No. _____

In the Supreme Court of the United States

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; and LYDELL CHESTNUT, Deputy Warden of Broad River Road Correctional Secure Facility,

Petitioners,

v.

SAMMIE LOUIS STOKES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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**** CAPITAL CASE ****
QUESTION PRESENTED

In his 28 U.S.C. § 2254 action, Stokes raised a defaulted claim. The district court accepted evidence outside the state court record over the State's 28 U.S.C. § 2254(e)(2) objection but ruled only that the claim remained defaulted. Stokes appealed. A divided Fourth Circuit panel excused the default, addressed the merits almost exclusively on the new evidence, and found resentencing was warranted. On May 31, 2022, this Court vacated and remanded "for further consideration" citing *Shinn v. Martinez Ramirez*, 596 U.S ___, 142 S. Ct. 1718, 1734 (2022). On March 22, 2023, over objection, the panel reinstated its prior opinion finding that the State had forfeited the statutory limitation by not raising it in initial appellate briefing. The questions presented are:

I. Did the Fourth Circuit defy this Court's remand instruction and circumvent 28 U.S.C. § 2254(e)(2)'s limitations on federal court authority by finding forfeiture based on the State not having offered the statutory argument as an alternative ground to deny relief on the claim when the State was defending on appeal the district court's sole finding of default?

II. If forfeiture, did the Fourth Circuit err in granting relief on a defaulted ineffective-assistance-of-trial-counsel claim by violating basic principles of *Strickland v. Washington*, 466 U.S. 668 (1984) that require reviewing courts afford deference to reasonable strategy and that the whole of the evidence be considered in a prejudice analysis? *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

STATEMENT OF RELATED PROCEEDINGS

Stokes v. Stirling, 18-6 (United States Court of Appeals for the Fourth Circuit) (opinion filed March 22, 2023, reinstating opinion reversing the district court's judgment).

Stirling v. Stokes, 21-938 (Supreme Court of the United States) (order filed May 31, 2022, vacating Fourth Circuit's August 19, 2021, opinion, "for further consideration in light of *Shinn v. Martinez Ramirez*, 596 U.S. ——, 142 S. Ct. 1718, —— L.Ed.2d —— (2022).").

Stokes v. Stirling, No. 18-6 (United States Court of Appeals for the Fourth Circuit) (order filed September 23, 2021, denying rehearing; opinion filed August 19, 2021, reversing the district court's judgment).

Stokes v. Stirling, No. 1:16-cv-00845-RBH (United Stated District Court for the District of South Carolina)(order filed September 28, 2018, denying habeas relief and denying certificate of appealability; report and recommendation filed May 9, 2018, recommending summary judgment in the State's favor).

Stokes v. South Carolina, Docket No. 15-9329 (Supreme Court of the United States) (order filed December 12, 2016, denying petition for writ of certiorari, postconviction relief action appeal).

Stokes v. State, Appellate Case No. 2013-000635 (Supreme Court of South Carolina)(order filed February 12, 2016, denying petition for writ of

certiorari to review the postconviction relief action order of dismissal).

Stokes v. State, C/A No. 01-CP-38-1240, (Circuit Court of South Carolina, First Judicial Circuit)(order filed February 19, 2013, denying Rule 59 petition; order filed October 22, 2010, denying postconviction relief).

State v. Stokes, Appellate Case No. 1999-013394 (Supreme Court of South Carolina) (order filed July 2, 2001, denying petition for rehearing; opinion filed May 29, 2001, denying relief).

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PETITION FOR WRIT OF CERTIORARI

The Director of the South Carolina Department of Corrections and the Deputy Warden (collectively, the State) respectfully petition for a writ of certiorari to review the Fourth Circuit Court of Appeals Opinion granting capital resentencing.

OPINIONS BELOW

The Fourth Circuit decision after remand from this Court is reported at 64 F.4th 131 (2023). (App. 1). The prior Fourth Circuit decision is reported at 10 F.4th 236 (4th Cir. 2021). (App. 38). The decision of the Federal District Court denying habeas relief may be found at 2018 WL 4678578 (D.S.C. Sept. 28, 2018). (App. 103).

JURISDICTIONAL STATEMENT

The Fourth Circuit Court of Appeals issued its opinion on March 22, 2023. (App. 1). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to counsel as secured by the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

This case also involves a portion of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), as reflected in 28 U.S.C. § 2254(e)(2):

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> …
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

INTRODUCTION

On remand, this Court directed the Fourth Circuit to consider this case in light of *Shinn v.*

Martinez Ramirez, 596 U.S. ___, 142 S. Ct. 1718 (2022). It did not. Instead, the majority crafted a forfeiture analysis based on a failure to offer the statutory limitation as an alternate ground to deny relief on a claim that the district court found defaulted. Essentially, the majority faults the State for prevailing in the district court on the procedural default and defending that ruling. The Fourth Circuit majority did not attempt to reconcile use of the new federal evidence to support the underlying claim with § 2254(e)(2)'s limitation on its authority. The reason, as the dissent points out, is clear: it could not. If the limitation is honored, the majority would be constrained to admit the unredeemable error in its reinstated opinion.

The Fourth Circuit majority opinion shockingly defies this Court's remand instruction and the statutory limitation, especially since the majority's forfeiture analysis is simply wrong. The majority opinion indulges in the type of federal court overreach that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) strove to eliminate. To flout AEDPA restrictions is egregious error enough, but to do so after this Court's instruction to consider a specific restriction is indefensible. The opinion cannot stand.

STATEMENT OF THE CASE

A. Facts of the Crimes

Stokes, while serving a prison sentence, accepted a contract to kill Connie Snipes. When released he did just that. Several days later, Stokes murdered Doug Ferguson. He confessed to both murders in a letter. (App. 160). The grisly facts were summarized in the direct appeal opinion:

> Stokes was hired by Patti Syphrette to kill her daughter-in-law, 21–year–old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30 pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin. The four of them then drove down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead ..."
>
> According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her

> nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head, and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.

State v. Stokes, 548 S.E.2d 202, 203 (S.C. 2001) (footnotes omitted). Stokes murdered Doug Ferguson "by wrapping duct tape around his body and head, suffocating him." *Id.,* at 204.

B. Trial Proceedings and Direct Appeal

South Carolina instituted capital case proceedings for the Snipes murder and the jury deemed death to be the appropriate sentence for Stokes. Stokes would later receive a life sentence after pleading guilty to Mr. Ferguson's murder.

As to the Snipes murder, Stokes was tried by a jury October 25 - 29, 1999, with sentencing held October 30-31, 1999. During the guilt phase, counsel argued that Stokes had shown remorse and admitted his involvement, but that his accomplice, Norris Martin, was a more major participant than Martin would admit. Counsel asserted: "on the one hand you've got one statement that's been shown to you by Sammie Stokes and you know we've talked about five stories that you have been told by Norris Martin." (J.A. 952). He argued that Martin fired the fatal shot to the back of the head. (J.A. 955-57). The jury

returned guilty verdicts on criminal conspiracy, kidnapping, criminal sexual conduct first degree, and murder. (J.A. 990-91).

The defense was prepared to present a mitigation case centered around Stokes's AIDS diagnosis that had, at the time of trial, advanced and ravaged Stokes' body; however, Stokes, on the eve of sentencing, prohibited counsel from presenting a case based on his "medical condition." (J.A. 998-99; App. 79).

During the sentencing phase, the State presented Stokes's prior violence and prison history and the details of both the Snipes murder and the Ferguson murder. Defense counsel presented a former warden who testified Stokes could be managed in prison "for the remainder of his life without causing undue risk or harm to other inmates, staff or the general community." (J.A. 1310). Additionally, Stokes, in his personal statement to the jury, accepted responsibility and expressed remorse, asserting that he was "deeply sorry that any of it ever happened and" asked for the jury to "forgive […him…] for the role that […he…] played in this …." (J.A. 1375-76). Consistent with Stokes's statement, defense counsel argued for a life sentence noting Stokes's remorse, his confession, and again cast doubt on Martin's credibility, inferring greater involvement by Martin. (J.A. 1376-83).

The judge instructed the jury that to be able to consider a death sentence, they must first find that the State proved, beyond a reasonable doubt, at least one statutory aggravating circumstance. (J.A. 1389-93, 1395). Here, while the trial judge instructed the jury

on six, the jury returned four: (1) the murder was committed while in the commission of criminal sexual conduct; (2) the murder was committed while in the commission of kidnapping; (3) the defendant committed the murder for himself or another for the purpose of receiving money or a thing of monetary value; (4) the defendant caused or directed another to commit murder or committed the murder as an agent or employee of another person. (J.A. 1406-07).[1] The jury did not return: "Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of action" and "The murder of Connie Lee Snipes was committed while in the commission of physical torture." (J.A. 1390). After deliberating over three hours, (J.A. 1404-06), the jury found death was warranted. The convictions and sentence were affirmed on direct appeal. *State v. Stokes*, *supra.*

C. State Post-Conviction Relief Action

In capital postconviction relief proceedings, South Carolina requires heightened counsel qualification requirements and the appointment of two attorneys. See *Robertson v. State*, 795 S.E.2d 29,

[1] The jury was correctly charged that under state law, the finding of statutory aggravating circumstances only established eligibility, *i.e.,* allowed them to consider a death sentence. (J.A. 1393, 1395). As this Court has already determined, in selecting the penalty, *i.e.,* whether a sentence of life or death is appropriate, the eligibility findings on statutory aggravating circumstances do not limit consideration of the evidence presented. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994)("the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances").

36 (S.C. 2016) ("Simply stated, at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education."). Attorneys Keir Weyble and Robert Lominack met those requirements and were appointed. Counsel alleged, among other claims, that the trial attorneys were deficient in their investigation and presentation of mitigation, (App. 150; J.A. 1495), but withdrew this allegation in an amended application, (App. 150-53; J.A. 1553). After litigation on the remaining claims, relief was denied. A petition for appellate review was denied.

D. Federal Procedural History

In his 28 U.S.C. § 2254 action, a new team of attorneys asserted the ineffective-assistance-of-trial-counsel/mitigation claim again and alleged that postconviction counsel should not have withdrawn the claim. Specifically, Stokes alleged that evidence of his disadvantaged background should have been presented to the jury. (App. 146). Notably, in making this assertion, Stokes asserted *both* trial and postconviction relief counsel found "copious evidence" outlining Stokes's background. (App. 155). To avoid the admitted default, Stokes relied on *Martinez v. Ryan*, 566 U.S. 1 (2012), which provides that postconviction counsel's deficient performance and the resulting prejudice in failing to assert a substantial ineffective-assistance-of-trial-counsel claim may serve as cause to excuse the default.

Though the State objected to receipt of new evidence to support the claim pursuant to 28 U.S.C.

§ 2254(e)(2), (App. 31-32), the magistrate held a hearing to gather facts to report to the district court. (See App. 140, 149). After review of the report, which recommended summary judgment in the State's favor, and the record, the district court found that the claim was defaulted and would not be excused. (App. 149-50, 163). In determining whether the defaulted claim was "substantial," (see App. 143, 163), the district court considered the evidence as a whole pursuant to *Wong v. Belmontes,* 558 U.S. 15 (2009). The district court found that "[t]he aggravating evidence in this case was overwhelming," and, even in light of the trial presentation and the background trauma evidence presented in habeas, there was no reasonable probability of a different result. (App. 162-63). The court concluded:

> Simply put, all the mitigating evidence does not outweigh all the aggravating evidence presented at trial, and Petitioner has not shown a reasonable probability that at least one juror would have voted against the death penalty had it heard the additional mitigating evidence in question. Because Petitioner fails to show *Strickland* prejudice, his underlying claim of ineffective assistance of trial counsel is not substantial and thus is procedurally defaulted. *See*

> *Martinez*, 566 U.S. at 14. The Court denies relief on Ground Six.

(App. 163).

The district court also denied a certificate of appealability, (App. 175), but the Fourth Circuit granted a certificate on all claims in Stokes's initial brief, which included the defaulted mitigation claim, (USCA Appeal 18-6, 4 Doc. 45).

After briefing and argument, in a divided opinion, the Fourth Circuit rejected the district court findings and found postconviction counsel was deficient for not pursing the claim. The majority concluded that counsel's testimony that they were inexperienced and either wrong or "lazy" in not doing more rebutted the district court's conclusion of a strategic withdrawal of the claim. (App. 58-63). The majority then considered whether trial counsel was ineffective based mostly on the new evidence. In its prejudice analysis, contrary to the district court, the majority extracted from the calculus the second murder and full circumstances of the capital case murder. (App. 35-36). Further, the majority did not consider any negative impact the newly offered evidence would have had, specifically, the evidence of Stokes's longtime dominance and abuse of Martin which would contradict the theory Martin was more culpable and the actual killer. It then resolved that confidence in the result was undermined because the newly presented evidence "could be enough to sway one juror" even in light of a highly aggravated case. (App.73). The majority found resentencing was warranted.

Judge Quattlebaum dissented and concluded that the majority failed to afford deference to counsel's informed strategic decisions. (App. 77-79). He noted the negatives to consider, specifically that "[t]he witnesses who would, if asked, be able to provide mitigating evidence, also had information that was damaging to [trial counsel's] strategy of portraying Martin as the main culprit." (App. 79-81). The dissent agreed with the district court that Stokes had failed to show deficient performance by postconviction counsel noting in counsel's "own words, they 'made some sort of judgment, explicit or implicit' in deciding" to withdraw what they considered "at the time" to be the "weaker" claim. (App. 97). The dissent highlighted that postconviction counsel were "experienced death penalty lawyers" trained in considering mitigation evidence. (App. 98).

The dissent also took issue with the majority's reasoning based on speculative impact on "one juror." (App. 101). While acknowledging one juror could make a difference, the dissent asserted "that does not mean we compromise our objective analysis or decline to view the evidence 'taken as a whole'" lest "we water down the prejudice analysis to something akin to anything is possible." (App. 101).

On petition for rehearing, the State again defended the district court's resolution that the claim was defaulted and reasserted, as it had in the district court before, that Section 2254(e)(2) barred a federal court from relying on the new evidence to grant relief on the underlying claim; then, after denial of its petition, raised the argument to this Court. (App. 9, 33). As noted previously, this Court granted the

State's petition and remanded for consideration of *Shinn*. The Fourth Circuit then requested additional briefing as follows:

> First, given that the state did not raise the same argument that was raised and decided in *Shinn*, did the state waive the 28 U.S.C. § 2254(e)(2) issue, and, if so, is there a reason to forgive the waiver? Second, what issues, apart from waiver, should be considered in weighing the impact of *Shinn* on *Stokes*? The parties should bring to the court's attention any relevant issues for consideration of the effect of *Shinn* on *Stokes*.

(USCA4 Appeal 18-6, Doc. 100).

After briefing and argument, noting that "a party may 'waive' an issue only" by failing to initially raise it "in the district court," the majority resolved that "the State did not irrevocably waive the § 2254(e)(2) argument on appeal." (App. 20-21). However, it found the State had "abandoned" the argument after the hearing and magistrate's report and forfeited the argument by not pressing the argument in initial appellate briefing. (App. 21). Further, it resolved it would be a "perverse result" to excuse forfeiture and "transform a 'difficult' task for Stokes" to obtain relief from a federal habeas court "into a Sisyphean one." (App. 25). The majority acknowledged by footnote the State's arguments submitting deficiencies in the original opinion, but did

not specifically address them, then reinstated the original opinion vacated by this Court. (App. 26).

Judge Quattlebaum dissented finding "[t]here is simply no way to square the opinion the majority reinstates with *Shinn*." (App. 30). See also (App. 27, "Stokes' petition and the opinion the majority reinstates today are inescapably at odds with *Shinn*."). The dissent found that "the State preserved the § 2254(e)(2) issue in the district court," and recognized that the district court granted summary judgment in the State's favor. (App. 32). Further, noting the significant difference between the burdens on an appellant compared to an appellee (the party who "won below"), the dissent reasoned while the State could have raised an alternate ground for affirmance, as an appellee, it was not obligated to do so to avoid a forfeiture. (App. 33). The dissent found that "every time the State bore the burden of showing error, it raised § 2254(e)(2)," consequently, there was no basis to find forfeiture. (App. 33). Alternatively, the dissent continued, if the argument had been forfeited, the dissent would excuse it considering four discrete factors.

First, the dissent would follow this Court's treatment of the issue in *Shinn*. (App. 35). In *Shinn,* this Court found any forfeiture in the district court should be excused to prevent additional "litigation in [a] decades old murder case[]." (App. 36). The dissent reasoned that the Fourth Circuit "should hesitate to chart a path so at odds with the one traversed by" this Court. (App. 36).

Second, considering that §2254(e)(2) is not discretionary, but "limits the power of federal courts," the dissent reasoned that "exercising our discretion so that our decision does not extend beyond the limits Congress placed on federal courts is appropriate." (App. 36).

Third, the dissent recognized that the majority's use of the new evidence in a merits analysis in the reinstated opinion "is directly foreclosed by the … holding in *Shinn*." (App. 36). The dissent cautioned that "any frustration with the State not raising the" statutory limitation "sooner should not cause us to issue an opinion inconsistent with current Supreme Court law." (App. 36).

Fourth, the dissent took the majority to task for relying on a premise that excusing forfeiture "would allow an unconstitutional sentence to stand" when the majority had no authority under the law to consider the new evidence for a merits analysis of Stokes's claim. (App. 36). Further, the dissent countered, the court need not deny the petition but could remand to the district court to consider the allegations within the confines of the state court record. (App. 36). The dissent concluded:

> The decision we reinstate today could not possibly stand under *Shinn*. It is based on evidence that § 2254(e)(2) precludes federal courts from developing and considering. *Shinn* requires that we remand the case to the district court for

> consideration of Stokes' petition based solely on the state court record.

(App. 37).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit majority, by failing to honor the limitations in 28 U.S.C. § 2254(e)(2), reinstated an opinion that is legally infirm. The merits analysis reflects profound legal errors in finding prejudice and deficient performance, made possible only by considering improper evidence, discarding record evidence, and diluting the burden of proof. To reinstate the opinion this Court previously vacated, the majority crafted a forfeiture analysis that simply ignores the ruling on appeal and mischaracterizes the State's argument to free itself from the statutory limitation to grant relief that could not stand with proper application of the statute. The majority's actions are directly contrary to this Court's remand instruction; to AEDPA's intentional limitation on the authority of federal courts sitting in habeas; to *Strickland* and its progeny; and, tread heavily, without just cause, on the sovereign right of the State to address criminal matters. The errors being so plain, the State submits that summary reversal is warranted.

I. The majority's conclusion that it was free to disregard 28 U.S.C. § 2254(e)(2) limitations and consider improperly received new evidence from the district court proceedings for a merits ruling was based on a factually and legally unsupported theory of forfeiture.

A. The State defended the only ruling available for appeal, the finding that the mitigation claim was procedural defaulted.

The majority's reasoning that the State forfeited the § 2254 alternative ground for affirmance rests on two fronts: one, that the State "abandoned" the argument after the magistrate's report, and two, that the State not only failed to raise the argument in appellate briefing, but also referenced evidence from the *Martinez* hearing evidence in defending the district court's decision. (See App. 23). But the majority misses a key point – the district court *did not excuse the default.* There was no ruling from the district court on the merits. Because *Martinez* requires a look at the underlying merits to consider if the claim is "substantial," (see App. 142-43), it should be unsurprising that the State referenced evidence that shows why the default was not excused. In fact, under existing precedent, having found default, a merits analysis was not allowed. See, *e.g.*, *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012) ("federal court ordinarily may not consider claims that a petitioner failed to raise at the time and in the manner required under state law" absent showing cause and prejudice or actual innocence).

To the extent that the majority relied on abandonment at the time of the magistrate's report, that point is faulty. It would require finding abandonment from alternative proposed findings which still resulted in recommendation of summary judgment. That exemplifies the strain of the majority's ruling. The district court plainly set out the magistrate's recommendation was to find the claim procedurally defaulted, though she additionally reported that, even so, the underlying claim lacked merit. (App. 149). See 28 U.S.C. § 636(b)(1)(B) (allowing magistrate to gather facts and report to the district court). The district court, though, did not excuse the default and address the merits. (App. 163). That is the only ruling that could be appealed. And, on appeal, the State merely argued in support of the district court's ruling that Stokes failed to show cause and prejudice.

Again showing the strain in the majority's position, it only vaguely referenced the State's arguments. Yet even a cursory review of the actual argument presented defeats the majority's offered point. For example, the State submitted in its first argument heading, upfront and plainly, that it was defending the finding of default:

> Stokes Has Not Shown Cause To Excuse His Procedural Default Under *Martinez v. Ryan* Because The Two Underlying Claims of Ineffective Assistance of Counsel Are Not Substantial And Post-Conviction Counsel's Strategic Decision Not To Raise Them Was Reasonable.

(State's Brief, p. 28.). That is the position consistently referenced in the brief. See State's Brief, p. 30, "[e]ven if a petitioner can prove deficient performance of trial counsel, he must still establish prejudice for the claim to be substantial"). The State's argument is not fairly read as inviting the majority to rely on the new evidence in resolving the claim on the merits. In fact, the Fourth Circuit has done exactly the same, considering new evidence in evaluating a ruling on failing to excuse a default. See *Sigmon v. Stirling*, 956 F.3d 183, 199-201 (4th Cir. 2020), *as amended* (Apr. 15, 2020) (finding claim not substantial and "the district court did not abuse its discretion by considering the [new] affidavits"). Reference to one is not a concession to the other. The majority is simply wrong. Moreover, the majority's assumption that the new evidence, once received, is available for both a default and merits analysis was expressly rejected in *Shinn.*

B. Directly contrary to *Shinn,* the majority assumed evidence adduced in support of cause and prejudice to excuse default may be considered in support of the underlying claim.

In *Shinn*, this Court considered an argument posited that if evidence is offered in a hearing only for cause and prejudice, the federal court could then use the evidence in evaluation of the underlying claim without ever holding a prohibited hearing "on the claim." 142 S. Ct. at 1738. This Court, while not expressly ruling on the "first point," resolved it would not countenance that sort of "end-run around the statute." *Id.* The Court announced expressly that

"when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied." *Id.*

Had the majority considered *Shinn* as directed by this Court, its seeming frustration over finding its former "review of the federal-court record was a waste of time," respectfully, could only be fairly attributed to its own improper treatment of the new evidence, and a function of the express statutory limitation on a federal court's authority.[2] Again, *Shinn*, could have guided the majority if it had considered this Court's precedent. This Court considered in *Shinn* the potential frustration of "*Martinez* hearings" becoming "a nullity" with "no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits." *Id.* However, though it "agree[d] that any such *Martinez* hearing would serve no purpose," this Court resolved "that is a reason to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside." *Id.,* at 1738-39. Though the restriction surely chafes a federal court with a mind to reverse, the statute must still be followed.

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[2] Recall that the State, after affording Stokes qualified, well-funded counsel and extensive time (many years, in fact) to make his challenges in state court, was forced into an extended federal court hearing over its objection, prevailed there, then defended the district court's default ruling on appeal.

C. The majority's failure to acknowledge that the default ruling was the only available ruling for appeal also taints its further analysis of the duties of an appellee and offer of additional grounds to affirm.

The majority also confuses an appellant's obligation to address all errors with an appellee's responsibility to defend the judgment below and also incorrectly meshes waiver at the district court level with failure to brief an alternative ground for affirmance. It is simply inescapable that an appellee comes to the court of appeals in a different position than an appellant. An appellee has won below and wishes "to maintain the status quo." (App. 33). The dissent catalogues cases from the Second, Third, Sixth, Tenth and Federal Circuit, while noting the Eleventh appears to favor finding an unraised alternate ground abandoned. (App. 34). However, even that Eleventh Circuit case, while true it states a general principle to hold an appellee to certain obligations, does not fairly match this case's factual context, or, for that matter, *Shinn*.

In the cited case, the Eleventh Circuit found that an appellee abandoned a defense that was *rejected* by the district court *and* not properly briefed. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) ("Southland's brief mentions the ministerial exception only once" noting "the district court … determined that the ministerial exception did not apply in this case"). That resolution is not so far from the logic of other circuits considering

that an appellate court may affirm on any ground appearing in the record but treating reversal as different. See *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) ("we treat arguments for *affirming* the district court differently than arguments for *reversing* it"). But more to the point and contrary to the majority's view, even the Fourth Circuit's own published and controlling precedent supports that a court of appeals may affirm on any argument "appearing in the record" even on "*theories not relied upon or rejected by the district court*." *United States v. McHan*, 386 F.3d 620, 622–23 (4th Cir. 2004) (emphasis added). The preference to affirm should be particularly heightened in federal habeas review of state criminal matters out of respect for an equal sovereign. *Cf. Day v. McDonough*, 547 U.S. 198, 202 (2006) (recognizing "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment" but allowing federal courts to *sua sponte* dismiss as untimely noting "a statute designed to impose a tight time constraint on federal habeas petitioners"); *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir.1990) ("failure to respond to claims in a petition for habeas corpus does not entitle the petitioner to a default judgment").

Moreover, the State's argument in the district court was not the evidence could not be received to consider cause and prejudice to excuse the default but that it could not be received in support of the claim. This was consistent with district court precedent. See *Fielder v. Stevenson*, No. 2:12-CV-00412-JMC, 2013 WL 593657, at *4 (D.S.C. Feb. 14, 2013) ("the usual bars to hearing evidence not presented in state court

may not be applicable insofar as the claims relate specifically to the PCR attorney's ineffectiveness"); *Terry v. Stirling*, No. 4:12-CV-1798-RMG-TER, 2019 WL 4723926, at *22 (D.S.C. Jan. 31, 2019), *report and recommendation adopted*, No. CV 4:12-1798-RMG, 2019 WL 4723345 (D.S.C. Sept. 26, 2019), *aff'd,* 854 F. App'x 475 (4th Cir. 2021) ("the court should consider the [new] exhibits for the sole purpose of examining cause for and prejudice resulting from the procedural default"). Though that precedent is not directly inconsistent with *Shinn,* neither does it need to be addressed here because *Shinn* makes clear the evidence should not be received at all when it cannot be used in support of the claim. 142 S. Ct. at 1738. Again, the district court did not misuse the evidence, only the Fourth Circuit majority misused the evidence to support the claim. The district court found Stokes failed to show the default should be excused. That was the ruling Stokes appealed. The State properly defended that ruling. The majority's forfeiture analysis lacks factual and legal support.

For similar reasons, the majority's view that raising the § 2254(e)(2) argument on rehearing was insufficient to avoid forfeiture similarly lacks supports. For the majority's theory to work, the error had to be in the district court on a merits review. The only ruling, though, was on default. The dissent's counter-position that the State properly addressed the issue at the first time it was necessary to do so, *i.e.,* when it bore the burden, is perfectly consistent with this Court's precedent. The Fourth Circuit was the first court to rely on the new evidence for an improper merits ruling. See *Holland v. Jackson*, 542 U.S. 649,

653 n. 1 (2004) (summarily rejecting argument that an issue was not properly preserved when first erroneous use of evidence occurred in the court of appeals).

But even if there was forfeiture, the majority erred by finding that it should not be excused. The court has the "'inherent authority to consider and decide pertinent matters that otherwise may be ignored as abandoned or waived.'" (App. 35) (dissent, quoting *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013)). The majority had a good guide in *Shinn.*

D. The majority wrongly concludes excuse of forfeiture, if any, in AEDPA review leads to a "perverse result" making obtaining relief more difficult.

In *Shinn,* inmate Ramirez asserted that the state had forfeited its § 2254(e)(2) argument by not "object[ing] to some evidentiary development in the District Court or before the Ninth Circuit panel." 142 S. Ct. at 1730 n.1. Immediately different, of course, is that the State here did object in district court to receipt of new evidence in support of the claim. Even so, this Court observed that it had "discretion to forgive any forfeiture," and chose to do so "because 'our deciding the matter now will reduce the likelihood of further litigation' in a 30-year-old murder case…". *Id.* The same holds true in this case, which has been in

litigation for over two decades, since 1999.[3] Directly contrary to the majority's view, forgiveness in those circumstances in *Shinn* did not produce a "perverse result," (see App. 25), and certainly could not do so here in circumstances even less amenable to a finding of forfeiture.

Further, the dissent correctly highlights, consistent with *Shinn,* a very important consideration that appears absent from the majority opinion: "§ 2254(e)(2) does not involve a discretionary decision or claims processing issue. *It limits the power of federal courts.*" (App. 36) (emphasis added). The majority's error is so fundamental – so contrary to AEDPA review – that even if the State had not objected in district court at all, the court of appeals should consider such an express limitation on its authority to act. See *Williams v. Norris*, 576 F.3d 850, 860 (8th Cir. 2009) (where district court granted relief upon improperly received evidence, reasoning: "Even if the State had not objected, we would exercise our discretion to review the district court's non-compliance with § 2254(e)(2)."). When Congress supplies a constitutionally valid rule of decision, federal courts must follow it." *Brown v. Davenport*, 596 U.S. ___, 142 S. Ct. 1510, 1520 (2022). The majority's finding of forfeiture, or failure to excuse any forfeiture, results in reinstating a decision granting habeas relief that is directly foreclosed by *Shinn*. In turn, this has led to an illogical result of allowing

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[3] Relatedly, as the dissent also observed, this Court vacated and remanded over Stokes's "objections that the State had forfeited the § 2254(e)(2) issue." (App. 35-36).

Stokes to escape the express limitation and enable him to upset a state sentence of death determined by a jury of his peers *over two decades ago* on evidence *that he failed to timely present* and that a federal court has *no authority* to receive. According to this Court, that is unacceptable, even when a timely objection is not made in district court. *Shinn*, 142 S. Ct. at 1730 n. 1.

The majority also tries to clothe its decision in a misguided conception of "justice and fairness" reasoning it had previously decided *on improper evidence* and *contrary to the district court* that the sentencing is unconstitutional. (App. 25). The majority cannot explain how excusing Stokes's being at fault[4] in failing to factually develop the issue in state court, and unable to meet the exceptions in § 2254(e)(2) is consistent with justice and fairness. The majority fails to acknowledge that the limitations in § 2254(e)(2) apply only because "the prisoner fail[ed]" to develop a factual basis for the claim, thus "contributing to the absence of a full and fair adjudication in state court…" *Williams v. Taylor*, 529 U.S. 420, 437 (2000). "The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992).

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[4] The majority reasons Stokes was not "at fault" in failing to exhaust his claim in state court. (App. 25). Presumably, it means postconviction counsel was ineffective. But this Court has already found that matters not as to factual development. *Shinn*, 142 S. Ct. at 1737.

Rejecting this Court's direct guidance in *Shinn* as to federal hearings, the majority mistakenly relies on *Day v. McDonough*, (App. 21), to supply a basis for its action, but *Day* is not helpful. In *Day*, this Court held "that district courts are permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition." 547 U.S. at 209. It speaks neither to § 2254(e)(2), or preservation of an error first appearing at the appellate level, or forfeiture. Rather, *Day* references "threshold constraints" such as exhaustion, procedural default or questions on retroactive application, not statutory restrictions on federal authority. *Id.*, at 210. And, apart from the obvious flaw that such an "exception" endangers the very existence of the statutory limitation on federal courts, *Day* did not establish such an exception to the statute. Rather, this Court *allowed* district courts to *sua sponte enforce* the statute of limitations provided the petitioner would have the opportunity to argue against enforcement. *Id.,* at 210.[5] *See also Wood v. Milyard,* 566 U.S. 463, 473 (2012) (extending same to appeals). In contrast to the "threshold constraints on federal habeas petitioners" referenced in *Day*, 547 U.S., at 210, § 2254 is a limitation *on federal courts*. Like § 2254(d), it is part of the structure of review, not a defense. *Accord Gardner v. Galetka,* 568 F.3d 862, 879 (10th Cir. 2009) ("We agree with our sibling circuits that the correct standard of review under AEDPA is not waivable. It

[5] The record shows that Stokes had notice of the kind contemplated in *Day*. The State repeatedly objected and moved to strike evidence outside the record offered in support of the claim. (App. 31). Stokes had an opportunity to respond.

is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case."). Nothing in the text of § 2254(e)(2) suggests anything other than restraint on a federal court.

In sum, the majority's complaint is truly with AEDPA limits on federal court authority, not forfeiture. Its decision should be summarily reversed.

II. The reinstated majority opinion reflects such extraordinary departure from this Court's clearly established precedent for *Strickland* analysis that the Court should grant the petition to exercise its supervisory power and reverse the grievously erroneous decision.

A. The majority failed to consider the whole of the record before disagreeing with the district court's conclusion that postconviction relief counsel, after thorough investigation, strategically withdrew the claim thus was not deficient under *Strickland*.

Postconviction counsel's decision not to pursue the mitigation claim was intentional and reasonable. In disregarding reasonable strategy, the majority "misapplied *Strickland* and overlooked 'the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions.'" *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland,* 466 U.S. at 689). The majority failed to consider the solid record support

demonstrating counsel's intentional, strategic decision.

The district court concluded postconviction counsel made an intentional decision to withdraw the claim after reinvestigating Stokes's background. (App. 147-50).[6] While the majority criticized the district court's reference to postconviction counsel "fall[ing] on their sword for their former client," (App. 61 n. 6), that was not only a reasonable observation based on competing direct and cross-examination responses, but the district court's evaluation was also much fuller, and compared contemporaneous, record-based evidence to counsel's testimony.

For instance, postconviction counsel retained the claim in their first amended application in 2002, investigated, then withdrew the claim by another amendment in 2004. (App. 147-48). Further, after the withdrawal, postconviction counsel wrote to trial counsel specifically asserting that there were no ineffective assistance claims raised against them. (App. 148, 150). As the district court properly found, investigation, withdrawal, and the letter to counsel, together show good evidence of a strategic decision, and the district court also found counsel's testimony

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[6] Curiously, though the majority wished to rely on new evidence, it did not give the required deference due district court factfinding. Those fact-findings were not made in clear error and should control. See Rule 52(a)(6), Fed.R.Civ.P.; *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("the parties … have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much").

on cross-examination that if the mitigation claim was a "strong" one, he would have "presented it," was credible. (App. 150). That likewise supported an intentional selection of issues after investigation. (App. 150).

Further, the majority failed to acknowledge the danger in pursuing the claim. The federal record showed what postconviction counsel had discovered, specifically, evidence that Stokes had dominated, used, and physically and sexually abused Martin for years. Trial counsel did not want that dominance to come out, neither did postconviction counsel. As the dissent correctly noted, postconviction counsel's investigation not only confirmed the prior research for trial, it *showed even more evidence detrimental to shifting blame to Martin*. (App. 96). Further, trial counsel considered the evidence of little benefit in their particular case, with their particular jury. (App. 90-91). The fact that the majority fails to acknowledge that which is inconsistent with its reasoning and asserts generalized disagreement with counsel makes its conclusion specious.

The dissent was also correct when it challenged the majority's response to a suggestion that the evidence may be harmful was simply to state that counsel was obliged to "find a way" to make it beneficial – a "remarkabl[e]" assertion given that "[e]ven if presented in the best way by the most capable of lawyers, it seems far from unreasonable for [trial counsel] to be concerned that the jury would not accept" the mitigation as being offered as a mere "excuse" for the criminal conduct. (App. 92). *See Pinholster,* 563 U.S. at 197 (rejecting "infatuation with

'humanizing' the defendant as the be-all and end-all of mitigation" since it "disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it.") (quoting *Pinholster v. Ayers,* 590 F.3d 651, 692 (2009) (Kozinski, C.J., dissenting)).[7]

And, of note, it was after investigation that trial counsel resolved to "emphasize Stokes' remorse and highlight the conduct and motivation of Norris Martin, who participated in the murder with Stokes, with the hope that the jury would view him as 'the bad guy.' " (App. 79). The investigation, though, "revealed risks" that would be detrimental to that defense "of portraying Martin as the main culprit." (App. 81). Faced with that knowledge, and having uncovered even more detrimental evidence, postconviction counsel demonstrated reasonable strategy in withdrawing the claim. The majority failed to apply the deference that proper application of *Strickland* warrants.

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[7] The majority concludes the trial attorneys were inexperienced in mitigation, failed to consult with "experience attorneys or mitigation experts," and conducted only a "shallow investigation." (App. 65, 69). A finding of a "shallow" effort is blatantly contrary to Stokes's assertion in district court that "the files of both trial and PCR counsel 'contain copious evidence, in the form of interviews and records' " on background evidence. (App. 155). Further, trial counsel were experienced attorneys, (App. 89-90), and, in preparing for trial, had consulted with experts for medical and background assessments, interviewed witnesses, and retained a jury consultant, (App. 79-81). As the dissent cautioned, in hindsight, "one could argue that counsel could have done more" but finding error on such does not follow *Strickland.* (App. 95).

B. The majority failed to consider the whole of the record before disagreeing with the district court's conclusion that even with the proposed new evidence considered, there was not a reasonable probability of a different result to establish *Strickland* prejudice.

To determine prejudice from the omission of mitigation evidence, this Court has long required a reweighing of the totality of the evidence, both the evidence from trial and from the collateral proceedings. *Strickland*, 466 U.S. at 697. Specifically, "[i]n the capital sentencing context, the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Shinn v. Kayer*, 592 U.S. ____, 141 S. Ct. 517, 522–23 (2020) (*per curiam*). The "balance" is defined as "*all* the relevant evidence that the jury would have had before it" including consideration of any negative "evidence that almost certainly would have come in with" the evidence not presented. *Belmontes*, 558 U.S., at 20 (emphasis in original)."The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland,* 466 U.S., at 693*).* The majority's analysis violated these basic principles.

The aggravating evidence here was overwhelming. Stokes committed a murder for money,

alone a significant aggravating fact, but the brutality of his acts shows a callousness and lack of respect for humanity that sets this case apart. Stokes savagely raped the victim, mutilated her, then committed a second murder. Additionally, Stokes had three prior aggravated assault offenses, two against his wife (in one, he stabbed and terrorized her, the other, he choked her into unconsciousness), and another for slicing an inmate's face with a box cutter). (App. 120-25).

To lessen the weight of the aggravation evidence, the majority wrongly excluded critical evidence of rape, mutilation, and the second murder. In further error, it did not consider the negative consequences that would have flowed from introducing the "bad upbringing" evidence. Then, it "water[ed] down" the "reasonable probability" standard to an "anything is possible" standard. These multiple, egregious errors, in a published opinion, call for this Court to exercise its supervisory power.

1. The majority reduced the power of the State's case in aggravation by refusing to properly consider the evidence of a second murder and horrific circumstances of the capital-case crime by creating a bar to consideration of evidence that does not exist in South Carolina's whole-of-the-evidence review for sentencing.

Determining what constitutes the pool of evidence to review in a *Strickland* prejudice analysis should be simple – what was properly admitted at trial

is a base from which subtractions or additions are made. *Belmontes, supra.* The majority altered that base by misconstruing the state capital process. The majority excluded from its prejudice consideration Stokes's acts of rape and mutilation and the Ferguson murder because the jury did not return the torture or common scheme statutory aggravating circumstances. (App. 72 n. 10). That is wrong under state law. The majority's error allowed it to reshape and diminish the State's powerful case in aggravation – the one actually presented to the sentencing jury. In short, it considered a case for death, but not this case.

That the jury did not return certain statutory aggravating circumstances means absolutely zero to South Carolina's whole-of-the-sentencing-evidence review. Simply, "the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons,* 512 U.S. at 162. South Carolina's structure has not changed in this regard since this Court's observation in *Simmons.* If the evidence is properly admitted, it may be considered in selecting the appropriate sentence. *See State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984). *See also Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (aggravating evidence included second murder unrelated to statutory aggravating circumstances); *State v. Shaw*, 255 S.E.2d 799, 806 (S.C.1979) ("post-mortem abuse to [victim's] body" properly admitted to show the crime and defendant's character).

The Ferguson murder and horrific details of the Snipes murder could properly be considered by the jury as the evidence was properly admitted. The district court summarized just some of remarkably

brutal details in the Snipes murder as presented in sentencing:

> Martin testified Snipes was screaming, crying, and moaning when [Stokes] cut her breasts, and the State's forensic pathologist testified Snipes' injuries were consistent with having been scalped, having had the nipple area cut from each breast, and having had the entire vaginal area cut out. The pathologist further testified that "[i]t definitely would have been painful" if Snipes were alive when her nipples were cut off, and that she also had incise wounds on her hands that would have been "very painful" and a stab wound on her neck that also would likely have been painful. The jury saw autopsy photographs of Snipes' mutilated and decomposed body.

(App. 158).

The district court also summarized the evidence heard as to the Ferguson murder:

> [Stokes] entered the room wearing latex gloves telling Ferguson he was going to teach him a lesson for having stolen his rings and watch. Syphrette said they should tie up Ferguson with duct tape. According to Lapp, Ferguson started crying while being taped up and begged [Stokes] and Syphrette not to shoot him. Ultimately, [Stokes] and Syphrette

> wrapped duct tape around Ferguson's entire body and head, thereby suffocating him. [Stokes] also punched Ferguson in the face and drew blood. Later that day, police arrived at Syphrette's residence to serve a warrant and found [Stokes] hiding under a bed and Ferguson's duct-taped body. To perform the autopsy, the State's pathologist had to cut layers of tape from Ferguson's body. The pathologist testified that Ferguson's face was wrapped with multiple layers of duct tape and that he was conscious during the taping and died from suffocation due to the tape covering his nose and mouth. The pathologist further testified a suffocating person unable to breath experiences a great deal of pain before passing out. The jury saw autopsy photographs of Ferguson's body both before and after the duct tape was removed.

(App. 159-60).

These facts show something about Stokes's character – something very negative and dangerous. The majority had no legal basis to discount them.

2. The majority also failed to consider the downside of introducing the bad upbringing evidence, specifically omitting from its calculus the danger of undermining the strategy to shift blame to accomplice Norris Martin.

The majority advanced a belief that the newly presented evidence was so powerful in itself, it must be presented. Yet, offering evidence of Stokes's background carried with it distinct threats to the defense strategy.

First, as noted above, going into background would allow the evidence of Stokes's domination and abuse of Martin to undercut the carefully drawn suggestion that Martin was more active in the crime than he admitted. The majority gives not even a nod to the fact that evidence showing Stokes dominated and abused Martin throughout their friendship would likely have been elicited on cross-examination.

Second, Stokes's childhood development expert offered in habeas to discuss risk factors from alleged childhood deprivation and trauma, did not simply explain those factors, but found Stokes more likely than the average killer to be violent. Dr. Garbarino concluded based on his 10-point scale that an "average" risk score for a killer is around "7" while Stokes scored well-above at "9." That infers Stokes is more likely to commit violent acts. Dr. Garbarino observed, "And we certainly have a lot of evidence that he did." (J.A. 3192-93). He also conceded Stokes's "volatility, to some degree, may reflect his temperament." (J.A. 3125). The majority, though,

failed to acknowledge *any* negative. Notably, trial counsel testified at the *Martinez* hearing and responded that he did not think such testimony would be helpful. (J.A. 3490). Quite so.

The majority's decision offends the independence of counsel preserved in *Strickland* and abandoned the fair consideration of the evidence as mandated by this Court's precedent.

3. The majority diminished Stokes's burden of proving prejudice by reasoning that "some evidence" could have made a difference.

Strickland established that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S., at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.,* at 693. The majority reasoned that since bad upbringing mitigation evidence *must* be mitigating, then it "could" have made a difference. (App. 36). This inverts the prejudice analysis and dilutes the reasonable probability standard.

The majority tried to support its approach by offering this case as analogous to *Porter v. McCollum*, 558 U.S. 30 (2009). (App. 74). It is not. The collateral investigation in *Porter* uncovered positive evidence (honorable military service) and gave context to relationship dynamics. *Id.,* at 43-44. Not so here. And, as noted above, that same evidence of "childhood adversity" shows Stokes to be more dangerous than an "average" killer. (App. 3192-93). *See Pinholster*, 563

U.S. at 201 ("the jury might have concluded that [he] was simply beyond rehabilitation"). Further, it unravels the defense to shift blame to Martin, showing Stokes had dominated and abused Martin. The majority suggested the evidence could "connect[] the dots" to mental issues or other circumstances, (App. 75), but there was no undiscovered mental issue or other circumstances to connect. The majority attempted to force its logic into the *Porter* rubric, but it fails to fit.

The dissent, noting the second horrific murder within days of the first, concluded: "Objectively considering the facts here, there is no basis to conclude that presenting the mitigating evidence would have had any effect on the outcome of Stokes' sentence." (App. 102). The dissent is correct. The majority not only relied upon a "water[ed] down standard," (App. 101), but wrongly excluded powerful evidence of aggravation and failed to consider dangers to the defense. Thus, the majority has reinstated a legally infirm opinion. This Court should not allow such egregious error to stand uncorrected, especially where it wrongly sets aside a state death sentence.

CONCLUSION

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

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