchen, and struck him repeatedly with a baseball bat. Sigmon then saw Mr. Larke's fifty-nine (59) year old wife enter the kitchen. Sigmon chased her back into her living room where he repeatedly struck her with the same baseball bat. He returned to the kitchen and continued beating Mr. Larke. He then went back to the living room and continued beating Mrs. Larke. (ECF # 33, at pp. 32-33; PCR App. p. 1516, line 14 - p. 1517, line 17). Mr. Larke sustained a total of nine (9) crushing blows to the skull, bruising on his ears, left shoulder, and a defense wound on the back of his right hand. His "skull was basically almost broken in two." (ECF # 33, at p. 150; PCR App. p. 1634, lines 9-12). Mrs. Larke similarly received nine (9) injuries to her skull and had defensive wounds to her forearms, wrists, and elbows. She had also inhaled blood into her lungs. The forensic pathologist called at trial testified that both victims would have died in approximately three (3) to five (5) minutes from the severity of the beatings. (ECF # 33, at pp. 143, 165; PCR App. p. 1627, line 3 - p. 1649, line 2).

Sigmon had been in a relationship with the Larke's daughter, Becky Barbare. He planned the murder in a scheme to get the daughter. After killing Mr. and Mrs. Larke, he waited for Becky to return. Sigmon captured her and forced her back into her white Nissan Pathfinder. When she tried to escape, he shot at her. (ECF # 33,

at pp. 32 – 36; PCR App. p. 1516, line 6 - p. 1520, line 11). She told the witnesses who stopped to help her that Sigmon told her he had "tied up" or had killed her parents. (ECF # 32-8, at p. 128; PCR App. p. 1278, lines 21-25; ECF # 32-8, at p. 135; PCR App. p. 1285, lines 4-10). Officers were dispatched to the Larke home and found their dead bodies. (ECF # 32-8, at p. 175 – 176; PCR App. p. 1325, line 1 - p. 1326, line 22). Sigmon fled and was later found in a campground in Tennessee. (ECF # 32-9, at p. 59 – 60; PCR App. p. 1389, line 8 - p. 1390, line 19). Sigmon confessed to both Tennessee officers and Greenville County, South Carolina detectives. (ECF # 32-9, at p. 129 – 144; PCR App. p. 1459, line 5 - p. 1474, line 19; ECF #59-4, State's Exhibit 11; ECF # 32-9 at p. 165 – ECF # 33 at p. 17 – 45; p. 1495, line 17 - p. 1529, line 24; ECF# 59-5, State's Exhibit 15).[1]

At trial, Eugene Strube testified that the night before the murders, he and Sigmon stayed in the adjoining trailer where Sigmon had lived with Becky. (ECF # 33, at p. 93 – 96; PCR App. p. 1577, line 14 - p. 1580, line 19; ECF # 33, at p. 99; p. 1583, lines 14-19). Sigmon and Strube drank beer and smoked crack cocaine. (ECF # 33, at p. 96 – ECF #33-1, at p. 13; PCR App. p. 1580, line 21-p. 1663, line 1).[2] Sigmon

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[1] The Tennessee interview tape was admitted in the PCR hearing. (ECF # 33-8, at p. 33, p. 129; PCR App. p. 2795; p. 2890). It contains multiple confessions to the double murder and Sigmon's clearly expressed continued infatuation with Becky, often in sexual terms. (See ECF #33-8, at p. 122).

[2] Sigmon asserts in his petition that "no court to review this case has ever found Sigmon was under the influence of drugs at the time of the murder." (Petition at 6). However, to be clear, the Supreme Court of South Carolina found, and the record supports, that Sigmon was *not intoxicated* at the time of the crime, but acknowledged that he had used drugs and alcohol the night before as he waited for the opportunity to enter the home. *See Sigmon v. State*, 742 S.E.2d 394, 401 (S.C. 2013) ("Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes.").

asserted that "he was going to get Becky for leaving him the way she did;" that he would "tie her parents up;" and, that he was going to "take care of Becky's parents, so he can get ahold of Becky...." (ECF # 33, at p. 97, p. 98; PCR App. p. 1581, lines 4-9; p. 1582, lines 20-22).

B. Detailed Procedural History.

1. State Trial, Collateral Actions, and Appeals.

At trial, Sigmon did not contest his guilt. Defense counsel advised the jury in opening statements: "You're going to find Brad Sigmon guilty... he confessed to it. He confessed to it more than one time...[your] job is to reach the ultimate decision in this case, whether Brad Sigmon lives or dies... you may wonder, well, why are we here? Well, I'll tell you... Because if Brad Sigmon were to plead guilty, he wouldn't have a right to a jury determine his sentence." (ECF # 32-8, at p. 105 – 106; PCR App. p. 1255, line 12 - p. 1256, line 23).[3] Petitioner addressed the jury at the close of the guilt phase: "Ladies and gentlemen of the jury, I am guilty." (ECF # 33-1, at p. 33; PCR App. p. 1683, lines 11-15).

Charges and Trial

On July 15, 2002, the State called the two murder charges and the burglary, first degree, charge for trial.[4] On July 17, 2002, after extensive qualification and *voir*

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[3] This was a correct statement as pursuant to state law, if a capital defendant pleads guilty, sentencing is conducted before a circuit court judge. See S.C. Code Ann. § 16-3-20 (B).

[4] Sigmon was indicted on multiple charges: assault and battery with intent to kill (2001-GS-23-7627); kidnapping and possession of a weapon during the commission of a crime of violence (2001-GS-23-7628); burglary, first degree (2001-GS-23-7629); murder of David Larke (2001-GS-23-07630); murder of Gladys Larke (2001-GS-7631); and grand larceny (2001-GS-23-07632). The charges included

dire, the jury was selected and sworn. The guilt phase began on July 18, 2002. On July 19, 2002, the jury returned guilty verdicts on both murder charges and the burglary charge. (ECF # 33-1, at p. 55; PCR App. p. 1705, lines 15-25). After observing the mandatory twenty-four (24) hour waiting period provided by state law, *see* S.C. Code § 16-3-20(B), the penalty phase began on July 20th. On the 21st, after deliberations, the jury found, beyond a reasonable doubt, three (3) statutory aggravating circumstances:

1) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct;

2) the murder was committed while in the commission of burglary;

3) the murder was committed while in the commission of physical torture.

(ECF # 33-3, at p. 134; PCR App. p. 2118, lines 9-18).

The jury returned a verdict of death. (ECF # 33-3, at p. 134; PCR App. p. 2118, lines 18-24). Sigmon timely pursued a direct appeal, and raised one claim related to the murder indictments. On December 19, 2005, the Supreme Court of South Carolina issued an opinion affirming the convictions and sentence, and subsequently denied a timely petition for rehearing on January 13, 2006. *State v. Sigmon*, 623 S.E.2d 648 (S.C. 2006). This Court denied certiorari review on June 26, 2006. *Sigmon v. South Carolina,* 548 U.S. 909 (2006).

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his crimes against the Larkes and against their daughter. Only the charges that dealt specifically with entry into the Larkes' home and their murders were called to trial.

State PCR Action

Sigmon then turned to post-conviction relief, filing an initial application on October 13, 2006. The Supreme Court of South Carolina appointed the Honorable J.C. Nicholson, Jr., to hear the action. By Order dated November 29, 2006, and after a hearing regarding appointment of counsel and a review of their qualifications, [5] Judge Nicholson appointed William H. Ehlies, Esq., and Teresa L. Norris, Esq. Each attorney's qualifications were reviewed prior to appointment:

William H. Ehlies, II, (aka Hank Ehlies):

- graduated from the University of South Carolina in 1975, in practice since November 1975;
- tried over a hundred felony cases;
- provided representation in four capital murder jury trials, and two prior capital PCRs;
- knowledgeable of the "federal habeas aspects to the PCR structure process";
- attended a number of the in-depth seminars on capital PCR litigation;
- had then recently concluded a capital murder case, along with PCR co-counsel Teresa Norris, that resulted in a life sentence;
- and, was qualified on the South Carolina Supreme Court's list for capital trial counsel.

(ECF #33-5 at 117-18).

Ms. Norris similarly set out her qualifications:

- graduated from the University of South Carolina Law School in 1990;

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[5] For indigent capital defendants, in addition to a hearing and funding for experts and/or other hearing preparation needs, South Carolina provides for the appointment of two attorneys with a heightened qualification requirement: "at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Robertson v. State*, 795 S.E.2d 29, 36 (S.C. 2016); *see also* S.C. Code Ann. § 17-27-160 (B).

- for the first four years of practice, served in the Army Legal Services Agency Defense Appellate and represented people on appeal that had been court marshalled, estimated to be 300 clients with serious felony offenses;
- In 1994, she joined what was then the South Carolina Death Penalty Resource Center, later the Center for Capital Litigation, initially as a staff attorney, later becoming the director for ten years;
- She had represented approximately 25 to 30 death sentenced inmates;
- The majority of her experience was in capital post-conviction and federal habeas proceedings, having participated in approximately 10 evidentiary or competency hearings;
- She attends conferences each year on capital litigation, and also teaches at such conferences;
- She confirmed that she was on the state supreme court list for qualified capital trial counsel.

(ECF #33-5 at 118-19).

After investigation, PCR counsel filed an amended application on June 4, 2008, that included claims that specifically showed investigation into the mitigation case, such as the allegations that trial counsel:

- failed to object to certain cross-examination of the defense's prison adaptability expert;

- failed to request a mitigation charge to consider age or mentality based on evidence of use of drugs and alcohol before the crime;

- failed to play a recorded telephone call from Sigmon to his mother for mitigation;

- failed to call Dr. Martin from the Greenville County Detention Center concerning Sigmon's depression.

(ECF # 33-5, at pp. 149-152; PCR App. pp. 2478-2481).

On July 22, 2008, PCR counsel moved for summary judgment. (ECF # 33-5, at p. 171- ECF # 33-6 at pp. 17-33; PCR App. pp. 2500-2517). A hearing was convened

on August 4, 2008. PCR counsel pursued the motion, offering depositions and arguments in support of their position, but, when denied, rested on that evidence, and did not present any witnesses or other evidence. (ECF # 33-7, at pp. 108 - 111; PCR App. p. 2758, line 11 - p. 2761, line 19). The State called former trial counsel Frank L. Eppes, Esq. On July 14, 2009, Judge Nicholson issued a written Order of Dismissal, filed July 20, 2009. (ECF # 33-8, at pp. 85-132; PCR App. pp. 2846-2893). Sigmon timely appealed.

Mr. Ehlies continued representation on appeal along with Robert M. Dudek, Chief Appellate Defender of the South Carolina Office of Indigent Defense, Division of Appellate Defense. Counsel filed a petition for writ of certiorari in the Supreme Court of South Carolina on April 21, 2010, and sought to raise claims relevant to the sentencing phase. (ECF # 34-5, at pp. 5-6). On December 16, 2011, the petition was granted in part. (ECF# 34-8). On March 20, 2013, the Supreme Court of South Carolina issued a published opinion affirming the denial of relief, and later issued a substituted opinion on May 8, 2013, with minor corrections. (ECF# 34-14 and 34-15). Sigmon petitioned for review, but this Court denied the petition on November 18, 2013. *Sigmon v. South Carolina*, 571 U.S. 1028 (2013).

Second PCR Action and Appeal

While pursuing federal habeas, on August 21, 2014, Sigmon returned to state court and filed a second PCR action. Additional state proceedings were barred under the PCR statute of limitations and the prohibition against successive actions. The state court dismissed the action by order dated February 10, 2017, and filed March

3, 2017. (ECF #186-1). On August 21, 2017, the Supreme Court of South Carolina dismissed the notice for failure to "show … an arguable basis for asserting that the determination by the lower court was improper," as required by state rule to avoid dismissal of cases resolved by ordinary application of the statute of limitations or successive applications bar. See Rule 243(c), SCACR. (ECF# 193-1).

2. Federal Habeas Action and Appeals.

Prior to filing his petition to this Court following the PCR appeal, Sigmon moved for appointment of PCR counsel to represent him in habeas which the court granted. (ECF # 1 and 19). Counsel filed a petition on August 21, 2013, pursuant to 28 U.S.C. § 2254. (ECF # 42). On October 21, 2013, Sigmon filed a memorandum in support of the petition. (ECF #55). Respondents moved for summary judgment, and also filed a Motion for Reconsideration of the Appointment of Counsel Pursuant to *Juniper v. Davis*.[6] (ECF # 62). Sigmon requested an independent attorney be appointed to review *Martinez* claims, and the court appointed Jeffrey P. Bloom, Esq. On June 20, 2014, Mr. Bloom filed a motion to amend and moved to substitute counsel (Mr. Ehlies and Ms. Norris), which the court granted on July 23, 2014. (ECF #117 and #123). Marta Kahn, Esq., was appointed on August 11, 2014. (ECF #132 and

[6] 737 F.3d 288 (4th Cir. 2013). The Fourth Circuit decided *Juniper* on December 10, 2013, after the appointment of counsel. It held in that case that "if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an 'initial-review collateral proceeding,' qualified and independent counsel is ethically required." 737 F.3d at 290. In an effort to avoid future unnecessary delay, because Mr. Ehlies and Ms. Norris represented Sigmon in PCR, Respondents requested the district court advise Sigmon that he could have separate counsel appointed, or waive the appointment of separate counsel. (ECF No. 62).

134). Ms. Kahn was later relieved from appointment and Joshua Kendrick was appointed in her place. (ECF #172).

On August 22, 2014, Petitioner moved to stay the federal action and return to state court to attempt to seek another PCR proceeding with an eye toward exhausting the defaulted claims in the amendment. (ECF #142). Over Respondent's objection, a stay was granted on September 30, 2014. (ECF #161). As noted above, the state court dismissed the untimely and successive action, and denied an appeal. (ECF #186-1 and # 193-1). The stay of the federal proceedings was lifted on August 30, 2017. (ECF #195).

Sigmon then filed a memorandum in support of his amended application on October 2, 2017. (ECF #201). Respondents filed a return to the amended application on November 21, 2017, and again moved for summary judgment. (ECF #207 and #208). After a response in opposition and reply, the magistrate issued a Report and Recommendation on July 9, 2018, and recommended Respondent's motion for summary judgment be granted. (ECF #223). On September 30, 2018, the district court agreed and granted Respondent's motion. (ECF #234). Sigmon timely appealed.

As previously noted, the Fourth Circuit agreed with the district and found, with one judge dissenting, that Sigmon was not entitled to relief. 956 F.3d 183. (See also App.1a-48a).

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny the petition because Sigmon's argument is based on an incorrect interpretation of *Martinez v. Ryan*. He focuses only on the determination in

the federal courts as to whether a claim is "substantial." Sigmon inexplicably ignores half the *Martinez* test. *Martinez* also requires that a petitioner show collateral counsel was ineffective. In requiring both, the Fourth Circuit, and the district court, correctly and faithfully applied *Martinez*. Consequently, because he fails to appeal a finding that will still bar any relief, his petition should be denied as moot.

Further, and plainly contrary to Sigmon's argument, *Martinez* does not guarantee an evidentiary hearing in district court, even with a showing of a "substantial claim." It would be impossible to accept Sigmon's position without grossly expanding the scope of *Martinez* – action this Court has solidly refused to take. There is no compelling legal reason to grant Sigmon's petition. Further, there is no compelling factual reason to grant the petition.

The basis for both of Sigmon's questions presented is his belief that the federal courts denied him the ability to show his mitigation ineffective assistance claim was substantial, which prevented him from showing his default of these claims should be excuse under *Martinez*. Yet, in the District Court of South Carolina, federal habeas petitioners (capital and non-capital) are allowed to expand the record for purposes of *Martinez*. Sigmon was allowed to do so. He obtained fresh affidavits for his federal action and they were accepted and considered. Rather than being denied the safety of *Martinez*, Sigmon was allow to rely on its largesse. He is not entitled to more.

Lastly, there is little doubt that Sigmon has been afforded ample opportunity to fairly contest his convictions and sentence both in state and federal courts. Finality much be reached at some point. In the absence of a cert-worthy question, and after

years of detailed litigation, as set out above, Sigmon fails to show a reason to grant additional review.

This Court should deny the petition.

I. Both the district court and the Fourth Circuit correctly applied *Martinez*, which requires a federal court to consider two things: whether a petitioner may show ineffective assistance of collateral counsel and whether the defaulted claim is substantial. Both courts found Sigmon failed to show that his collateral counsel was deficient in the investigation of mitigation evidence. This uncontested finding is fatal to Sigmon's continued effort to rely on *Martinez* to excuse his default.

In *Martinez*, this Court established that a federal habeas petitioner may avoid a procedural default when he shows his state collateral counsel "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)," and "also demonstrate[s] that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one" defined as having "some merit." 566 U.S. at 14.[7] The state may respond to an inmate's argument by showing the underlying claim is insubstantial *or* that the PCR attorney was not ineffective. *Martinez*, 566 U.S. at 15-16. But it does not work the other way. A petitioner does not meet his *Martinez* burden by showing only a substantial claim. Sigmon either misinterprets *Martinez* or argues for an extension of *Martinez,* one that would allow a petitioner to show *either* a substantial claim *or* ineffective assistance of collateral counsel. It is especially hard to understand his argument to this Court when Sigmon argued both prongs

[7] A petitioner must also show that state law mandates *Strickland* claims are channeled to collateral review. 566 U.S. at 17. South Carolina does, so *Martinez* applies to petitioners seeking Section 2254 habeas review of their South Carolina convictions. *See Sigmon,* 956 F.3d at 198.

below to the district court, and in the appeal (albeit through rather cursory mention). *See Sigmon v. Stirling,* 2018 WL 4691197 at *17 (D.S.C. Sept. 30, 2018); (App. 81a-82a); Brief of Appellant, Doc. 30 at 52-59; Reply Brief, Doc 46 at 20, asserting PCR counsel did not interview certain additional witnesses and failed to call Dr. Martin). But the Fourth Circuit considered Sigmon's thin argument, and his affidavits from PCR counsel[8] as accepted in the district court proceedings in finding he failed to show collateral counsel was ineffective:

> … even assuming Sigmon presents a substantial claim of ineffective assistance of trial counsel, to invoke *Martinez*, he must also demonstrate PCR counsel were ineffective in failing to raise this issue. Sigmon suggests the additional information was "easily located during the *Martinez* review." Appellant's Br. at 52. But PCR counsel's affidavits indicate that although they did not independently interview Sigmon's proposed additional witnesses (other than Dr. Martin) prior to the PCR proceedings, PCR counsel "retained a mitigation investigator who conducted a number of interviews" with family and community witnesses. J.A. 848. Attorney Norris stated that "to [her] knowledge[,] [the] investigator did not interview [Barbare's son] or [Pastor] McKellar." J.A. 849. Nonetheless, Sigmon's allegations of deficient performance are simply that PCR counsel failed to conduct interviews themselves and that their investigator failed to interview Barbare's son and the pastor at Sigmon's parents' church. This is insufficient to show ineffective assistance by PCR counsel, and no other facts alleged in the petition support such a finding.

Sigmon, 956 F.3d at 200–01. (App.26a).

The district court had also found no basis to find PCR counsel ineffective, but because it also found trial counsel was not ineffective. *Sigmon*, 2018 WL 4691197, at *21. *See Strickland,* 466 U.S. at 687 ("Unless a defendant makes both showings, it

[8] Again, in this case, the state court appointed counsel with specific experience in capital collateral litigation. See infra. at 11. This is not case where Sigmon was left without experienced, professional assistance in preparing his collateral case.

cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."); *see also Owens v. Stirling,* 967 F.3d 396, 428 n. 6 (2020) (explaining failure of one element of the *Martinez* test makes superfluous ruling on another). Sigmon only in passing acknowledges the fact that he failed to show counsel was deficient in their investigation, (see Petition, p. 15), and he does not claim error in the Fourth Circuit's ruling on this point. This uncontested ruling negates further reliance on *Martinez* to excuse his default. His petition presents only academic questions. For that reason alone, this Court should deny the petition. *Lane v. Williams,* 455 U.S. 624, 634 (1982) ("possibility that other persons may litigate a similar claim does not save this case from mootness"); *United States v. Alaska S.S. Co.,* 253 U.S. 113, 116 (1920) ("this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.' ").

II. This Court in *Martinez* did not grant the right to an evidentiary hearing to develop evidence nor was it necessary to do so. The existing rules of habeas litigation provide for expansion of the record in a stepped approach which favors submission of documents, including affidavits, prior to any grant of an evidentiary hearing. Sigmon was allowed to present affidavits in support of his position and the district court accepted his affidavits. Sigmon was not automatically entitled to more.

Sigmon essentially argues that the failure to grant an evidentiary hearing unfairly limits his ability to rest on *Martinez* to excuse the default. He concedes his affidavits were accepted by the district court. (Petition, p. 17). But he argues that,

in the absence of an evidentiary hearing, the district court simply ignored his evidence. (Petition, p. 9). There is no support for this assertion.

Martinez incorporates the *Strickland* test into review of collateral counsel's performance, 566 U.S. at 14, but there is no automatic evidentiary hearing mandated or required. *Strickland* itself established this fact as to Sixth Amendment ineffective assistance claims. *Strickland,* 466 U.S. at 700 ("the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing" and noting "The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing."). Consequently, there certainly would not be a requirement of a hearing for an equitable exception.

Sigmon's suggestion to the contrary leads to troubling inconsistency and would grossly expand *Martinez* to ensure hearings in every case, especially every capital case. This offends the very essence of AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996) – to avoid the undeniable, universally recognized, unreasonable delays *in capital cases*. *See, e.g., Woodford v. Garceau,* 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"). Sigmon's own argument proves the point.

Nearly every case capital case on habeas review suggests that trial counsel was ineffective for failure to discover and present "powerful" mitigation evidence that would have turned the tide in sentencing. Sigmon is no different, characterizing this

position as "the classic *Martinez* claim." (Petition at 17). But under *Strickland*, the question is not whether there is more mitigation found later, rather, the question is whether counsel's investigation was objectively reasonable. 466 U.S. at 688 ("the defendant must show that counsel's representation fell below an *objective* standard of reasonableness) (emphasis added). *Cf. Wiggins v. Smith*, 539 U.S. 510, 533 (2003) ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case."). An evidentiary hearing is not categorically required to assess an ineffective assistance claim. *Strickland, supra.* Consequently, a hearing is not necessarily warranted in a *Martinez* inquiry. *See Runningeagle v. Ryan*, 825 F.3d 970 (9th Cir. 2016) (finding district court granted petitioner's motion to expand the record on question of *Martinez* cause to excuse his default and accepted "a number of exhibits" but denied a hearing when the documents "fully presented the relevant facts") (quoting *Williams v. Woodford*, 384 F.3d 567, 591 (9th Cir. 2004)).

In fact, the rules for habeas actions favor a more stepped approach before considering whether a hearing is necessary. Rule 7 of the *Rules Governing Section 2254 Cases in the United States District Courts* provides for expansion of the record "[i]f the petition is not dismissed," and specifically, that "[a]ffidavits may be considered as part of the record." Further, Rule 8(a) directs that the court consider "any materials submitted under Rule 7 to determine whether an evidentiary hearing

is warranted." Here, the magistrate allowed the affidavits that Sigmon presented. *Sigmon v. Stirling*, 2018 WL 6113017, at *33 (D.S.C. July 9, 2018). Each court to review the matter made specific reference to those affidavits. It is unlikely that a petitioner will "hold back" evidence that would show a substantial claim in hopes of gaining a full evidentiary hearing. Simply, whether an evidentiary hearing is warranted for factual development remains is a discretionary decision: "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Both the district court and the Fourth Circuit acknowledged that discretion, but found that since Sigmon did not show cause to excuse the default, a hearing was not necessary. Sigmon shows no error of law or fact to undermine this discretionary ruling.

Sigmon suggests, however, that a survey of cases shows a developing split in the circuits. It is not a circuit split to show various examples of the exercise of a court's discretion. There are a multitude of cases one may point to for examples of *Martinez* analysis, some with hearings, some without. In a case where the petitioner argued a hearing was necessary for him to show cause, the Eighth Circuit observed:

> We have, to be sure, remanded to allow a district court to hold an evidentiary hearing to evaluate whether a petitioner has an excuse under *Martinez*. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 851, 853–54 (8th Cir. 2013). But we have also been clear that a remand is only available when the ineffective-assistance-of-trial-counsel claim is "substantial or potentially meritorious." *Dansby*, 766 F.3d at 834 (internal quotation marks omitted). And here, for the reasons we have already stated, Deck's claim is not.

Deck v. Jennings, 978 F.3d 578, 584 (8th Cir. 2020).

To be clear, expansion of the record, by documents or by hearing, is tied to showing cause to excuse the default, not proof of the underlying claim. *See Fielder v. Stevenson,* 2013 WL 593657, *3 (D.S.C. Feb. 14, 2013) (district court noted that although § 2254(e)(2) "sets limits on a petitioner's ability to expand the record in a federal habeas proceeding[,] ... courts have held that § 2254(e)(2) does not ... constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults.") (*citing Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002); *Buckman v. Hall*, 2009 WL 204403 (D. Or. Jan. 23, 2009)). If the default is not excused, a petitioner is barred from an evidentiary hearing on the underlying claim as he would be responsible for the failure to develop a factual basis. 28 U.S.C. § 2254 (e)(2). Further, the statute limits claims that may be heard in habeas for the first time to those involving actual innocence. Id. Sentence mitigation claims plainly could not meet that restriction. But this case does not get to that point. Instead, Sigmon failed to show his claim was substantial. Coming forward with some new evidence is not enough to show actual deficient performance, though that is clearly Sigmon's logic as he argues:

> … the Fourth Circuit in its opinion below recognized some of the evidence presented in Sigmon's *Martinez* claim was unknown to trial counsel. *Sigmon*, 956 F.3d at 200. Though that reflects trial counsel's decisions were not "reasonable, informed decisions about the scope of the investigation" the Fourth Circuit held the evidence was merely cumulative to that which was presented. *Id.*

(Petition at 20).

Sigmon's position is as troubling as it is unfounded. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.") (quoting *Strickland*, 466 U.S. at 689). It would relieve him of the burden of showing ineffective assistance which is contrary to *Strickland*. Just because other evidence existed, it does not follow conclusively that counsel rendered deficient representation in his investigation. Too many variables exist. The *Strickland* rule sets out reasonableness as the required measure for a reason. The district court and the Fourth Circuit, again, adhered to this Court's precedent and Sigmon has shown no error of law. In fact, Sigmon has shown nothing more than an ordinary application of the clearly established *Strickland* test.

III. Sigmon has shown nothing more than an ordinary application of well-established law in his habeas action. Both the district court and the Fourth Circuit merely applied the venerable *Strickland* test to assess Sigmon's argument that collateral counsel was ineffective and also to consider whether Sigmon set out a substantial claim that trial counsel was ineffective.

At the heart of Sigmon's argument is a belief that any additional evidence produced in later challenges is per se proof of deficient performance. Again, his position fails as a matter of law. Further, the district court order, and the Fourth Circuit opinion show detailed consideration of the new facts – including whether trial counsel and PCR counsel adhered to professional norms in their investigations – in context of the sentencing case presented. In short, both the law and the facts are against him.

The district court observed that "[t]rial counsel retained a mitigation investigator … consulted with three mental health professionals" and "a prison adaptability expert and a clinical social worker." 2018 WL 4691197 at 18. (App. 84a). It also noted "[t]he social worker interviewed Petitioner three times and interviewed several of his family members including Petitioner's mother, father, sisters, brother, two step-siblings, and aunt." *Id.* The court reviewed the actual testimony presented, which included Dr. Morton's testimony regarding Sigmon's diagnosed depressive disorder for which he received medication, and his chemical dependency disorders. *Id.* The social worker testified in detail "regarding [Sigmon]'s family history and background" including his father's alcohol abuse; Sigmon's "emotional neglect during his childhood" which in turn affected his development and "led to depression, anxiety, and inability to establish and maintain healthy relationships," and also testified to observations that "children who experience neglect generally tend to be over-reative and overly involved or attached to relationships." *Id.* A well-known former warden testified to prison adaptability, and counsel also called five detention center employees to describe his behavior. *Id.* (App. 85a). Additionally, counsel presented testimony from a "religious volunteer at the detention center" and five family members, and two other mental health witnesses. *Id.* Sigmon's suggestion that the case was "a scant collection of disjointed witnesses," (see Petition, p. 17), does not square with the record. Further, both federal courts were correctly guided by relevant precedent.

The district court, citing *Bobby v. Van Hook*, 558 U.S. 4 (2009), reasoned "[t]here comes a point at which more evidence can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Id.,* at 19.[9] (App. 87a). The district court agreed with the magistrate that "this was not a case where counsel failed to act while potentially powerful mitigation evidence stared them in the face." *Id.* It then reviewed in detail the new evidence in context of the trial evidence. *Id,* at 19-20 (App. 87a-90a). Only at that point did the district court find that "for the most part," the information was "cumulative of the mitigation case trial counsel presented through its 14 mitigation witnesses." *Id.,* at 20. (App. 90a). It determined that "[i]t was objectively reasonable for trial counsel to 'rest' with the mitigation case that was presented" at trial. *Id.*[10] *But in the alternative*, the court

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[9] The magistrate noted in her report and recommendation that "the record suggests that counsel's mitigation team interviewed all of Petitioner's habeas affiants, with the exception of Troy Barbare, Jr., Pastor McKellar, and Mike Sigmon. Moreover, with one exception—Petitioner's mother's report of physical abuse in Petitioner's childhood—the information offered in the affidavits is cumulative of information presented at trial." 2018 WL 6113017, at *39–40.

[10] The magistrate also noted detail in the report, which the district court adopted, reflecting the specific points showing the quality and reasonableness of trial counsel's investigation:

- Prevailing professional norms at the time of Petitioner's trial emphasized the importance of the mitigation investigation and suggested that counsel could rely on an investigator or mitigation specialist to interview witnesses and assist in presenting the mitigation case. *See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(D)(3), (7) (1989) ("ABA Guidelines").
- trial counsel's mitigation investigator interviewed a number of Petitioner's family members, had contact with experts, and helped uncover a good deal of mitigation.
- the mitigation case covered the range of topics listed in the ABA Guidelines, including: medical history, educational history, employment and training history, family and social history, Petitioner's rehabilitative potential, and Petitioner's record of prior offenses. *See* ABA Guideline 11.8.6(B);
- trial counsel are not required to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," *Wiggins*, 539 U.S. at 533, but, rather, must uphold their "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691;

resolved that if counsel was deficient, Sigmon failed to show the required *Strickland* prejudice. *Id,* at 21 (App. 90a-91a).

In applying the *Martinez* test, the district court acknowledged initially that *Martinez* "requires a showing that state habeas counsel was ineffective." *Id,* at *16 (quoting *Gray v. Zook,* 806 F.3d 783, 789 (4th Cir. 2015)). It then set out that "a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is substantial" defined as one of "some merit." *Id,* (quoting *Martinez,* 566 U.S. at 14). In light of this recognized precedent, and after considering the *Martinez* affidavits in context of the defense presented, the district court resolved:

> Petitioner has failed to show a reasonable likelihood that the additional evidence of prison adaptability, good character, physical abuse, depression, and remorse would have resulted in a life sentence, especially when the evidence is cumulative of what was already presented. *See Morva v. Zook*, 821 F.3d 517, 531 (4th Cir. 2016). The additional evidence of mitigation set forth in the affidavits is not particularly compelling and amounts to only minimal mitigation evidence at best. There is no reasonable probability that at least one juror would have changed his or her sentencing vote based on anything set forth in the affidavits. When the evidence in aggravation (torture, burglary, two murders committed during one course of conduct) is weighed against the totality of available mitigating evidence, there is no reasonable probability that at least one juror would have changed his or her sentencing vote.

- "Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." ABA Guideline 11.8.6(A). However, "there comes a point at which [more evidence] can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009);
- [t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face or would have been apparent from documents any reasonable attorney would have obtained. It is instead a case ... in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." *Bobby*, 558 U.S. at 11–12 (citations omitted).

2018 WL 6113017, at *39–40.

Id., at *21. (App. 91a).

It reasoned "[b]ecause trial counsel were not ineffective for failing to investigate and present available mitigating evidence, and there was not resulting prejudice, PCR counsel were not ineffective for failing to raise" such a claim. *Id.*

Likewise, the Fourth Circuit made a careful comparison between the new evidence offered and the actual mitigation at sentencing. *See* 956 F.3d at 198–201. (App. 22a-25a). Acknowledging this Court's precedent, the Fourth Circuit properly reasonably concluded Sigmon failed to show deficient steps in the investigation by trial counsel, such as having unreasonably limited investigation to a few documents, or refusing to investigate an active lead. *Id,* at 199-200 (citing, for example, *Williams v. Taylor*, 529 U.S. 362, 396 (2000), and *Wiggins, supra*) (App. 23a-24a). It found no evidence that a "comparable deficiency occurred here." 956 F.3d at 200. (App. 24a). Rather, turning to specific review of the original sentencing case, the Fourth Circuit reasoned:

> Much of the evidence Sigmon argues should have been discovered and presented was cumulative of evidence presented to the jury. Several jail employees and an expert testified to Sigmon's adaptability to prison. Positive character evidence came in through a jail volunteer and several family members, including Sigmon's parents and son. A social work expert testified about Sigmon's difficult childhood, including the fact that Sigmon worked as a teenager to support his family. Dr. Martin's diagnosis of major depressive disorder came in through another defense expert. Trial counsel introduced evidence of Sigmon's remorse through Sigmon's mother, through a jail employee, and through their closing argument, which referred to Sigmon's call to his mother before his capture. Sigmon argues no witnesses testified to any physical abuse or domestic violence during his childhood. However, this potentially mitigating fact—in light of the testimony from the social work expert and Sigmon's family about his difficult childhood more generally—is not

> on a par with the substantial mitigation evidence missed by counsel in *Williams*, *Gray*, and *Wiggins*.

Id. (App. 24a-25a).

Such detailed reasoning was similarly set out as the Fourth Circuit logically reasoned Sigmon failed to show ineffective assistance of *collateral* counsel:

> Sigmon suggests the additional information was "easily located during the *Martinez* review." Appellant's Br. at 52. But PCR counsel's affidavits indicate that although they did not independently interview Sigmon's proposed additional witnesses (other than Dr. Martin) prior to the PCR proceedings, PCR counsel "retained a mitigation investigator who conducted a number of interviews" with family and community witnesses. J.A. 848. Attorney Norris stated that "to [her] knowledge[,] [the] investigator did not interview [Barbare's son] or [Pastor] McKellar." J.A. 849. Nonetheless, Sigmon's allegations of deficient performance are simply that PCR counsel failed to conduct interviews themselves and that their investigator failed to interview Barbare's son and the pastor at Sigmon's parents' church. This is insufficient to show ineffective assistance by PCR counsel, and no other facts alleged in the petition support such a finding.

956 F.3d at 201. (App. 26a).

Sigmon's current suggestion that the courts merely listed evidence to find his new evidence cumulative, (see Petition, p. 20), does not fairly reflect the careful evaluation that each court engaged in. Both courts engaged in precisely the detailed comparison that this Court has instructed should be effected. Rather than being contrary to the precedent, the courts here faithfully applied. And Sigmon does not show an error in the legal principles applied which were directly taken from this Court's precedent.

Sometimes an unreasonable investigation is more easily identified than others. *See Andrus v. Texas*, —— U.S. ——, 140 S.Ct. 1875, 1882-83 (2020) (per

curiam) ("counsel performed virtually no investigation" into "the myriad tragic circumstances that makred Andrus' life"); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam) ("Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation.") (emphasis in original); *Wiggins*, 539 U.S. at 531 and 535 (investigation limited two record sources and counsel failed adequately investigate social background which included evidence of sexual abuse, mental limitation, and homelessness). In other cases, it takes more consideration. However, where there is reasonable investigation, showing something more was available is not enough.

For example, in *Van Hook*, trial counsel spoke with parents, other family and friends "early and often" in preparation for the penalty phase; contacted experts; reviewed his "military history" and sought records; "looked into enlisting a mitigation specialist when the trial was still five weeks away," and uncovered a detailed history of childhood trauma, his drug and alcohol use and suicide attempts among other details of his background. 588 U.S. at 9-11. This Court rejected Van Hook's argument that more was to be found, therefore, counsel was ineffective in not continuing to look: "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained. It is instead a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.' " *Id.,* at 11-12 (internal citations

omitted) (quoting *Strickland* 466 U.S. at 699). The case reflects application of long-established *Strickland* guidance.

Concentrating on the reasonableness of counsel's actions, as *Strickland* requires, this Court has likewise rejected the concept that showing "more" mitigation was available is on its face sufficient to establish prejudice. *See Wong v. Belmontes,* 558 U.S. 15, 28 (2009) ("Schick's mitigation strategy failed, but the notion that the result could have been different if only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful").[11]

Sigmon laments, though, that courts have "struggled" with balancing this Court's advice in *Van Hook* and *Belmotes*. (Petition at 19). He misses the point of these cases. Both stand for a clear proposition: simply showing "more" evidence exists does not show ineffective assistance. But only *Van Hook* speaks to deficient performance, the Court avoided the deficiency prong in *Belmontes* and resolved that relief was not due as Belmontes could not show the required prejudice. 558 U.S. at 19. At most, these two cases show, true to *Strickland*, (1) that no two attorneys would prepare a case the same way, 466 U.S. at 689, and, (2) if counsel's conduct does fall into deficient representation, there still must be a reasonable probability of a different result, *id.,* at 692. Sigmon has not shown any concept that is confusing or misapplied.

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[11] Sigmons's attempt to distinguish *Belmontes* in application here because *Belmontes* additional evidence included "the existence of a second murder," (Petition at 18), does not help him. This admits the highly aggravated nature of his case – a vicious double murder.

The district court and the Fourth Circuit reasonably, indeed logically, resolved that the additional minor mitigation effect, if any, from the presentation of these witnesses would not allow Sigmon to meet his burden. The courts correctly considered the evidence in detail and in context which shows not only an ordinary application of established principles, but a fair and reason conclusion. Sigmon can show no basis for relief.

IV. Sigmon's request for additional habeas proceedings "aggravate[s] the harm to federalism that federal habeas review necessarily causes,"[12] and frustrate the important need for finality of litigation of his convictions and sentence. Sigmon failed to show cause to excuse his clearly defaulted claim and he is entitled to nothing further.

"[T]he principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). See also *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("Finality in the criminal law is an end which must always be kept in plain view."); *Ryan v. Schad*, 570 U.S. 521, 525 (2013) (recognizing again a state's interest in finality of its criminal convictions).

The crime in this case occurred in April 2001 – nearly twenty years ago. Sigmon was convicted and sentenced in July 2002. Over the years, he has had direct review by the South Carolina Supreme Court, a state PCR hearing, certiorari review of the order denying relief by the South Carolina Supreme Court and this Court, and

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12 *Davila v. Davis*, 137 S. Ct. 2058, 2069–70 (2017).

federal habeas review by a magistrate judge, the district court and the Fourth Circuit. Further, he even obtained a stay in federal habeas to pursue a second application that was clearly untimely and improperly successive. *Martinez* should not be used to allowing him additional proceedings. Justice Scalia predicted in *Martinez* that:

> … [I]n capital cases, [the majority's decision will effectively reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume. I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.

Martinez, 566 U.S. at 23 (Scalia, J., dissenting) (emphasis in original).

Sigmon substantiates Justice Scalia's guarantee. To keep balance, this Court should not allow *Martinez* to be expanded in scope or practice. Sigmon failed to show cause to excuse his clearly defaulted claim. His petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

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