No. 21-6151

IN THE
Supreme Court of the United States

GARY DUBOSE TERRY,
Petitioner,
v.

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

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

BRIEF IN OPPOSITION

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December 1, 2021

CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

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?

LIST OF PARTIES

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

STATEMENT OF RELATED PROCEEDINGS

Respondents identify the following 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, 854 Fed.Appx. 475 (4th Cir. May 5, 2021) (appeal from district court)

Terry v. Stirling, No. 4:12-1798-RMG, at 2019 WL 4723345 (D.S.C. Sept. 26, 2019) (order granting motion for summary judgment and denying habeas petition);

Terry v. Stirling, No. 4:12-1798-RMG-TER, 2019 WL 4723926 (D.S.C. Jan. 31, 2019) (report and recommendation);

State v. Terry, 529 S.E.2d 274 (S.C. 2000) (direct appeal opinion affirming conviction and death sentence);

Terry v. State, 714 S.E.2d 326 (S.C. 2011) (opinion affirming dismissal of post-conviction relief application);

Terry v. State, 2000-CP-32-3470 (S.C. Ct. Common Pleas, Feb. 16, 2009) (order dismissing post-conviction relief application with prejudice).

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RESPONDENT'S BRIEF IN OPPOSITION

In September 1997, a state court jury convicted Petitioner, Gary Dubose Terry, of raping and murdering Urai Jackson, during a burglary of her Lexington County, South Carolina home and sentenced him to death. After denial of relief in state collateral proceedings where he was represented by qualified and experienced attorneys, Terry turned to the federal courts for relief. In addition to the two claims exhausted in state collateral proceedings that he ultimately abandoned, he litigated four additional ineffective assistance of trial counsel claims not pursued in state court, including his claim that counsel were ineffective for not presenting mitigating evidence of Terry's childhood abuse. To excuse the procedural default of his new claims, he asserted his collateral counsel were deficient under *Martinez v. Ryan*, 566 U.S. 1 (2012), and that his new claim should be heard. Yet, the lower courts – considering his new evidence – rejected his argument for cause to excuse the default because none of his claims was substantial. 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, this Court should deny certiorari review since Terry presents a question that cannot support relief, and which fails factually and as a matter of law.

CITATIONS TO OPINIONS BELOW

The district court's unreported September 26, 2019 Order denying habeas relief is available at 2019 WL 4723345. App. 42a-77a. The December 10, 2019 unpublished Order denying the motion to alter or amend is available at 2019 WL 6716030. The May 5, 2021 unpublished opinion of the Fourth Circuit affirming the denial of habeas corpus relief, is reported at 854 Fed.Appx. 475. App. 1a-41a. The June 2, 2021 Order of the Fourth Circuit denying rehearing or rehearing *en banc* is unpublished. App. 77. The state court Order denying post-conviction relief is unreported. The Supreme Court of South Carolina's opinion affirming denial of relief is published at 714 S.E.2d 326.

JURISDICTION

The Fourth Circuit filed its opinion affirming the denial of habeas relief on May 5, 2021. It denied Terry's timely petition for rehearing and rehearing *en banc* on June 1, 2021. Terry invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides that "[i]n 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, which 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–

(1) a new rule of constitutional law, made applicable 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 fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

STATEMENT OF THE CASE

A. Statement of Facts.

The Supreme Court of South Carolina briefly summarized the State's guilt phase evidence surrounding the murder as follows:

> The victim in this case, 47 year old Urai Jackson, was found beaten to death in her Lexington County home on May 24, 1994. The window on the carport door to her home had been broken out and the telephone wires had been pulled from the phone box. Victim's mostly nude body was found in the living room, and semen was found in her vagina. She had several blunt trauma wounds to the head, and a number of defensive wound injuries. The cause of death was blunt trauma with skull fracture and brain injury.

State v. Terry, 529 S.E.2d 274, 275-76 (S.C. 2000).

More specifically, the guilt phase jury heard evidence that the victim had either a t-shirt or gown across part of her body, but her breasts and her genitalia were exposed, her legs were spread, and her left leg was up at an angle with the bottom of her foot on the floor. St. App. 1284-98; 1308-09; 1332-36; 1342-43; 1353-58; 1419-22.[1] Thus, she was positioned in a manner testified to as "very characteristic" of victims that have been engaged in sexual activity or assault at the time of death. St. App. 1471-73; 1478-80. DNA testing established that Terry's semen was located in the victim's vaginal canal. St. App. 1471-73; 1478-80.

The forensic pathologist who performed the autopsy found at least four and possibly more blunt trauma wounds where a blunt, heavy, club-like object hit the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind her right ear. The appearance of the wounds indicated that the victim was struck from behind and possibly from above and behind with a blunt instrument. App. 1466-68. Two blunt trauma lacerations on the top of her shoulder appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm and wounds to her left forearm were defensive wounds. Although these wounds were consistent with State's Exhibit 13, the top of a pool cue found at the scene, the head wounds were more likely caused by a heavier instrument that had a rounded end, such as a club or a baseball bat. The victim's thumb was "almost smashed," and the pathologist opined this could be a defensive injury caused by the perpetrator stomping on her thumb. St. App. 1468-70.

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[1] The designation "JA" refers to the Joint Appendix filed in the court of appeals, and "St. App." refers to the state court Appendix filed in the district court.

B. Procedural History.

1. Trial and direct appeal.

Terry received a jury trial on September 15-21, 1997, on charges of murder, burglary in the first degree, criminal sexual conduct (CSC) in the first degree, and malicious injury to telephone system. The jury convicted Terry as charged. St. App. 16-1591. In a separate capital sentencing proceeding, the same jury heard not only further evidence relating to the rape and murder of the victim,[2] they also heard that Terry participated in other, unrelated prior criminal activity. Specifically, jurors heard that Terry: stole cars and body shop materials; pled "guilty to receiving stolen goods that had been taken from a golf course that was under construction;" carried a fraudulent driver's license; was arrested and convicted for driving under a suspended license; and was arrested for driving a stolen vehicle, for resisting arrest, and for failing to stop for a police vehicle. While working security at a bar, he would hit patrons with beer mugs, rocks, and pool cues. When an acquaintance would not pay Terry to fix his car, Terry rammed into that person's car with his own, almost striking the man. JA 361-64.

Terry incurred a number of disciplinary infractions while previously

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[2] For instance, the jury heard that Terry had given two statements to law enforcement about Jackson's murder. JA 370. Terry initially stated he had never been alone with the victim inside her home. JA 370. Two months later, he said "he went to [her] house and indicated that he had consensual sex with her." JA 371. "When Terry started to leave, they got into a verbal altercation because [she] wanted him to stay." JA 371. Terry reacted with "a bad temper:" he hit the victim "several times" with an object and left out the back door, which he busted open from the inside out. JA 370-71.

incarcerated, such as bribery, disorderly conduct, and possessing or attempting to obtain contraband. JA 361. Once, Terry "used a fire extinguisher to make a hole in the wall of his cell" in the County Detention Center. A letter found in Terry's cell "detailed" the murder and residential and vehicular arson of another woman. It also instructed Terry on how to confess to these crimes for which another inmate awaited trial. JA 363-64. Investigators discovered the author of the letter planned to assist with Terry's escape from the Detention Center in exchange for Terry's confession. JA 364.

Other evidence established Terry's violent, predatory interactions with women. He once stabbed a prostitute in the neck and was calm afterwards. St. App. 1620. He also raped his ex-wife during their marriage and she ultimately obtained a divorce from him on the grounds of his physical cruelty. St. App. 1773-75. His former girlfriend described him as having a "hot, quick temper." JA 365-66. He "would throw things" if she disagreed with him (JA 366); and he damaged her cars, setting one on fire. JA 368. "After one fight, Terry left her at a friend's house" and went and "busted" her answering machine and tore up photos and threw them around her room. JA 366. Another time, he threw her "kitten up against the wall and threw the T.V. off the shelf" in a house they shared. JA 366.

She testified that while Terry did not physically abuse her, he controlled her "emotionally and mentally." JA 366. She knew Terry would steal things, including money from her paychecks, to fund a drug habit. JA 366. Terry told her he beat another man "half to death" because the man "cussed at Terry when Terry had told him to be quiet." JA 366. Terry wrote her a letter in which he described his temper and confessed it "felt so good to hurt people." JA 367. Once, Terry told her "to shoot him so he would avoid going to court for back child support." JA 367.

When she tried to leave Terry, an altercation ensued during which he removed a wire from her car engine, forced her into his truck, and "told her that he was going to make [her] watch him kill himself." JA 368. She jumped from his truck, "but he picked her up and then took her back to her car and returned the wires to her engine." JA 368. One of her female friends offered protection by hiding her in the friend's home, but Terry came over looking for her. JA 368-69. Terry and the friend got into a struggle, and the friend ended up in the hospital with internal bleeding. JA 364-65. Then, Terry forced his girlfriend to leave with him. She only escaped by jumping out of the car when "she saw blue lights behind" it. JA 369.

The jury sentenced him to death based on the finding of two statutory aggravating circumstances: the murder was committed while in the commission of burglary in any degree and criminal sexual conduct (CSC) in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997).[3] St. App. 1602-2130. The Supreme Court of South Carolina affirmed his conviction and death sentence on direct appeal. *State v. Terry*, 529 S.E.2d 274 (S.C. 2000). This Court subsequently denied his Petition for Writ of Certiorari. *Terry v. South Carolina*, 531 U.S. 882 (2000).

[3] He was sentenced to consecutive sentences of life imprisonment for burglary in the first degree, thirty years imprisonment for CSC in the first degree and ten years imprisonment for malicious injury to a telephone system. St. App. 2128-30.

2. Initial state post-conviction proceedings.

In 2001, Terry filed a post-conviction relief (PCR) Application. Appointed counsel, H. Wayne Floyd and Melissa Armstrong, who were statutorily qualified to represent death-sentenced PCR applicants under S.C. Code Ann. § 17-27-160(B) (Supp. 2020), assisted him.[4] His primary claims in PCR were that trial counsel were ineffective for not objecting to the State's exclusion of Terry's statement to law enforcement in the guilt phase based on prosecutorial misconduct in "sandbagging," and for not adjusting their trial strategy in order to maintain credibility with the jury in sentencing. JA 1313-16. The Supreme Court of South Carolina denied both claims on the merits. *Terry v. State*, 714 S.E.2d 326 (S.C. 2011). JA 1311-16. It also denied his petition for rehearing. St. App. 2333-34. Terry subsequently presented both claims in a Petition for Writ of Certiorari filed in this Court, which was denied on February 21, 2012. *Terry v. South Carolina*, 565 U.S. 1206 (2012).

3. Federal habeas corpus and his successive PCR.

Terry filed a Petition for Writ of Habeas Corpus (ECF #16) and a "Motion to Stay Proceedings Pending Exhaustion of State Remedies" (ECF #17), with the assistance of counsel,[5] on June 29, 2012. Among the claims raised was that counsel's

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[4] The Supreme Court of South Carolina strictly enforces the requirements of this section. See *Robertson v. State*, 795 S.E.2d 29, 37 (S.C. 2016) ("we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance *per se*"). Appointed counsel are "compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel." Also, capital defendants in PCR are "entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure. S.C. Code Ann. § 17-27-150(B) (Supp. 2020).

[5] Originally, Teresa L. Norris, Esquire, Elizabeth Franklin-Best, Esquire, and Derek

ineffectiveness for not presenting evidence Terry had been physically abused by his father. Respondents filed a Response opposing his motion to stay (ECF #25) on July 16, 2012. On August 27, 2012, Respondents filed a Return and Memorandum of Law in Support of Summary Judgment (ECF #31) and a Motion for Summary Judgment. ECF #32. Terry filed a "Response to State's Motion for Summary Judgment and Motion to Strike Exhibits" on November 12, 2012. ECF #49. Respondents filed a Reply to the Response opposing summary judgment on November 20, 2012. ECF #52. The magistrate judge granted a stay on December 10, 2012.[6] ECF #53. The case remained stayed, over objection, until July 13, 2018. ECF #119.

On October 24, 2018, Respondents filed an amended return and memorandum in support of an amended motion for summary judgment. At that same time, Respondents filed a motion to strike Terry's exhibits attached in support of claims not raised in state court. On January 31, 2019, the magistrate judge recommended Respondents' motion for summary judgment be granted, Respondents' motion to strike Terry's exhibits be denied, and relief denied on all claims. He found the ineffective assistance claim now before this Court was procedurally defaulted and that the default should not be excused under *Martinez*, as it was not a substantial claim. JA 316-77. By decision filed September 26, 2019, the district court adopted the

J. Enderlin, Esquire, represented him. However, Mr. Enderlin filed a motion to withdraw (ECF #87), which was granted on October 14, 2015. ECF #88.

[6] Meanwhile, Terry filed a successive PCR Application (2012-CP-32-02718), through counsel, on June 29, 2012. Respondents made a Return and Motion to Dismiss on July 30, 2012. Respondents filed an Amended Return and Motion to Dismiss on October 3, 2014. The successive PCR was denied on June 19, 2018.

Report and Recommendation. App. 42a-76a. The district court found that the procedural default of Terry's *Martinez* claim could not be excused because it found that the underlying claim of ineffective assistance of trial counsel was not substantial. App. 65a-68a. It denied Terry's subsequent motion to alter or amend that judgment, as well as a certificate of appealability. App. 75a-76a; JA 439-45.

Terry timely appealed. The Fourth Circuit agreed with the district court and found that Terry was not entitled to relief. App.1a-39a. It found it did not need to reach the question of whether original PCR counsel were ineffective because the underlying claim of ineffective assistance of trial counsel was "insubstantial under *Martinez*." App. 30a & n. 11. See also App. 30a-36a. The Court accurately characterized counsel's mitigation case as "a coherent mitigation case with a clear theory for why the jury should have voted for life," App, 30a, and "robust." App. 33a. Even if trial counsel's performance was deficient, the Court concluded that "Terry suffered no prejudice from counsel's alleged deficiency ... because the aggravating circumstances of Terry's crimes, and his propensity for violence, were too much to overcome." App. 37a. So, "even if counsel's performance was deficient, it wasn't prejudicial under *Strickland* and thus doesn't excuse procedural default under *Martinez*." App. 39a.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny the petition because Terry's argument is based on an incorrect understanding of *Martinez*. His question presented is based on his belief that by denying him an evidentiary hearing, 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 excused under *Martinez*. Yet, in the District Court of South Carolina, both capital and non-capital federal habeas petitioners are allowed to expand the record for purposes of *Martinez*, and Terry did so below. He obtained fresh affidavits and other evidence to support his defaulted claims. This evidence was accepted and considered at face value by the lower federal courts. Rather than denying his *Martinez* claim "by drawing factual inferences against the petitioner," as Terry suggests, the district court and the Fourth Circuit rejected his showing of cause because they refused to infer ineffective assistance of trial counsel on the underlying claim when his proffered evidence showed none.

Instead of being denied the safety of *Martinez*, he was allow to rely on its largesse but failed to demonstrate the underlying claim was "substantial." He is not entitled to more. His contrary position is based solely on hindsight, *contra Strickland v. Washington*, 466 U.S. 668, 689 (1984), and ignores both the strong presumption of reasonable performance and that "[t]here are countless ways to provide effective assistance in any given case." *Id.*

Moreover, Terry has been afforded almost a quarter century to fairly contest his convictions and sentence both in state and federal courts. Finality must be reached at some point. Absent a cert-worthy question and after decades of detailed litigation, as set out above, he fails to show a reason to grant additional review.

I. *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 that favors submission of documents, including affidavits, prior to any

grant of an evidentiary hearing. Terry presented affidavits in support of his position, the district court accepted his affidavits, and both the district court and the Fourth Circuit considered those affidavits in determining that he did not show cause for the default of his claim. He was not automatically entitled to more.

Terry 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. 3), but he argues that the district court simply ignored the strength of his evidence (Petition, pp. 3, 13-14) by drawing inferences against him and in Respondents' favor that were not supported by the record. There is no support for his assertion.

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*," and "also demonstrate[s] that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one" defined as a claim having "some merit." 566 U.S. at 14.[7]

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. *Strickland*, itself, established this fact as to Sixth Amendment ineffective assistance claims. *Strickland*, 466 U.S. at 700 (finding "the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence

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[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 § 2254 habeas review of their South Carolina convictions. *See* App. 28a-29a.

presented at the District Court hearing" and noting "[t]he state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing"). *Martinez* similarly explained that a 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. So, there certainly is no requirement of a hearing for an equitable exception.

Terry's suggestion to the contrary leads to troubling inconsistency and would needlessly expand *Martinez* to ensure hearings in every case, especially every capital case. *Cf. Martinez*, 566 U.S. at 23 (Scalia, J., dissenting). This offends the very essence of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – 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"). Terry's own argument proves the point.

Nearly every capital petitioner suggests on habeas review that trial counsel was ineffective for failure to discover and present "powerful" mitigation evidence that would have turned the tide in sentencing. Terry is no different, claiming his habeas counsel uncovered "a wealth of information" (Petition at 3) that "painted a starkly different picture of Terry's upbringing than what the jury heard at trial." Petition, p. 7. But under *Strickland*, the question is not whether there is more mitigation found later. Instead, the question is whether counsel's investigation was objectively reasonable. *Strickland*, 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"); *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009).

An evidentiary hearing is not categorically required to assess an ineffective assistance claim. *Strickland*, 466 U.S. at 697; *Martinez*, 566 U.S. at 15-16. Consequently, a hearing is not necessarily warranted in a *Martinez* inquiry. *Id.* See also *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 Terry presented. *Terry v. Stirling*, 2019 WL 4723926 at *22 (D.S.C. Jan. 31, 2019). Each court to review the matter made specific reference to those affidavits but found they did not show cause for the default. It is unlikely that a petitioner will "hold back" evidence that would show a substantial claim in hopes of gaining a full evidentiary hearing.

Whether an evidentiary hearing is warranted for factual development remains 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 Terry's new evidence did not show cause to excuse the default, a hearing was not necessary. He shows no error of law or fact to undermine this discretionary ruling.

There are a multitude of cases one may point to for examples of *Martinez* analysis, some with hearings but 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 v. Hobbes*, 766 F.3d 834(8th cir.2014)] (internal quotation marks omitted). And here, for the reasons we have already stated, Deck's claim is.

Deck v. Jennings, 978 F.3d 578, 584 (8th Cir. 2020), *cert. denied, sub nom.*, *Deck v. Blair*, 2021 WL 4508313 (U.S.S.Ct., Oct. 4, 2021).

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*, 2013 WL 593657 at *3 (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 (3rd 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).[8] Simply presenting some new evidence of physical abuse is not enough to show actual deficient performance, especially where the evidence of the most serious specific instance of childhood physical abuse adduced to date was presented at trial, even if trial counsel did not emphasize physical abuse to the same extent that Terry's habeas counsel now asserts with the benefit of unerring hindsight it should have been. See *Austin v. McCotter*, 764 F.2d 1142, 1144 (5th Cir. 1985) ("With the benefit of hindsight and its unerring superb visual acuity, one might suggest that the trial strategy chosen by Austin's appointed counsel left much to be desired. The magistrate and the district court were inclined to preserve this issue for subsequent review. With this we do not agree"). *See also Strickland*, 466 U.S. at 689.

Contrary to Terry's claim, the lower federal courts did not transgress this

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[8] 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, Terry failed to show his claim was substantial.

Court's precedent or the summary judgment standard under Fed. R. Civ. Proc. Rule 56 by drawing inferences in Respondent's favor from Terry's newly presented evidence. Rather, the district court correctly applied this Court's relevant summary judgment precedent. See App. 45a-46a ("The Court will construe all inferences and ambiguities against the movant and in favor of the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The existence of a mere scintilla of evidence in support of the non-moving party's position is insufficient to withstand a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, an issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-movant. *Id.* at 257"). The Fourth Circuit thereafter found no error on de novo review. App. 27a-28a.

Despite Terry's protestations, both courts accepted Terry's evidence presented in federal habeas proceedings as true but simply refused to infer deficient performance under *Strickland*, where this new evidence did not establish any deficiency. This straightforward application of *Strickland* does not support further review. 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).

II. Terry 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 whether he set out a substantial claim that trial counsel was ineffective.

The heart of Terry's argument is that any additional evidence produced in later challenges is *per se* proof of deficient performance by trial counsel. 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 adhered to professional norms in their investigations – in context of the mitigation case presented. In short, both the law and the facts are against him.

A. Mitigation evidence presented by trial counsel.

Knowing they would face a prosecution case revealing a history of violence and criminality and particularly violence towards women, *see supra*, pp. 7-9, *infra*; pp. 32-33, counsel made a constitutionally reasonable investigation for and presentation of evidence in mitigation of punishment, including evidence of physical abuse. *See Strickland*, 466 U.S. at 689-91. Both attorneys met with Terry a number of times before trial. Counsel Stone did not feel that he was getting a lot of good information to help with the case. So, he sent the defense psychiatrist, Dr. Donna Schwartz-Watts, to meet with Terry "numerous times." Terry gave counsel several different factual accounts of the offense and repeatedly complained of headaches. Stone hired "just about every psychologist and psychiatrist that we could get our hands on." JA 932-35, 969-72, 978-79, 1020-21. Stone thought this and organic brain damage were the best defenses in sentencing. JA 978-79.

Counsel Fullwood testified the defense used Massey, a mitigation specialist whom Fullwood had used in the past. Massey met with Terry "on a number of occasions." Though her primary responsibility was to gather background and social history information from Terry, she also spoke to him about anything that he wished to discuss, including the facts of the crime. Counsel relied on the information Terry provided to Massey. JA 1021-23. *Accord Strickland*, 466 U.S. at 691.

To support the theory that Terry had brain damage, counsel retained and presented four experts: clinical neuropsychologist Dr. Robert Deysach (JA 806-26), behavioral neurologist Dr. David Bachman (JA 827-49), forensic psychiatrist Dr. Schwartz-Watts (JA 850-76), and social worker Jan Vogelsang. JA 753-85. These experts testified extensively about Terry's brain damage, Dr. Watts' diagnosis of "organic mental disorder not otherwise specified," and the treatment he was receiving at the time of sentencing.

Social worker Jan Vogelsang interviewed Terry (four times), his wife and sixteen other family members, as well as an ex-wife and a former girlfriend. She also reviewed a litany of records relating to him and his family. JA 765-68.[9] See also *Terry*, App. 16a. "Vogelsang explained the relationship between Terry's upbringing and brain damage." *Id.* Based upon her investigation, she concluded that: (1) Terry

[9] She reviewed roughly four years of Mrs. Terry's diary entries, spanning from when Terry was twelve until his arrest; school records for his immediate family and more distant relatives; DSS records on Lou Ann and Terry; DSS records on his brothers, Billy and Johnny; "records ... or documents on two of Billy's sons; the custody papers for his sister Faye; Terry's corrections records, his priors, and the priors of his two brothers and two uncles; medical records of Terry, his parents and his brothers medical records; mental health records and psychological evaluations of Terry, his sister Faye, his brother Johnny, and two of his nieces; the school psychosocial education evaluations for one son and his daughter Ashley; "the reports of the crime" and crime scene photographs; the SPECT scan report from the radiologist; a statement from Dr. Jim Steele concerning the treatment of Terry's father; marriage and birth certificates; and a portion of Terry's taped statement. JA 766-68.

was born to parents whose own lives and circumstances made it "very difficult for them to parent effectively" and who could, as a result, only provide "the very basic needs for their children;" (2) Terry had "some special developmental needs" and "there were no resources for those and no family members" able to "help the family;" (3) Terry's "environment was neglectful" because the family "had to put all [of] its energy and effort into surviving financially;" (4) because of financial difficulties, the family had "little energy or time left ... to give the children the kind of [necessary] attention, the educational help, [or] the social skills in the forming of family relationships that one would hope to see to produce healthy children;" (5) one side of the family had a pattern of alcohol abuse; (6) there was a pattern of "rather unusual medical problems," and of learning and emotional problems for both his immediate and extended family; and (7) Terry's own "documented history of learning disabilities" and of "attentiveness impulsivity, poor judgment, explosive outbursts and other behavioral indications that later have turned out to be attributable to a medical condition that causes changes in his behavior." With medical intervention, however, Vogelsang opined it "entirely possible that he will be able to restrain himself and adapt to prison life." JA 768-71.

While her sentencing testimony primarily focused on neglect and how Terry's drug use impacted his abnormal brain functioning (JA 771-98), she also testified that Terry, a sibling of smaller stature, was subject to violent encounters within his nuclear family: "his teen-age [brothers] were arrested for beating him up. His parents had them arrested. His dad broke his collarbone with a board." JA 784. Vogelsang said she did not wish to "imply that family violence" was "the kind of pervasive violence you find in a lot of homes where battering takes place"—just that there was "some violence" within the Terry home that caused him to emit "signs and cues that something was terribly wrong" from a very young age. JA 784.[10]

Further, Vogelsang testified both of Terry's older brothers and his sister had all lost custody of their children because they either abused or neglected them, and Vogelsang emphasized the adverse "impact of neglect on children and that ... is one of the keys for children ending up in the criminal justice system." J.A. 783-84.

Terry's parents, Patricia and Bill, testified to hardships the family faced after Bill suffered a debilitating injury. Mrs. Terry testified to an apparent suicide attempt by Terry from sniffing glue, in which he lost consciousness, at age thirteen. St. App. 1875-80. She further testified Terry first left home at fourteen after a fight with a brother. The fight ended when their father broke Terry's collarbone with a flat board. Terry left the house and went to the hospital. JA 692-93. She added that Terry and his brothers "fought a lot" and that he began having "a lot of run-ins with his dad" at twelve or thirteen. JA 688.

She learned that Terry eventually began getting into legal difficulties, of which

[10] Terry implies in footnote 4 that counsel made inconsistent sentencing phase closing arguments. Yet, he takes their closings out of context. Fullwood's focused upon the statutory and other mitigating circumstances that jurors had heard, including Terry's "mental disturbance," his "defective brain," the State's failure to present expert testimony contradicting the defense's evidence of brain damage, and his adaptability to prison. She also asked jurors to think about the impact of sentencing on Terry and his family. JA 894-99. Aware the jury had already heard those points, Stone argued that jurors did not have to base a life sentence on sympathy for Terry because the medical evidence of brain damage supported sparing his life. JA 899-904.

the State had previously introduced evidence. She asked Terry's ex-wife, Tammy, at one point to have Terry "put in a mental institution or somewhere for at least, an evaluation." This intended intervention got "pushed aside" following the incident in which he stabbed the prostitute and then fled to Florida. St. App. 1885-86. She suspected that Terry used drugs and eventually discovered that he and Tammy had been using marijuana. St. App. 1886-87.

Mrs. Terry also described a significant head injury that Terry had incurred while working for a tree company in Florida, an earlier motorcycle accident, and a head injury that he received when struck in the head with a board during yet another fight. St. App. 1887. She claimed that when incarcerated after his return from Florida, he once coughed up blood and was transported to the hospital. Further, she claimed that she had found blood on his bedroom floor and that she had witnessed him coughing blood when he lived with her. St. App. 1888-90. Mrs. Terry testified Terry had problems with his memory and she had seen him stagger after the head injury that he received in Florida. He had received medicine, which temporarily helped with his problems. St. App. 1890.

Lou Ann Terry, Terry's wife at the time of the murder, testified that she and Terry married in 1988 and have four children together. Their children have a loving relationship with Terry and she loves him despite his adultery. Finally, she pleaded with jurors to give Terry a life sentence. App. 1927-31.

B. Terry's new evidence.

In habeas, Terry presented evidence that in a 1996 interview with Terry, Vivian Massey recorded that Terry's father had health problems and a temper, and that Terry's father "beat the s--- out of" Terry "with a belt," and would "slap" and "whip" each of his children with "whatever he could reach when he got mad." JA 55. Her interview stated that on one occasion when Terry was in high school, "daddy hit him across the back with something and broke his shoulder blade. [Terry] remembers being taken to [the] hospital." JA 55; *see also* JA 83 (affidavit of Patricia Terry); JA 90 (affidavit of Faye Servoss). Terry also relayed that "his mother was usually home when all this was going on but she tried to stay out of the way. .... His mother didn't discipline him – she left it up to his daddy." JA 55.

Mrs. Terry averred[11] that her husband, Bill, "was very rough on the children, and on me." JA 82. They married when she was only thirteen and he was twenty-one. Bill was "very strong." JA 82. His children once saw him get angry and punch a hole in the roof of the car. JA 88. He began beating the children at an early age and the abuse got worse as his children got older. He would whip the children "with a belt" or "hit at least one of the children" with his hand almost daily. JA 82, 84. Mrs. Terry also detailed other examples of Bill's physical abuse of the children and his controlling behavior. JA 82-90.

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[11] The state PCR judge found her testimony not credible (JA 1269), rendering her credibility in habeas proceedings inherently suspect. Respondents submit that this finding is supported by the record and Terry cannot overcome the presumption of its correctness. *See* 28 U.S.C. § 2254(e)(1); *see also Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire").

Terry's older sister Faye averred she wore "long-sleeved shirts to school, regardless of the season, to hide the bruises." JA 87. Depending on how angry Bill was, he would beat the children eight to ten times with "a leather and canvas piece of a conveyor belt." JA 82; 87. He would make the children hold his hand during the beatings, asking them, "Do you hate me?" JA 87. Faye averred that her mother "contributed to the violence in the house by antagonizing daddy." She felt their mother took Bill's side when he beat the children. JA 88; 91. Faye also described incidences of her father's physical abuse and cruel behavior. JA 88-91.

Charles Register, Terry's uncle, averred that Bill beat Terry "with a stick" when Terry was six. Register was upset by this "severe beating," and he and his son left. JA 94. Register also averred that Terry's older brothers, who were larger and stronger, would "physically and mentally abuse [Terry]." Rather than stopping the fights, Bill "would allow them to beat one another up, and 'handle it' themselves." JA 95.

Counsel Fullwood, a Lexington County public defender, averred that "[o]ur theory of the case was that Gary Terry's brain was physically abnormal and either caused or substantially contributed to his criminal behavior. Accordingly he should not be killed for a condition that is beyond his control." Mr. "Stone was responsible for most of the scientific aspects of the trial, including the brain abnormality testimony," while she "was responsible for other aspects of the social history, and [she] prepared those witnesses." In ¶ 12, she stated, "I do not recall making any strategic decision to limit the mitigation testimony of Gary's family members or to avoid presentation of evidence that he had suffered significant abuse as a child. It was my intent to present all of the evidence of that nature that we could and all that I was aware of was presented." JA 46-47.

Vogelsang's post-trial affidavit states that in reviewing her notes and speaking to Terry's habeas counsel, she believed that "it is apparent that [Terry] and his siblings suffered significant abuse at home. It would have been typical of me to make this known to the attorneys and to stress the impact of trauma on development." However, she further averred that she did not have any "independent recollection" of talking to Terry's other experts and "only vaguely recall[ed]" the mitigation investigator, Ms. Massey. Indeed, Vogelsang admitted, "I could recall almost nothing about this case." She repeatedly speculated as to why she had no memory and blamed her lack of memory on counsel. JA 77-79.

C. Discussion.

The district court agreed with the magistrate's findings that "trial counsel presented some evidence of [Terry's] childhood abuse, [Terry] has not presented any evidence that trial counsel knew more information about the abuse than was presented and cannot be faulted for their experts' failure to convey that information, and the record suggests counsels' expert did not find the abuse significant at the time." App. 65a. The district court further noted that Terry had not objected to these findings. *Id.* See also *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (Where no objection is made, the Court need " 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation'

") (quoting Fed.R.Civ.P. 72, Advisory Committee note); accord *Thomas v. Arn*, 474 U.S. 140, 150, 154 (1985) (observing "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings" but stating "while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge").

The district court observed that there was "some evidence suggesting that [Terry] and his family informed Vogelsang and Massey that [Terry's] father beat [him] with a belt, beat [him] so hard he would bleed, saw his children as workhorses and would not allow them to play, would tie the children to a tree and have them beat each other." App. 66a. But, the court found Fullwood's affidavit did not support a finding of deficient performance because counsel "did discover relevant information about abuse and counsel intended to present all evidence regarding abuse to the jury." App. 65a-66a. Based on Vogelsang's admission that she "could recall almost nothing about this case," the district court found Vogelsang gave averments inconsistent with her prior testimony, and thus speculated about why she had not included additional evidence of abuse at trial. It concluded, "Her speculation is not enough to overcome contradictory record evidence and create a genuine issue of fact and does not rebut the strong presumption that counsel performed reasonably." App. 67a (citation omitted). The district court further and correctly found that counsel had the right to rely on the experts they retained and that "to the extent that any deficiency exists, it falls to Vogelsang or Massey for not conveying the full extent of Petitioner's abuse to counsel, and not to counsel." App. 66a-67a.

On de novo review, the Fourth Circuit explained that it had recently held that:

> [A] state prisoner satisfies *Martinez* by showing, first, that initial postconviction counsel performed deficiently, under the first prong of *Strickland*, by failing to exhaust the underlying ineffective-assistance-of-trial-counsel claim, but not that said counsel's deficient performance was prejudicial, under the second prong of *Strickland*; and second, that the underlying claim is substantial, or has some merit, with respect to both prongs of *Strickland*.
>
> [*Owens v. Stirling*, 967 F.3d 396, 423 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 2513 (2021)].

29a-30a.

The Fourth Circuit likewise carefully compared the new evidence offered by Terry with the actual mitigation counsel presented at sentencing. The Fourth Circuit accurately characterized counsel's mitigation case as "a coherent mitigation case with a clear theory for why the jury should have voted for life," App, 30a, and "robust." App. 33a. It found it was unnecessary to address whether original PCR counsel were ineffective because the underlying claim of ineffective assistance of trial counsel was "insubstantial under *Martinez*." App. 30a & n. 11. The Court found that trial counsel had "attempted to humanize Terry and presented extensive evidence of his difficult childhood through testimony from his mother, father, and wife." App. 30a. The Court then recounted some of the evidence detailed above, including evidence that Terry's father had broken his collarbone, which the Court observed was "one of the few specific instances of abuse against Terry in which the affiants testify." App. 30a-31a.

The Fourth Circuit likewise observed that:

> Terry's counsel didn't limit their mitigation case to testimony from his family members, however. They also called four experts, all of whom presented unrebutted evidence of Terry's brain damage and its effects on his behavior—particularly his ability to control his impulses and make decisions. Vogelsang, who interviewed multiple family members and also interviewed Terry four times, testified at length to the impact of Terry's neglectful, and at times violent, childhood on his character. Then in closing, Terry's counsel argued that the jury should spare his life, because executing him would inflict unnecessary additional pain and shame on his family, and because Terry's brain damage diminished his responsibility for his violent behavior.

App. 31a.

The Fourth Circuit found that the district court had rejected Terry's ineffective assistance claim for "good reason" because counsel had "discovered and presented evidence of physical abuse." Further, counsel had "intended to present all evidence regarding abuse to the jury. And they don't say now that they knew about the evidence of abuse in the notes prepared by Massey and Vogelsang." App. 32a.

Although counsel Fullwood's file contained Massey's notes of further physical abuse that was not presented, Terry did not present evidence she had read those notes. Also, the Court determined that Vogelsang, the expert, was familiar with her own handwritten notes, "presumably reviewed them and concluded that neglect had a greater impact on Terry's behavior than the abuse of which she was aware." Because "counsel had no reason to believe that Vogelsang's opinion was unfounded or that Vogelsang failed to fully inform them of the circumstances of Terry's childhood," the Court found that "it's not unreasonable or contrary to prevailing professional norms for counsel to rely on a qualified mitigation investigator or other experts" and that counsel could "rely on Vogelsang' expert opinion concerning the causes of Terry's behavior." 33a-34a (citing *Rhode v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998).[12]

Noting that Terry's claim was made from hindsight, *contra Strickland*, 466 U.S. at 689, the Court observed that "[t]he widespread use of the tactic of attacking trial counsel by showing 'what might have been' proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge trial counsel's performance through hindsight." App. 34a (quoting *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc)). *See also Waters*, 46 F.3d at 1514 ("That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel"). The Court also properly concluded that "counsel conducted a reasonable investigation 'and they cannot be held

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[12] Terry asserts that "the most likely inference" from trial counsel's failure to present evidence of abuse that was contained in counsel's file is that "counsel did not look at their own file." Yet, he conveniently ignores counsel's ability to recall why she did not present more evidence of physical abuse may have faded in the almost fifteen years between the 1997 trial and counsel Fullwood's June 27, 2012 affidavit, and that trial counsel could reasonably rely on their experts– Massey and Vogelsang - to develop and present mitigation testimony relating to Terry's background and social history, including evidence of childhood abuse. Indeed, "[i]f an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995).

Terry's contention also ignores that he did not obtain an affidavit from counsel Stone. So, there is no record of what he may recalled of why further evidence of abuse was not presented.

accountable for information Petitioner and his family failed to provide or their experts failed to convey.' " App. 34a (quoting district court).

The Fourth Circuit properly distinguished this Court's decision in *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), 34a-35a, where counsel failed to review a court file and had they done so, they would have seen records that " 'would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts.' " 34a (quoting 545 U.S. at 391). The Court likewise correctly distinguished its own precedent, *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012), and *Abdul-Salaam v. Secretary of Pennsylvania Department of Corrections*, 895 F.3d 254 (3rd Cir. 2018), on which Terry had relied. App. 35a-36a.

Finally, the Fourth Circuit concluded that Terry was not prejudiced by counsel's allegedly deficient performance:

> "The question of whether counsel's deficiency prejudiced the defense centers on whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [*Sigmon v. Stirling*, 956 F.3d 183, 192 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 1094 (2021)] (cleaned up). A showing of prejudice "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). To establish *Strickland* prejudice, Terry must demonstrate "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. In determining whether Terry has shown prejudice, we review the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.
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> Here, the jury heard substantial mitigating evidence—about both Terry's neglectful and somewhat violent childhood and his significant brain damage. Four experts testified (without rebuttal from the state) to the effects of brain damage on Terry's behavior, explaining in detail

how Terry's brain dysfunction limited his ability to control his behavior and how the various aggravating circumstances raised by the state were consistent with Terry's mental impairment. Nevertheless, the jury took a little over an hour to recommend that Terry be sentenced to death.

The reason, in our view, is because the aggravating circumstances of Terry's crimes, and his propensity for violence, were too much to overcome. Before breaking into Jackson's house and murdering her, Terry disconnected Jackson's telephone so that she couldn't call for help. He brutally beat Jackson, likely striking her with two weapons and hitting her head multiple times with a blunt object hard enough to crush her skull. See J.A. 372 (where Dr. Carter opined that Terry used two weapons during his assault on Jackson); *State v. Terry*, 529 S.E.2d at 276 (stating that Jackson's "cause of death was blunt trauma with skull fracture and brain injury"). Terry also raped Jackson. This senseless murder was the culmination of a life littered with crimes and a pattern of violence, particularly toward women.[13] In the face of the state's case in aggravation, we agree with the district court that there's no reasonable probability that Terry's additional evidence of childhood abuse would have led even one juror to conclude that "the balance of aggravating and mitigating circumstances did not warrant death." *Sigmon*, 956 F.3d at 192.

The affidavits from Vogelsang and Schwartz-Watts concerning the effect of Terry's childhood abuse on their analyses confirms our conclusion. Vogelsang doesn't explain how the additional evidence of abuse would have changed her opinion, other than saying that the evidence "could have shed light on why Gary is the way he is." J.A. 79. Dr. Schwartz-Watts explains that, had she known that Terry suffered childhood abuse, she would have opined that the abuse was "mitigating in its own right" and "is also significant with respect to significant brain dysfunction, as the abuse may have actually contributed to the dysfunction." J. A. 102. Schwartz- Watts also states, "Terry had more neurological dysfunction than any patient I have ever evaluated, including those prior to 1997 and since." *Id.* But she doesn't connect this observation to Terry's childhood abuse. And as we have already explained, 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 trial counsel did present. *See, e.g.*, *McHone v. Polk*, 392 F.3d 691, 710 (4th Cir. 2004) (no prejudice from counsel's failure to present evidence that as a child petitioner had witnessed his

[13] The State's sentencing phase evidence is discussed at pp. 6-8, *supra*.

> father "regularly inflict brutal beatings" on his mother and half-sister when counsel had presented evidence that petitioner's father had engaged in "violent fights" with his mother).
>
> In sum, we're not persuaded that Terry's new mitigation theory would have fared any better than the case that was actually presented. Thus, even if counsel's performance was deficient, it wasn't prejudicial under *Strickland* and thus doesn't excuse procedural default under *Martinez.*

App. 37a-39a (opinion footnotes 13 and 14 omitted) (footnote added).

Thus, both the district court and the Fourth Circuit engaged in precisely the detailed comparison that this Court has instructed should be effected and both courts faithfully applied this Court's precedent. Sometimes an unreasonable investigation is more easily identified than others. *See, e.g., Andrus v. Texas*, 140 S.Ct. 1875, 1882-83 (2020) (per curiam) ("counsel performed virtually no investigation" into "the myriad tragic circumstances that marked Andrus' life");[14] *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 to two record sources and counsel failed to adequately investigate social background which included evidence of sexual abuse, mental limitation, and homelessness); *Rompilla, supra.* In other cases, more consideration is required. However, where, as here, there is reasonable investigation, showing

[14] Terry attempts to analogize his case to *Andrus*, asserting that has never had the opportunity to conduct discovery or present testimony on the question of his trial counsel's ineffectiveness." His efforts are, *at best*, disingenuous. The affidavits and other materials he submitted in support of this claim belie the claim he was unable to conduct discovery. His problem is that the discovery he conducted simply does not show the ineffectiveness of trial counsel that he has alleged.

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 Van Hook's "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 counsel was ineffective in not continuing to look because more was to be found: "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"). Here, the absence of prejudice is underscored by trial counsel's presentation of evidence Terry's father hit Terry with a board and broke his collar bone

True, more extensive evidence of abuse in the Terry home would be mitigating. Yet, this additional evidence of abuse does not explain Terry's exceedingly violent behavior—particularly his physically and sexually violent behavior directed towards the victim and other women. On the other hand, the evidence that trial counsel presented at the sentencing hearing offered such an explanation. The fact Terry's current attorneys second-guess counsel's chosen strategy with hindsight, or assert that a different strategy should have been followed does not establish ineffectiveness. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"); *id.* ("[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"); *Richter*, 562 U.S. at 106. The claim was correctly deemed insubstantial.

III. This is a very intensely fact-specific case that was properly resolved by the lower federal courts and will impact few others than Terry.

The foregoing makes unerringly clear that certiorari should be denied because Terry's is an intensely fact-specific case that was properly resolved by the lower federal courts. As such, it will affect few others than him. See *Wetzel v. Lambert*, 565 U.S. 520, 528 (2012) ("We do not normally consider questions of the type presented here, namely, fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (same). *See also Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").

IV. The outcome in Terry's case is not affected by the Court's recent grant of certiorari in *Shinn v. Ramirez*, 141 S.Ct. 2620 (2021) to review the decisions of the Ninth Circuit in *Ramirez v. Ryan* and *Jones v. Shinn* because unlike *Ramirez* and *Jones*, here, the lower federal courts properly determined that Terry had not presented a "substantial" claim of ineffective assistance of trial counsel under *Martinez*. So, he could not be entitled to a hearing on the procedurally defaulted claim.

In *Jones v. Shinn*,[15] the Ninth Circuit rejected the State's argument that § 2254(e)(2) barred the district court "from considering new evidence developed to overcome a procedural default under *Martinez* when considering the merits of the underlying claim." *Id.* at 1220-21. The Court held that "*Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." It found that the Congressional limitations on evidentiary hearings in § 2254(e)(2) were inapplicable to a claim brought under *Martinez*. *Id.* at 1221. Thus, the same evidence that was presented to established cause and prejudice under *Martinez* could be used to establish the merits

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[15] See *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019), 943 F.3d 1211 (9th Cir. 2019), *rehearing and rehearing en banc denied*, 971 F.3d 1133, *cert. granted*, 141 S.Ct. 2620 (2021).

of the underlying ineffective assistance of counsel clam. In *Ramirez v. Ryan,*[16] the Ninth Circuit held that even after the *Martinez* exception had been established by the new evidence, the petitioner could present additional evidence in support of the claim on the merits. The Court in *Ramirez* did not even discuss how the limitations in§ 2254(e)(2) impacted that evidentiary presentation. *See id.* at 1242-51.

This Court recently granted certiorari in *Shinn v. Ramirez,* 141 S.Ct. 2620 (2021), to consider the following question presented by the State of Arizona in those cases:

> Does application of the equitable rule this Court announced in *Martinez v. Ryan* render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief?

Terry asserts that "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." Petition, p. 16 n. 9. But, his contention puts the cart before the horse by ignoring that the petitioners in both *Jones* and *Ramirez* presented "substantial" claims of ineffective assistance by their trial attorneys, whereas here the lower federal courts properly determined that Terry had not presented a "substantial" claim of ineffective assistance of trial counsel under *Martinez.* So, he could not be entitled to a hearing on the procedurally defaulted claim.[17]

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16 *See Ramirez v. Ryan,* 937 F.3d 1230 (9th Cir. 2019), *rehearing and rehearing en banc denied sub nom., Ramirez v. Shinn,* 971 F.3d 1116, *cert. granted,* 141 S.Ct. 2620 (2021).

17 Respondents agree with the arguments advanced by Arizona in *Ramirez,* but submit that the outcome in *Ramirez* will not impact this Court's consideration of this case for the reasons argued in this Brief.

V. Granting a petitioner, such as Terry, an evidentiary hearing to litigate his procedurally defaulted ineffectiveness claim in federal habeas corpus, where his newly-proffered evidence does not demonstrate that the claim is "substantial" under *Martinez*, would needlessly "impose significant costs on the federal courts," "aggravate the harm to federalism that federal habeas review necessarily causes," and frustrate the important need for finality of litigation of his convictions and sentence.

"Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez*, 566 U.S. at 9. The Court in *Davila v. Davis*, 137 S.Ct. 2058, 2070 (2017), explained that "[f]ederal habeas review of state convictions 'entails significant costs,' ... ' 'and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority,' ' " *Id.* (Citations omitted). Also, federal habeas review " 'degrades the prominence of the [State] trial,' *Engle v. Isaac*, 456 U.S. 107, 127 (1982)], and it "disturbs the State's significant interest in repose for concluded litigation [and] denies society the right to punish some admitted offenders,' [*Harrington v. Richter*, 562 U.S. 86, 103 (2011)] (internal quotation marks omitted)." *Davila*, 137 S.Ct. at 2070. Granting Terry an evidentiary hearing to litigate his procedurally defaulted ineffective assistance of trial counsel claim, where the evidence proffered in federal habeas does not reflect that this is a "substantial" claim under *Martinez* would needlessly "impose significant costs on the federal courts" and "aggravate the harm to federalism that federal habeas review necessarily causes."

Further, "the 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). *Id. Teague* added, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' " *Id.* (Citation omitted). See also *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation"); *Ryan v. Schad*, 570 U.S. 521, 525 (2013). "And when a habeas petitioner succeeds in obtaining a new trial, the ' 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time,' ... prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (citation omitted).

The crime in this case occurred Memorial Day weekend of 1994. Terry was convicted and sentenced to death in 1997. Over the ensuing twenty-four years, he has had direct review by the Supreme Court of South Carolina, a state PCR hearing, certiorari review of the order denying PCR relief by the Supreme Court of South Carolina and this Court, and federal habeas review by a magistrate judge, the district court and the Fourth Circuit. Further, after Respondents had made a Return and moved for summary judgment on his habeas claims (ECF #'s 31-32), the magistrate judge granted Terry' previously-filed motion for a stay and abeyance under *Rhines v.*

Weber, 544 U.S. 269 (2005), to exhaust previously-unexhausted claims in a successive state PCR action on December 10, 2012. Over objection, the stay was not lifted until July 13, 2018. JA 115-16.

The present case underscores the correctness of Justice Scalia's prediction 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). *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring) ("There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality").

If the Court's decision in *Martinez* truly is a "narrow" or "limited" exception to the general rule in *Coleman*, *see Martinez*, 566 U.S. at 9; *id.* at 16, as opposed to a mechanism allowing habeas petitioners to end-run the necessity of presenting their claims to the state courts in the first instance, then the need for finality demands an end to Terry's effort to challenge to his state court sentence and the Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

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No. 21-6151

IN THE
SUPREME COURT OF THE UNTED STATES

GARY DUBOSE TERRY,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; and Lydell Chestnut, Deputy Warden of Broad River Correctional Institution Secure Facility,

Respondents.

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

PROOF OF SERVICE

I, **WILLIAM EDGAR SALTER, III**, counsel for the Respondents, certify that I have served the within Brief in Opposition on Petitioner by email and by depositing two (2) copies of the same via Federal Express to his attorneys of record, Elizabeth Franklin-Best, elizabeth@franklinbestlaw.com 2725 Devine Street, Columbia, South Carolina 29205 and Hannah Freedman, hannah@justice360sc.org, and Brendan Van Winkle, brendan@justice360sc.org 900 Elmwood Avenue, Suite 200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

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