No. _____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

GARY DUBOSE TERRY,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Gary Terry was sentenced to death in South Carolina by a jury that heard almost nothing about pervasive abuse he suffered at the hands of his father. In state post-conviction proceedings, his trial counsel averred that they presented all evidence of abuse of which they were aware, despite the fact that their own file included notes documenting how Terry's father regularly beat him "hard enough for the w[elt]s to bleed" and how his father whipped all of the children whenever he was angry. Terry's state post-conviction review counsel neither inquired into nor challenged the adequacy of trial counsel's mitigation presentation.

When Terry's case went into federal habeas and his new counsel proffered evidence of the child abuse for the first time, the district court—at the summary judgment stage—drew a series of unsupported inferences in favor of the State, granted the State's motion for summary judgment, and denied Terry's request for an evidentiary hearing. The Fourth Circuit affirmed.

Under these circumstances, where post-conviction counsel's ineffectiveness deprives a state-court prisoner the opportunity to present evidence of trial counsel's ineffectiveness, this Court has recognized an equitable exception to the standard procedural default rules. *Martinez v. Ryan*, 566 U.S. 1 (2012). But because Terry never had an opportunity for an evidentiary hearing and because his case was dismissed at the summary judgment stage, no court has ever considered the merits of his ineffective assistance of trial counsel claim with a materially accurate factual record. The question presented is:

> In determining whether a federal habeas petitioner's pleadings and supporting documents have alleged a substantial but defaulted claim of ineffective assistance of trial counsel that satisfies *Martinez v. Ryan*'s "cause" standard, may a district court summarily dismiss the petition by drawing factual inferences against the petitioner without holding an evidentiary hearing?

PARTIES TO THE PROCEEDING

The petitioner (the petitioner-appellant below) is Gary Dubose Terry.

The respondents (the respondents-appellees below) are Bryan P. Stirling, Director of the South Carolina Department of Corrections, and Michael Stephan, Warden of Broad River Correctional Institution.

STATEMENT OF RELATED PROCEEDINGS

Terry v. Stirling, No. 20-3, ECF No. 76 (4th Cir. June 2, 2021) (order denying rehearing and rehearing en banc)

Terry v. Stirling, No. 20-3, ECF No. 72 (4th Cir. May 5, 2021) (panel opinion)

Terry v. Stirling, No. 4:12-1798-RMG, ECF No. 162 (D.S.C. Sept. 26, 2019) (order and opinion adopting report and recommendation and denying habeas corpus)

Terry v. Stirling, No. 4:12-1798-RMG-TER, ECF No. 142 (Jan. 31, 2019) (magistrate's report and recommendation to grant summary judgment and deny habeas corpus)

Terry v. State, No. 27033 (S.C. Aug. 29, 2011) (opinion affirming the dismissal of the application for post-conviction relief)

Terry v. State, No. 2000-CP-32-3470 (S.C. Ct. Common Pleas, Feb. 16, 2009) (order dismissing the application for post-conviction relief with prejudice)

Terry v. South Carolina, No. 00-5038 (U.S., Oct. 2, 2000) (order denying petition for writ of certiorari to the Supreme Court of South Carolina)

State v. Terry, No. 25085 (S.C. Mar. 13, 2020) (direct appeal opinion affirming conviction and death sentence)

State v. Terry, No. 95-GS-32-1670 (S.C. Ct. General Sessions, Sept. 21, 1997) (conviction and imposition of sentence)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary D. Terry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this capital case.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion affirming the district court's denial of habeas relief to Gary D. Terry was issued on May 5, 2021. *Terry v. Stirling*, No. 20-3, 854 Fed. App'x 475 (May 5, 2021) (mem. op.). Pet. App. 1a-41a. The district court's order denying habeas relief is unreported. Pet. App. 42a-77a.

STATEMENT OF JURISDICTION

The Fourth Circuit's order denying rehearing or rehearing en banc issued on June 2, 2021. Pet. App. 77a. This petition is being filed within 150 days of that date. See 589 U.S. __ (court order dated March 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to
>
> have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, provides, in pertinent part:

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

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

STATEMENT OF THE CASE

When Gary Terry was on trial for his life before a South Carolina jury, his appointed counsel owed him a duty to present "*all reasonably available* mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (per curiam) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). In Terry's case, that evidence included a wealth of information about abuse he suffered at the hands of his father, but Terry's attorneys never reviewed records in their own files or talked to available witnesses about Terry's father. As a result, the jury that decided Terry's fate heard only a sanitized, materially inaccurate retelling of his upbringing. Without any sense of Terry's childhood, the jury sentenced him to death.

When the case went into state post-conviction review (PCR), Terry's second set of state-appointed attorneys had a professional duty to investigate trial counsel's performance and to raise any colorable ineffective-assistance-of-trial-counsel (IATC) claims. *See Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013). But like trial counsel, they failed Terry: they did not hire a mitigation investigator; they did not review records in trial counsel's file documenting the abuse that characterized Terry's childhood; they did not consult any mental health experts; and they did not raise claims related to mitigation. Thus, by no fault of Terry's, his strongest claim—IATC for failure to present mitigation evidence at sentencing—was procedurally defaulted.

These are precisely the rare, inequitable circumstances this Court described in *Martinez* and *Trevino*, where a narrow exception to the procedural-default doctrine serves the goal of protecting the "right to the effective assistance of counsel," a "bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. Nevertheless, when Terry sought to invoke this exception below, the district court refused his request for an evidentiary hearing and demurred based on a set of factual inferences and credibility assessments not supported by the record. Relying on these unsupported factual assumptions, the district court concluded that Terry could not survive summary judgment because, without any factual development in federal court, he could not prove both prongs of *Strickland v. Washington*, 466 U.S. 688 (1984). Relying on the district court's improper factual findings at the summary judgment stage, the panel affirmed and held, in a two-sentence paragraph, that Terry was not entitled to an evidentiary hearing. To date, no court has given Terry a fair opportunity to present his IATC claim.

A. 1997 Trial and Death Sentence

Gary Terry was charged with the sexual assault and murder of Urai Jackson, who was found dead in her home in Lexington, South Carolina, in May 1994. *See State v. Terry*, 529 S.E.2d 274, 275-76 (S.C. 2000). The court appointed two attorneys to represent Terry at his trial, Elizabeth C. Fullwood and I. McDuffie Stone. Fullwood had previously represented two capital defendants,[1] while Stone had never before tried a murder case. JA046, 931-32.[2] Although the standard process in South Carolina at the time was for the court to appoint one public defender and one local attorney

[1] Both of those defendants, Michael Torrence and Joseph Ard, were sentenced to death. Torrence waived his appeals and was executed in 1996. *Oregon and South Carolina Execute Killers*, N.Y. TIMES, Sept. 7, 1996, at A11. Ard's conviction and sentence were eventually vacated for ineffective assistance of counsel, *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007), and at a re-trial with different counsel, he was acquitted of murder and released from prison.

[2] Citations to "JA" are to the Joint Appendix in the Fourth Circuit.

at the public defender's suggestion, the administrative judge selected Stone, his former law clerk and a part-time prosecutor, to represent Terry in an effort to help Stone "start up his practice." JA046.

Terry went to trial in September 1997. As his attorneys acknowledged, the case was "very good . . . for the State as far as guilt" because there was "strong evidence, and "the more [they] investigated it, the worse the case got." JA713-14, JA727. They knew the State was going to present physical evidence; they had "a D.N.A. match. They had a fingerprint on the phone box outside of the house, and they had a videotaped 45-minute confession from [Terry]." JA713-14. Thus, in the face of the State's overwhelming evidence of guilt, counsel had two reasonable options: admit that Terry was guilty and prepare a coherent penalty-phase presentation, or put the State's evidence to the test. They did neither.

Stone opened the guilt phase by telling the jury: "Ladies and gentlemen, Gary Terry over here told the police he did it. . . . So what in the world are we doing here? Why are we even having one of these guilt phases?"[3] The defense presentation that followed involved zero witnesses or evidence, and counsel did not offer the jury an alternate narrative about the murder. Nevertheless, in closing, they insisted that the jury should find Terry not guilty. *E.g.* JA437 ("We know that there was no evidence of rape."); JA441 ("We know that D.N.A. is based on probability and guess what else is? The weather. . . . Murder, burglary and malicious injury to a phone line. They bring you a fingerprint and they bring you D.N.A. and they want you to fill in the blanks.").

[3] The confession Stone referenced was not admitted into evidence during the guilt phase of Terry's trial. JA478. As a result, all the jury heard about the confession at the guilt phase was what Stone told them in his opening—that Terry told police he killed Urai Jackson. JA422.

At sentencing, Fulwood called four social history witnesses: Terry's mother; Terry's father; Terry's wife; and Jan Vogelsang, a social worker. Because there was no cogent plan, Fulwood did not ask any of the witnesses about abuse. Instead, the story the jury heard from Vogelsang was that "Gary was born to parents whose own lives and circumstances of their lives had made it very difficult for them to parent effectively." JA549. The family was poor and "[t]he environment was neglectful. The family had to put all its energy and effort into surviving financially." JA550. Vogelsang noted in passing that Terry's brothers "were arrested for beating him up" and "[h]is dad broke his collarbone with a board." JA564. The only other witness who mentioned abuse was Terry's mother, who told the jury, without prompting that Terry "had a lot of run-ins with his dad," and that her husband once "broke Gary's collarbone" with "a flat board." JA468, JA472.

When Fulwood was done, Stone called three medical experts, none of whom were aware of the child abuse Terry had suffered. As a result, they each testified about Terry's brain damage but did so in a vacuum, without any testimony about possible etiologies or any mitigating explanation for Terry's behavior. The jury was therefore left to conclude—incorrectly—that Terry was born damaged and grew into an "abnormal" and dangerous man whose problems were irremediable. In closing, the State capitalized on this unchallenged picture of Terry, arguing that "[i]f your folks were poor and your folks worked hard and your folks came home a little tired, but they still loved you and that's going to push you toward a life of crime . . . then we need to build more prisons."[4] JA881. The jury returned a death sentence within an hour. JA685.

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[4] The defense's closing ignored the State's arguments. Instead, Fulwood asked the jury to "think about Gary's family, too" and to "consider that there are people who love Gary and will be affected by your verdict." JA675-77. Stone began his closing by immediately undermining Fulwood, telling the jury that "what I'm really not going to do is ask you to cry for Gary Terry,

B. Terry's Direct Appeal and PCR Proceeding

The Supreme Court of South Carolina affirmed on direct appeal. *Terry*, 529 S.E.2d 274, *cert. denied*, 531 U.S. 882 (2000). In 2001, with new appointed counsel, H. Wayne Floyd and Melissa Armstrong, Terry filed a PCR application in state court. PCR counsel did not hire a mitigation investigator, a social worker, or any mental health experts. JA106, JA109. They did not interview any of the penalty-phase experts that testified at Terry's trial, nor did they attempt to review the file from Vivian Massey, the trial team's investigator. JA105-06, JA109. At the state-court evidentiary hearing, PCR counsel focused almost exclusively on record-based claims; nowhere in the state-court record did any attorney present evidence about the true nature of Terry's childhood. JA706-07, JA723-24, JA967. The PCR court adopted the State's proposed order verbatim, denied Terry relief on all claims, and dismissed the petition. *Compare* JA844-957 (State's proposed order) *with* JA958-1069 (identical order of dismissal). The Supreme Court of South Carolina affirmed. *Terry v. State*, 714 S.E.2d 326 (S.C. 2011).

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not for him, not for his family, not for his mother or his father or anybody else" because "if there's tears to be shed, it's to be for [the victim's daughter] and Urai Jackson." JA680. He continued:

> If the question is just is this a horrendous crime, there's no need for this hearing. This is a horrendous crime, ladies and gentlemen, and you decided that two days ago and you're right. You were right then and you're right now. Garry Terry is a rapist. He's a murderer. He's an invader of homes. All that is true. We are not going to sit here and ask you to ignore that. That would be lying to you and I'm not going to do it.

JA681.

C. Federal Habeas Corpus Proceedings

1. The New Evidence Terry's Jury Never Heard

When Terry's case arrived in federal court, habeas counsel uncovered evidence that painted a starkly different picture of Terry's upbringing than what the jury heard at trial. Federal counsel revisited files from Terry's trial counsel, which included memoranda from the investigator, *see* JA053, and notes from Vogelsang, the social worker who testified at trial, JA056-076. Federal counsel also re-interviewed Terry's mother, Patricia (Patsy) Terry, with a focus on childhood abuse, spoke to members of his family, and attached to the habeas petition affidavits from Terry's mother; his sister; his uncle; and his brother's ex-wife. The fruits of the federal investigation revealed the following.

Over a year before his trial, Terry told Massey that "daddy beat the shit out of me with a belt" and has "a temper." JA055. Terry reported that his daddy "whipped hard enough for the whelps [sic] to bleed. He (daddy) slapped him (Gary) on his face, on the side of his head or whatever he could reach when he got mad." JA055. "[D]addy would cuss him when he got blamed for doing something," meaning Terry's brother Johnny "would do stuff and blame it on me and I would catch hell for it." JA055. Terry recalled one time in particular, when he was in high school "talking on the telephone at home" and "daddy came by and said something," which got "the cussing started." JA055. Terry "tried to run away," but "daddy hit him across the back with something and broke his shoulder blade." JA055. "All the [Terry] children got whipped like that." JA055. Terry told Massey that "his mother was usually home when all this was going on but she tried to stay out of the way" because "[o]ne time she got in between them and got hit." JA055.

The collateral witnesses to whom federal counsel spoke elaborated on the brutality of Gary's upbringing. Terry's mother, Patsy, recalled that her husband, Bill, "was very rough on the

children, and on me." JA082. She had married Bill when she was only thirteen years old and he was already twenty-one, and she gave birth to their first child when she was fifteen. JA82.

The beatings began almost as soon as the children were born; "Billy (Gary's oldest brother) was 6 weeks old when Bill first spanked him for crying." JA084. As the children got older, the abuse got worse, and Bill "whipped the children with a belt" or "hit at least one of the children" with his hand almost daily. JA084. Terry's older sister, Faye, recounted how she wore "long-sleeved shirts to school, regardless of the season, to hide the bruises." JA087. Bill "would give [the children] 8-10 licks or more, depending on his anger level," using "a leather and canvas piece of a conveyor belt." JA084, JA087. The whip "was 3-3 1/2 inches wide, and he stripped it so that it would have between 5-6 tassels or whips. The handle was taped with black electrical tape." JA087. During the beatings, Bill, "would make [the children] hold his hand and would ask, 'Do you hate me?'" JA087.

Terry's maternal uncle, Charlie Register, described a time when Terry was six or seven years old and Bill had watermelon growing in his garden. JA094. Bill "believed that Gary was damaging the garden" and "viciously beat Gary with a stick." JA094. Charlie's son was there and saw the "severe beating," which upset Charlie enough that he took his son and left. JA094. Patsy and Faye both described the incident when Bill broke Terry's collarbone. Gary was no more than fourteen years old at the time, and he and his brother Johnny "were fighting in the garage area" while Bill watched. JA083. Johnny was "much bigger and stronger than Gary," so "Gary picked up a brick and threw it at Johnny." JA083. "The brick broke the windshield of Bill's car," and Bill then "broke [Terry's] collarbone" by "hitting him with a board." JA083. Tammy, Terry's girlfriend at the time, and her stepfather had to take Terry to the hospital. JA090.

The beatings were not only severe, they were "unpredictable." JA083, JA087. "You never saw it coming, and any little thing would set [Bill] off." JA087. "If one of the children broke a rule but did not own up to it, then all of the children would be beaten." JA082. For example, once, when Gary was a baby, their father woke them up "really late at night. He wanted to know who 'fucked up' his car." JA088. When nobody answered, Bill "beat the hell out of all [the children]" until "Johnny told him that he did it." JA088.

When Patsy was at work, she wondered "if Bill would knock any of the children unconscious" because she "noticed that [their] dog would hide behind the couch when Bill would start hitting one of the kids."[5] JA082-83. When she was home, she sometimes tried to break up the beatings, but then he would turn on her and "[t]he children would see Bill hitting [her]." JA082. Bill was also controlling and "would check the mileage on the car before and after [Patsy] went to work, or took the kids to school." JA084-85. One time, Faye "saw daddy hold [Patsy] down on the floor and made her eat cigarettes because he did not like her smoking" and "said she was not old enough to smoke." JA088. Patsy remembered how, in front of their children, "Bill often told me that he would 'blow [my] brains out.'" JA085. He said similar things to Faye. JA090.

Although Patsy was a frequent target of her husband's violence, she also "contributed to the violence in the house by antagonizing daddy." JA091; *see also* JA088 ("When daddy beat us, I always felt that momma was on his side."). Both parents forced the children to fight each other, "like we were a sport to them." JA083, JA089. Patsy told habeas counsel "that this is part of the reason why the children will not have anything to do with one another." JA089.

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[5] Later, "daddy poured hot grease on [the] dog. It burned the dog and he lived, but had urinary problems" and they "had to put him to sleep shortly afterwards." JA089.

After Bill broke his back in a work accident, he would make his older sons beat their younger siblings. JA087. Starting when Faye was thirteen, her oldest brother "Billy would tie [her] to a tree and he would beat [her] because daddy told him to do it." JA087. Bill had previously inflicted this same punishment on Billy. JA098. Terry's brothers, like their father, were disturbed and violent. Faye recalled a time when Billy told Johnny—then "a little boy"—to "twist the neck of a kitten and break its neck." JA090. Johnny did it. JA090. Terry was forced to fight these brothers, who were always "larger and stronger" and who "physically and mentally abuse[d] Gary." JA095.[6]

Terry's childhood was also characterized by severe emotional abuse, far beyond the neglect that Vogelsang testified about in sentencing.[7] His sister Faye "basically raised him," starting when she was nine years old. JA087. Faye explained that their mother "hand[ed] Gary to me when he was still an infant and t[old] me, 'here, he's yours' as she went to work." JA087. Bill never

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[6] When Billy and Johnny moved out and started their own families, they perpetuated the cycle of violence. Billy knocked the teeth out of his third wife's mouth and went to jail for beating his first wife. JA090. "Billy used to beat his oldest son, Billy Ray Terry III with a water hose," made him "work all the time, and made him stay in the garage and wouldn't let him go play with other kids." JA098. Fran, one of Billy's wives, recalled one Christmas when Billy, who "was an alcoholic," got drunk and became upset because Fran would not have sex with him while their five children were in the bed asleep. JA098-99. Billy beat Fran so severely that she "couldn't go anywhere for a few months." JA099. Like Billy, Johnny "beat all of his wives." JA090. He beat his wife Brenda often, leaving her with "black eyes" and "bruises and marks on her." JA098. Faye, like her brothers, mirrored the life her parents modeled. When she got pregnant at sixteen and moved in with her husband, she "thought that married life meant being beaten." JA089. Faye stayed with her husband, even though he "was very physically abusive," to the point of shooting up her house, killing and cutting up her dog, and attempting to shoot her in the head in front of their daughter. JA089. When Faye tried to leave, Bill and Patsy "did not help [her] at all, and left [her] to deal with it all by [her]self." JA089.

[7] Vogelsang's records contained documentation of severe abuse, and as she told habeas counsel, her typical practice was "to make this known to the attorneys and to stress the impact of trauma on development." JA078. Nevertheless, she could not recall "interactions with the legal team" or meetings at which trial counsel gave her guidance about the focus of her testimony. JA079.

"show[ed] any affection towards any of the children," JA095, and he used methods other than violence to control his wife and children. For example, Patsy recalled that her husband once "got angry because I fixed the children's dinner plates before I fixed his" and "threw all the food out the back door." JA083. He did that any time he did not like what Patsy prepared for dinner, and "[h]is philosophy was that if he couldn't eat, then no one else would. He did not care that the children went without eating supper." JA083. Nobody was "allowed to touch food in the kitchen unless Bill gave us permission," and "[n]o one could eat until Bill did." JA084

Terry and his siblings "were always isolated from other kids" and "were not to associate with cousins or other children." JA087. Bill would not let them "go outside and play like other children" or "spend the night with friends, or go to any functions." JA082. Faye recalled that she "was happy to go to school because it meant that I did not have to be at home. I did not want the weekends to come." JA087. Bill, however, "did not think that school was important," and "[i]f there had not been a law in place saying that the children had to go to school, then he would not have let them go." JA082. He treated his children like workhorses, forcing them to cut metal for scrap "to help him make money," and they missed school because of this. JA094. The Terry children had to work "when they got home after school," and "[s]ometimes they would work until 10 o'clock at night." JA082. They did this "all year round, regardless of how cold it was outside." JA094. "He would not let them into the house until they were finished for the night, and Bill would not allow them to do anything on the weekends because they had to work for him." JA094. If the children refused to work, "they were punished severely by [Bill] repeatedly hitting them." JA094. Charlie, Terry's uncle, recalled that "[i]t was like watching prisoners in a chain gang." JA094.

Bill's sister "would not come around Bill because of his treatment of the children." JA094. And although Patsy's "whole family knew that Bill abused Patsy and the children," they did not

intervene "for fear that he would hurt them" and because at the time, the view was "that what a man did with his kids was his own business." JA094. Charlie "believe[s] Bill kept [his family] isolated so they would not report the abuse." JA095.

Terry's jury did not hear any of this testimony, but not because the witnesses were unavailable or unwilling. Patsy explained that at her son's sentencing, she "did not testify about [Bill's abuse]" because she "simply answered the questions asked of [her] and no one asked about these things." JA085. Faye, who was not called as a witness, affirmed that she "would have testified to [the abuse] had [she] been subpoenaed to testify at Gary's trial, but [she] was not." JA091. Trial counsel did not contact either Charlie Register or Frances Terry, and both witnesses were available and would have testified had defense counsel spoken with them. JA095 ("I was available and would have testified to these events had I been contacted by defense counsel. My sister has always been afraid of Bill's abuse, but I am not."); JA099 ("I would have testified to these statements at Gary Terry's trial had I been contacted by defense counsel.").

Fulwood submitted an affidavit to Terry's habeas counsel stating that the defense "hoped to convince the jury to sentence Terry to life imprisonment based on his neurological problems." JA046-47. Fulwood was responsible for preparing the social history witnesses, and she did not recall making any strategic decision to limit evidence of abuse at trial. JA047. To the contrary, she told habeas counsel "it was [her] intent to present all of the evidence of [abuse] that we could and all that [she] was aware of was presented." JA047. Nevertheless, most of the proof of severe abuse that was in trial counsel's file never reached the jury. Massey, the investigator, sent all of her interview notes to Fulwood, and Massey's notes (described above) included detailed narratives about abuse that the jury never heard. *See, e.g.*, JA053.

Moreover, Terry's expert medical witnesses never learned of the abuse because, as Fulwood admitted to habeas counsel, trial counsel offered the medical witnesses no collateral evidence. JA047. Forensic psychiatrist Donna Maddox (now Donna Schwartz-Watts) "did not review, because [she] was not provided, detailed interviews with family members," nor "did [she] review, because [she] was not provided, any of the materials assembled by Jan Vogelsang." JA101. Maddox had also not seen, because trial counsel did not uncover it, the information about Terry's upbringing detailed in the affidavits from his mother, his uncle, his sister, and his sister-in-law. JA101-02. After reviewing this information and reevaluating Terry in 2012, Maddox concluded that Terry "had more neurological dysfunction than any patient I have ever evaluated, including those prior to 1997 and since." JA102. Had she known in 1997 what she knew before seeing Terry in 2012, she could have contextualized that dysfunction. In 2012, Maddox concluded that "Terry certainly suffered effects from trauma" and explained that Terry's abusive childhood likely "contributed to [his] dysfunction." JA102.

2. The Proceedings Below

Terry filed a timely federal habeas petition, which included claims related to trial counsel's deficient mitigation presentation, and requested an evidentiary hearing. The State filed a return, moved for summary judgment, and moved to strike the exhibits.[8] *See* JA259. Without holding a hearing or taking any testimony, the district court discredited Terry's proffered evidence and drew a series of material inferences in favor of the State, the moving party, and concluded that Terry's IATC claims as the court construed them had no merit.

[8] The State moved to strike the exhibits under 28 U.S.C. § 2254(e)(2), but the Magistrate Judge recommended denying the motion to strike and Respondents did not object to that recommendation. JA273.

First, the court acknowledged that there was evidence of child abuse in trial counsel's file that never reached the jury and that trial counsel presented all evidence of abuse of which they were aware. Without addressing the most likely inference that these facts invite—trial counsel did not look at their own file—the court reached the far less likely conclusion, based on nothing in the record, that Terry's experts withheld evidence of abuse from trial counsel. Pet. App. 66a-67a. Second, the court concluded that trial counsel must have made an informed decision to focus on neglect and brain damage instead of child abuse and therefore declined to present a complete picture of Terry's upbringing. Pet. App. 66a-67a. This determination is plainly contradicted by the only record evidence regarding trial counsel's strategic thinking—Fullwood's statement that counsel intended to present "all of the evidence of abuse that we could." Third, the court reasoned in the alternative that to the extent there was a problem with trial counsel's mitigation presentation, Terry's social history expert, Vogelsang, was to blame. In reaching that conclusion, the court discredited an affidavit from Vogelsang that described the defense team as dysfunctional and assumed, again without any support, that Vogelsang had decided on her own not to testify about abuse. Pet. App. 66a-67a.

The court—jumping to the merits of Terry's IAC claim rather than viewing the claim through the *Martinez* gateway—concluded that because, in its view, the record could support various inferences about what Terry's attorneys did and why, Terry could "not rebut the strong presumption that counsel performed reasonably." Pet. App. 67a. Having discounted the import and scope of the unpresented child abuse evidence, the court held that because the jury heard "some evidence" of abuse, Terry had suffered no prejudice. Pet. App. 65a, 72a-73a. Without addressing the fact that Terry's attorneys failed to present evidence of child abuse that was documented in

their own file and without even considering Terry's request for an evidentiary hearing to resolve factual disputes, the court granted the State's motion for summary judgment.

A panel of the Fourth Circuit affirmed. Pet. App. 1a-41a. According to the panel, Terry's trial counsel were not ineffective because the evidence they failed to present was not "easy to obtain" and was not the sort of evidence that "required no effort on trial counsel's part to decipher." Pet. App. 35a-36a (citing *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) and *Winston v. Pearson*, 683 F.3d 489, 491-93 (4th Cir. 2012)). The panel continued: "[T]he record is at best, ambiguous as to whether Terry's counsel failed to review the evidence of abuse they had. And even if they did, this error doesn't amount to deficient performance, particularly when juxtaposed with the robust mitigation case that they did present." Pet. App. 35a. Because the evidence Terry's attorneys failed to present would not have "categorically barred a death sentence" or countered a fact "the state would use as aggravating evidence," the panel held that Terry could not establish prejudice. Pet. App. 35a-36a. This, the panel concluded, meant that Terry could not survive a motion for summary judgment, despite the fact that he had not been given an evidentiary hearing or an opportunity to develop the record from which the district court had drawn unsupported inferences. Because the panel affirmed on its view that Terry's IATC claim failed on the merits, they also affirmed the district court's denial of an evidentiary hearing and declined to address "whether state postconviction counsel were ineffective in failing to exhaust the claim." Pet. App. 30a, n.11, 41a.

REASONS FOR GRANTING THE PETITION

If the panel decision is left standing, "*Martinez* [will] be a dead letter" in the Fourth Circuit. *See Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) (plurality op.). Habeas petitioners like Terry, whose claims of trial counsel ineffectiveness have never been subjected to constitutionally adequate scrutiny, will have their cases closed and their sentences

rubberstamped—even where, as here, the parties disagree about what federal courts in any other context would recognize as material facts. Because the district court and the panel below sidestepped the "record-intensive analysis" necessary to assess "the effect the additional mitigating evidence" would have had on a jury, Terry has never had the opportunity to conduct discovery or present testimony on the question of his trial counsel's ineffectiveness. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886-87 (2020). If this Court does not intervene, he will be executed without the "assur[ance of] a fair trial" and "the guiding hand of counsel." *Martinez*, 566 U.S. at 12 (internal quotation marks omitted).

The decision below also threatens a silent abrogation of this Court's precedent and the rules applicable to federal habeas proceedings. Specifically, the panel decision accomplishes what Arizona asks this Court to do in *Shinn v. Ramirez*, 141 S. Ct. 2620 (2021) (mem.) (granting a petition for writ of certiorari for the Ninth Circuit to review *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019)): for a habeas petitioner raising a claim through the *Martinez* gateway, it cuts off the ability to develop and present evidence to support a claim of IATC at a hearing in federal court.[9] Both approaches, in practice, evade *Martinez*; Arizona seeks to prohibit federal courts from considering evidence outside the state-court record, while the Fourth Circuit simply holds any evidence outside the state-court record to an impossible standard. This Court should grant the petition to clarify what constitutes a material factual dispute for the purposes of surviving a motion

[9] Because the question of whether an IATC claim survives the "some merit" assessment under *Martinez* overlaps with both the question in this case and the related question of what evidence—if any—is admissible to assess the strength of such a claim, a ruling in favor of the *Jones/Ramirez* Respondents would implicate Terry's case and would entitle him to a remand for an evidentiary hearing. Thus, there is a substantial likelihood that a ruling in favor of the *Jones/Ramirez* Respondents affirming *Martinez* and *Trevino* would impact Terry's case and require a remand to the Fourth Circuit. A hold pending resolution of the related case is appropriate in these circumstances.

for summary judgment in federal habeas, before the court has had the benefit of fact development or an evidentiary hearing.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S DECISION THREATENS TO ERODE THIS COURT'S PRECEDENT AND THE STANDARD DICTATED BY FEDERAL RULE OF CIVIL PROCEDURE 56.

A. Under the Familiar Summary Judgment Standard, Terry's Habeas Corpus Petition and the State's Response to It Raised Disputed Questions of Material Fact.

Terry's habeas petition contained detailed allegations supported by affidavits from relevant witnesses and numerous documents in the state court record. The State did not submit any evidence to support its request for summary judgment. The district court's ruling granting the State's motion therefore should have prevailed only if none of the factual disputes at issue could "reasonably be resolved" in Terry's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). As described above, the district court made three specific factual determinations that were improper at the summary judgment stage, given the state of the record that was before the court.

First, Terry's trial counsel presented only a fraction of the information about abuse that was documented in their own file (which was, as Terry's family later made clear, an even smaller portion of the abuse Terry actually suffered). The trial team's investigator took notes, which were in counsel's file, that included detailed narratives from Terry about how "daddy whipped hard enough for the whelps [sic] to bleed," "slapped him (Gary) on his face, on the side of his head or whatever he could reach when he got mad," and how "[a]ll the children got whipped" when their father was upset. JA55. The jury heard none of this. Nevertheless, the district court concluded that Terry had not presented "any evidence that trial counsel knew more information about the abuse than was presented." Pet. App. 65a.

Second, although Terry proffered evidence from one of his trial attorneys and from his social history expert detailing the dysfunction that defined his trial team, the district court discounted that evidence as not credible and instead concluded—against the weight of the full record that was before it—that "counsel conducted a thorough investigation." Pet. App. 68a. To the contrary, Terry's trial counsel acknowledged their intention "to present all evidence of [abuse]" they could find. JA47. But they did not even take the most basic steps to uncover the evidence they sought, including reviewing their investigator's notes or asking Terry and his family about abuse.

Third, the district court concluded that if there were any error in the penalty-phase presentation, the blame for that "falls to [the social history expert] or [the investigator] for not conveying the full extent of [Terry's] abuse to counsel, and not to counsel." Pet. App. 67a. Not only is this conclusion inconsistent with the record, it is inconsistent with the court's own conclusion about what trial counsel did; counsel cannot have simultaneously known about some or all of the abuse Terry suffered (documented in their own file) but decided not to pursue that evidence *and* not known about the abuse because their experts withheld information about it from counsel.

At a bare minimum, the district court's factual assessments were amenable to more than one interpretation and it was therefore improper to grant summary judgment. *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented."). In such a situation, where "the habeas applicant did not receive a full and fair evidentiary hearing in a state court," and where the district court has not taken additional evidence but "the facts are in dispute," the issues are twofold: (1) whether to grant summary judgment, a question that is controlled by Federal Rule of Civil Procedure 56; and, if summary judgment is not appropriate, (2) whether to grant an evidentiary

hearing, a question that is controlled by the standard described in *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See also Blackledge v. Allison*, 431 U.S. 63, 80 (1977) ("This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing. As in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment.").

As is true of nearly all civil cases that reach the summary judgment stage, the parties here disagree about the facts, and "[w]hen things are in such a posture, courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). The district court did the opposite, despite the fact that the moving party (the State) did not proffer any evidence to contradict the materials in Terry's habeas petition, and the Fourth Circuit affirmed without even acknowledging the tension in the district court's factual assessments. By deciding habeas cases at such an early stage of the proceedings, and by doing so when factual disputes have not been resolved, the Fourth Circuit has invited inconsistent outcomes. *Compare* Pet. App. 1a-41a (denying habeas relief for a defaulted claim of IATC for failure to investigate and present mitigating evidence—including a failure to review the file or read the investigator's notes—where the habeas petitioner was convicted of a murder and rape) *with Stokes v. Stirling*, 10 F.4th 236, 267 (4th Cir. 2021) (Quattlebaum, J., dissenting) (granting habeas relief, after the district court held an evidentiary hearing, for a defaulted claim of IATC for failure to investigate and present mitigating evidence—including a failure to "personally conduct" follow-up interviews of

mitigation witnesses or "otherwise develop the investigator's findings"—where the habeas petitioner was convicted of a murder and rape in which he "scalped [the victim's] head, stabbed and mutilated her nipples and body, and cut her vagina out of her body," and where the jury heard evidence that the petitioner committed another "horrific murder mere days later"). Certiorari is appropriate to define what constitutes a material disputed fact for a habeas petitioner raising a claim of trial counsel ineffectiveness through the *Martinez* gateway.

B. The Panel's Decision Renders *Martinez* Inapplicable in Circumstances Where Trial Counsel's Ineffectiveness Is Not Evident on the Face of the State-Court Record.

Because the panel resolved Terry's case before any fact-finding was permissible, it ensured that Terry would never have an opportunity to develop the record beyond what is contained on the face of the state-court record. Such an approach accomplishes in practice what Arizona has asked this Court to do formally: bars district courts from expanding the record and limiting *Martinez* to trial-level errors of inclusion while cutting off development of any errors of exclusion.[10] Thus, at its core, the panel decision undermines *Martinez* in cases like Terry's—where state post-conviction counsel failed entirely to raise a claim of trial counsel ineffectiveness for not presenting evidence that the jury should have heard—by not even addressing the question of post-conviction counsel's ineffectiveness and instead addressing the merits of the IATC claim on an undeveloped record.

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[10] The result of both approaches is inconsistent outcomes, in which habeas courts grant relief for defaulted IATC claims only when trial counsel's errors are obvious on the face of the state-court record. *E.g.*, *Bowers v. McFadden*, 153 F. Supp. 3d 875, 877 (D.S.C. 2015) (granting habeas relief for a defaulted claim of IATC without holding an evidentiary hearing because the state intermediate appellate court, considering an appeal from the denial of PCR relief, noted in dicta that trial counsel were ineffective and that their errors constituted prejudice but declining to grant relief under South Carolina's strict error-preservation rules "because the PCR trial counsel had not raised the issue in the initial PCR proceeding below").

By design, *Martinez* created a narrow gateway for a small number of federal habeas petitioners to bring defaulted IATC claims after they were twice provided ineffective assistance of counsel in state court. It did not "purport to displace *Coleman* as the general rule governing procedural default" but merely "qualifie[d] "*Coleman* by recognizing a narrow exemption." *Davila v. Davis*, 137 S. Ct. 2058, 2065-66 (2017) (alteration in original) (quoting *Martinez*, 566 U.S. at 9, 17). The exemption is narrow—meaning few petitioners will raise claims that fit within its definition—and in practice, most habeas claims raised through *Martinez*'s gateway will be properly dismissed without evidentiary development because "the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Martinez*, 566 U.S. at 16. Simply put, it is rare that state post-conviction counsel will fail entirely to raise a viable claim of trial counsel ineffectiveness.

That leaves only a small pool of cases, like Terry's, where state post-conviction counsel failed to develop obvious evidence of trial counsel's ineffectiveness, and at the summary judgment stage, those claims—wholly undeveloped in state court—must be held to a lower evidentiary standard than claims on the merits. This is because, as *Martinez* recognized, "[i]neffective-assistance claims often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 12. To accomplish its two-step process, by which most claims are summarily dismissed, *Martinez* borrowed from an analogous context—the certificate of appealability (COA) inquiry. That inquiry, this Court "ha[s] emphasized, is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). At the COA stage, and therefore at the substantiality stage of *Martinez*, "the only question is whether the applicant has shown that 'jurists of reason could disagree,'" and "[t]his threshold question should be decided without 'full consideration of the factual or legal bases

adduced in support of the claims.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)).

But this is not what the district court or the panel below did here. Instead, as described above, the district court credited the moving party's version of events at the summary judgment stage, and as a result, the district court and the panel analyzed the merits of Terry's IATC claims through the lens of a factual record that was not only undeveloped, but was tilted in favor of the State. *E.g.*, Pet. App. 37a, 39a ("the aggravating circumstances of Terry's crimes . . . were too much to overcome") ("the evidence of abuse, though potentially mitigating in its own right, doesn't overcome the mountain of aggravating evidence found in the record and is not prejudicial in light of the robust, and unrebutted, mitigation case Terry's counsel did present"). Had the panel faithfully applied the summary judgment standard and held Terry to the lower "some merit" requirement described in *Martinez*, the proper resolution of Terry's case would have been a remand for an evidentiary hearing. And only after an evidentiary hearing would the district court have been in a position to assess the actual merits of Terry's underlying IATC claims. The Court should grant certiorari to clarify the proper steps a district court must take to resolve a habeas petitioner's claims when those claims are raised through the *Martinez* gateway.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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