

No. 24-7302
IN THE
Supreme Court of the United States

STERLING ATKINS,

Petitioner,

v.

JEREMY BEAN, WARDEN, ET AL.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Capital Case)

At the time of the penalty phase, trial counsel presented significant evidence in mitigation. Specifically, counsel presented evidence from Atkins' father, who testified that he physically abused Atkins and that both Atkins and his siblings were removed from the home because of that abuse. Atkins' stepsister confirmed that their parents were alcoholics and there were constant fights, arguments, and beatings between the parents and the children. Further, Atkins' expert psychologist testified to Atkins' upbringing in a physically and verbally abusive home which resulted in several mental issues.

Every court that has reviewed this claim, both state and federal, denied the merits of Atkins' allegations.

The questions presented are:

Can a claim of ineffective assistance of counsel be denied on the basis of an alleged failure to show what trial counsel did rather than what they failed to do?

Can a claim of ineffective assistance of counsel be denied on this basis when the record plainly showed that nothing was done or could be done?

LIST OF THE PARTIES

Petitioner Sterling Atkins, Jr., is an inmate confined in the High Desert State Prison in Clark County, Nevada. Respondent Jeremy Bean is the warden of High Desert State Prison. Respondent Nevada Attorney General is not listed in the caption.

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INTRODUCTION

Atkins fails to present this Court with a viable basis to grant review under Sup. Ct. R. 10.

First, there is no split of authority; Atkins misstates the ineffective assistance of trial counsel standard. Second, the question before this Court is fact specific. And the facts do not support Atkins' contention of ineffective assistance of trial counsel. Even if this Court determined that trial counsel was deficient, Atkins fails to demonstrate prejudice. Therefore, there was no constitutional violation, and the Nevada Supreme Court's rejection of the claim is entitled to deference under 28 U.S.C. § 2254(d).

This Court should deny the petition.

STATEMENT OF THE CASE

1. On January 16, 1994, hikers discovered the nude body of twenty-two-year-old Ebony Mason (Mason) a short distance from a road in the desert in Clark County, Nevada. App. 23. She was face down on the ground with her hands extended above her head and a four-inch twig protruding from her rectum. App. 23. Three footwear impressions were found around the area of her body. App. 23.

A coroner testified that the cause of Mason's death was asphyxia due to strangulation and/or blunt force trauma to the head. App. 23. The expert also identified nine broken ribs and multiple external bruises, contusions, lacerations, abrasions, and a ligature mark on the anterior surface of the neck. App. 23. There were also several patterned contusions consistent with footwear impressions on her back and chest. App. 23. Finally, the expert identified severe lacerations to Mason's head and an underlying hemorrhage within her skull indicating blunt force trauma. App. 23.

2. The prosecution charged three defendants with Mason's murder—Anthony Doyle (Doyle) and brothers Shawn Atkins (Shawn) and Sterling Atkins (Atkins). App. 23. The Federal Bureau of Investigation arrested Shawn in Ohio. App. 23. In his voluntary statement, Shawn implicated Atkins and Doyle. App. 23. According to Shawn, Mason had consensual sex with Atkins and performed oral sex on Shawn but refused Doyle's attempt to have anal sex. App. 23. Doyle then agreed to drive Mason to downtown Las Vegas. App. 23-24. Mason got into a pickup truck with Doyle, Atkins, and Shawn. App. 23. Doyle drove to a remote desert area and expressed anger with Mason, demanding that she walk home. App. 24. When she refused, Doyle stripped her naked and raped her while Shawn and Atkins watched. App. 24. Then Atkins and Doyle beat and kicked Mason until she died. App. 24.

3. The prosecution charged Doyle, Atkins, and Shawn with murder, conspiracy to commit murder, robbery, first-degree kidnapping, and sexual assault. App. 24. The prosecution filed a notice of intent to seek the death penalty. App. 24. The court ultimately dismissed the robbery charges and severed the trials. App. 24.

4. On January 3, 1995, a jury convicted Doyle of first-degree murder, kidnapping, and sexual assault. App. 24. The jury sentenced Doyle to death for Mason's murder. App. 24.

5. On February 13, 1995, Shawn pled guilty to murder and kidnapping in exchange for two concurrent sentences of life with the possibility of parole and an agreement to testify at Atkins' trial. App. 24.

6. The state courts initially appointed two attorneys to represent Atkins—Anthony Sgro and Laura Melia. App. 29. Mr. Sgro and Ms. Melia represented Atkins through the preliminary hearing held in May 1994. App. 29. Ms. Melia then withdrew from the case because she left Mr. Sgro's firm, but another attorney, Kent Kozal, continued to assist Mr. Sgro as they prepared for Atkins' trial. App. 29.

In the weeks leading up to Atkins' trial, Mr. Sgro required a continuance due to a calendaring conflict. App. 29. Because the trial court judge was not inclined to continue the trial, Mr. Sgro approached Ms. Melia about reentering the case. App. 29. Ms. Melia agreed and substituted for Mr. Sgro on May 15, 1995. App. 29. Ms. Melia and Mr. Kozal represented Atkins at the guilt and penalty phases of trial. App. 29.

7. Atkins' trial commenced on March 20, 1995. App. 24. During the trial, the jury heard evidence that the defendants killed Mason because she told them she would report them all for rape. App. 16. Atkins stopped Mason from calling the police. App. 16. The jury also heard evidence of obvious signs of a struggle at the crime scene and the extensive injuries to Mason's

body, including three separate shoeprint impressions from the men stomping her body; several wounds consistent with blunt and sharp trauma, lacerations and ligature marks on her neck; and injuries consistent with sexual assault. App. 16. Following the ten-day trial, the jury found Atkins guilty of first-degree murder, kidnapping, and sexual assault. App. 24.

8. Atkins' penalty phase began almost a month after the guilty verdict. See 2-ER-353.¹ At the penalty hearing, the prosecution called multiple witnesses, including law enforcement officials and Mason's parents. App. 4; 2-ER-343-352. Law enforcement testified that at the time of the murder, Atkins was on parole for a prior conviction for assault with a deadly weapon involving a 1992 stabbing. 2-ER-343-352.

In mitigation, in addition to Atkins himself testifying, the defense called four witnesses. App. 39-42.

First, the defense called Atkins' father, Sterling Atkins, Sr. (Atkins Sr.). App. 39. Atkins, Sr. graphically admitted his shortcomings as father. App. 39. He admitted daily substance abuse in front of his three children—Atkins, Shawn, and their half-sister, Stephanie Normand (Normand). 2-ER-356-57. He and his wife were alcoholics and were routinely drunk in front of Atkins and his siblings. App. 39. Atkins, Sr. also described daily arguments with his wife and frequent domestic violence, which Atkins witnessed. App. 39.

Atkins, Sr. also admitted physically abusing Atkins. App. 39. He acknowledged frequent physical abuse and neglect of his children, noting that he would beat Atkins with his hands and "anything that was around." App. 39. On one occasion, Atkins, Sr. purposefully burned Atkins' and Shawn's hands on a stove, which lead to the placement of all three children into foster care. App. 39; 2-ER-359.

¹ From Atkins' excerpts of record filed in the Ninth Circuit Court of Appeals.

Atkins, Sr. further testified that he was not a role model for his children and that Atkins did not grow up in a healthy environment. App. 39. “Honestly, ma’am, I was trying to raise myself,” clarifying that he “really didn’t know how to raise” Atkins. 2-ER-357. 2-ER-358.

Second, the defense called Atkins’ half-sister, Normand. She confirmed Atkins, Sr.’s account of family life and Atkins’ upbringing. App. 39-40. The family moved often. App. 39. Both parents were alcoholics who frequently argued with each other and with the children. App. 39-40. Normand would often drive her father home when he was really drunk. App. 40. Atkins Sr. beat the children but tended to single out Atkins for beatings. App. 40. Atkins, Sr. also used any handy object for the beatings, including belts and a 2x4. App. 40. She further testified that the beatings occurred “[a]ll the time.” App. 40. Normand also confirmed that Atkins, Sr. punished Atkins and Shawn by burning their hands on a stove, which led to the placement of the three children in different foster homes for one to two years. App. 40. Her father would also make the boys stand in the corner overnight with their hands against the wall. App. 40; 2-ER-367.

Normand took on most of the responsibility for raising her younger brothers because her mother was also an alcoholic. App. 40. Her mother’s substance abuse problems were so bad that Normand would have to carry her mother “to the bathroom because she would be so drunk she would fall.” App. 40. Normand would then “pick her up and put her in the bed, [and] feed her before she went to sleep so she wouldn’t get sick.” App. 40. Her mother continued to struggle with substance abuse. 2-ER-369-70. Normand also testified that their mother and Atkins Sr. were not good role models. App. 40.

Third, the defense called a retired associate warden from the Nevada Department of Corrections, who discussed what inmate life was like in the Nevada Department of Corrections. App. 40.

Finally, the defense closed its case in mitigation by calling a psychologist, Dr. Philip Colosimo. App. 40. He tested Atkins on three occasions and met with Atkins six times for a total of nine hours. App. 40.

Dr. Colosimo diagnosed Atkins with a schizo-effective disorder, which meant that Atkins had symptoms of schizophrenia, disorganized thinking, bizarre mentation, and affective problems. App. 40. He explained this meant Atkins had depression with “some kind of manic activity, but mostly depressive by nature, with paranoid thoughts.” App. 40. Atkins’ paranoid thoughts included tremendous suspicion of others and their intentions, believing “the world is out to get him or hurt him.” App. 40-41. Dr. Colosimo also diagnosed Atkins with psychoactive substance dependence based upon Atkins self-reporting that he experimented a lot of drugs and alcohol. App. 41. He also diagnosed Atkins with antisocial personality characteristics, sometimes called sociopathic or psychopathic behaviors. App. 41. Specifically, Atkins had a “schizoid withdrawn style in that he doesn’t trust others” resulting in his alienating himself from others, including his family. App. 41. And “narcissistic personality characteristics.” App. 41.

Dr. Colosimo could not identify any medical problems other than a self-reported head injury that Atkins suffered as an adolescent from a fight, during which he passed out. App. 41. The doctor also identified numerous “psycho-social stressors” which likely resulted in socialization problems, emotional problems, financial difficulties, and “general adjustment difficulties.” App. 41. Nevertheless, Atkins had a high adaptation and “functions daily in sort of a symptomatic way and also has psychiatric problems that exist throughout the day.” App. 41. Finally, Dr. Colosimo acknowledged that Atkins reported hearing voices, but the voices were quiet when he was in prison. App. 41.

Atkins read at a third-grade level while his spelling and arithmetic were at a second-grade level. App. 41. Dr. Colosimo testified that Atkins' functioning demonstrated "a pronounced functional lag in academic achievement" that was "usually found in people that have impoverished environments growing up," and further diagnosed Atkins with attention deficit disorder. App. 41. Testing indicated Atkins had a full scale IQ of 87, which amounted to "dull normal intelligence or well below average," and a verbal IQ of 84, which was low average and "indicate[d] that he has experienced pronounced learning disabilities since he began school." App. 41. But Atkins scored 94 in performance functioning, indicating that his "nonverbal intelligence is much better." 2-ER-400. Atkins told the doctor that he dropped out of school at the eighth or ninth grade. App. 41.

Dr. Colosimo then linked the abuse that Atkins suffered at the hands of his father with his ability to think, reason, process information, and learn. App. 42. Atkins Sr. was an alcoholic who physically abused Atkins from an early age. App. 42. While Atkins reported enjoying his foster homes, he always wanted to return to his parents. App. 42. His parents took him back for short periods and then were out of his life again. App. 42. As a result, Atkins never received the steadiness he needed in his childhood. App. 42.

Finally, Dr. Colosimo noted that Atkins enjoyed the times he was in prison or the juvenile homes because he knew the boundaries and how far he could go. App. 42. Atkins' history supported those statements, as he was repeatedly returned to those places due to his delinquent behaviors and relatively short probation periods. App. 42.

9. The jury found that the State proved six aggravating circumstances: (1) The murder was committed by a person under sentence of imprisonment; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit a sexual assault; (3) the murder was committed while the person was engaged in the commission or an attempt to commit

first-degree kidnapping; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody; (5) the murder involved torture, depravity of mind or the mutilation of the victim; and (6) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another. App. 5 at n.7. The jury found that no mitigating factors sufficiently outweighed the aggravating circumstances and imposed death. App. 5.

10. The Nevada Supreme Court reversed Atkins' conviction for sexual assault but otherwise affirmed his convictions and sentences on direct appeal. App. 24.

11. Atkins then pursued post-conviction relief. In relevant part, Atkins asserted claims of ineffective assistance of trial counsel related to the presentation of mitigating evidence. 5-ER-889-899, 903-905. The state district court denied relief. App. 24. The Nevada Supreme Court affirmed. App. 24.

12. Atkins initiated his federal proceedings and ultimately filed a fourth-amended federal habeas petition. App. 25. After granting in part a motion to dismiss, the district court reserved ruling on numerous overlapping exhaustion/procedural default defenses and ordered Respondents to file an answer. App. 26-27. After Respondents answered the petition, the district court issued an order on the merits denying relief and granting a certificate of appealability on five claims. App. 23-65. Regarding Claim 4(b), in which Atkins alleged trial counsel failed to develop mitigating evidence regarding his upbringing, the court found the claim exhausted and denied it on the merits, but in the alternative determined that the claim was subject to dismissal as procedurally defaulted. App. 39-44.

13. On appeal, the Ninth Circuit affirmed denial of the certified issues. App. 2-17. Regarding Atkins' claim that trial counsel failed to investigate and present mitigating social history

evidence (Claim 4(b)), the court found that the Nevada Supreme Court reasonably denied the claim. App. 6.

First, the panel determined that the claim was exhausted in the first state habeas appeal. App. 7. Even though Atkins presented no supporting evidence other than the trial record in his first state petition, and in his federal petition he added additional potential witnesses and presented declarations from all of the potential witnesses plus his two trial counsel, the court concluded that Atkins did not fundamentally alter the ineffective assistance claim. App. 7. However, the panel recognized that it could only review the new declarations for purposes of evaluating whether the claim was fundamentally altered and not for the merits. App. 7 at n.9 (citing *Shoop v. Twyford*, 596 U.S. 811, 818-819 (2002); *Shinn v. Ramirez*, 596 U.S. 366, 382 (2002)).

The panel then reviewed the claim based on the evidence presented in the first state habeas appeal. App. 7. While there was documentation of the hours that trial counsel billed, the record did not include information to show what investigation counsel performed; how much investigation counsel performed; or what information was uncovered or the avenues counsel failed to pursue. App. 8. The panel concluded that the “lack of evidence is fatal to Atkins’ claim” as the burden to demonstrate deficiency was on Atkins, and the absence of evidence could not overcome the strong presumption that trial counsels’ conduct fell within the wide range of reasonable professional counsel. App. 8. Nor could Atkins demonstrate prejudice, as Mr. Kozal’s inexperience alone or combined with the timing of Ms. Melia’s re-appointment was insufficient to satisfy *Strickland*.² App. 8. Further, as the state court record did not include the new witness declarations, Atkins fails to show in state court what additional mitigation evidence trial counsel could have presented. App. 8. Therefore, the Nevada Supreme Court had no additional mitigation evidence to

² *Strickland v. Washington*, 466 U.S. 668 (1984).

evaluate and its denial of the claim was not unreasonable. App. 8.

However, even assuming it could consider the new declaration evidence, the panel found Atkins still fails to satisfy *Strickland*. App. 8. None of the new evidence addressed what investigation took place regarding Atkins' upbringing or social history. App. 8. And the testimony trial counsel presented at the penalty phase demonstrated "that counsel did investigate, discover, and present evidence that Atkins had an abusive childhood, grew up in a dysfunctional environment, and likely has a learning disability and impaired thinking." App. 8. The court concluded that the evidence in the new declarations was largely cumulative of the mitigation evidence trial counsel presented through Atkins, Sr., Normand, and Dr. Colosimo. App. 8. And presenting the jury more detailed evidence of generational addiction and abuse, Atkins' parents' alcoholism, his poor school performance, and Atkins' emotional instability, was unlikely to add to the weight of mitigating evidence already in the record. App. 8.

Finally, the court found that the Nevada Supreme Court's findings were not an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). App. 9. Again, the evidence in the declarations presented in the federal court was largely cumulative of the evidence actually presented in the penalty phase. App. 9. Atkins also improperly relied upon the new evidence submitted in federal court. App. 9 (citing *Twyford*, 596 U.S. at 819).

The court also denied expansion of the certificate of appealability on several ineffective assistance of trial counsel claims. App. 11-17. That included a claim that trial counsel Melia had a financial conflict of interest that discouraged her from asking for a continuance of the trial. App. 16. Atkins argued if counsel asked for a continuance, the court would not have appointed her; therefore she risked proceeding to trial unprepared or losing the financial opportunity that was Atkins' case. App. 16.

As to that conflict claim, the panel found the ground technically exhausted but procedurally barred and that Atkins fails to overcome the bar as he fails to demonstrate that appellate or state post-conviction counsel were ineffective or that his claim was substantial under *Martinez v. Ryan*, 566 U.S. 1 (2012). App. 16. Finally, the court determined that prejudice was not presumed because Atkins fails to show an actual conflict of interest affecting Ms. Melia's representation. App. 17. It did not appear from the record that Ms. Melia believed she would lose the appointment if she sought a continuance and she stated that she was prepared for trial. App. 16.

REASONS FOR DENYING THE PETITION

There is no split of authority for the Court to resolve here. Atkins seeks nothing more than error correction when there is no error to correct. In any event, there are multiple alternative grounds for affirmance that obviate the need for this Court to address the issues Atkins presents in his petition.

I. Atkins' Questions Presented Ask This Court To Decide A Point Of Law This Court Already Resolved In Respondents' Favor In *Strickland*.

Atkins' first question presented, which he incorporates into his second question presented, is: "Can a claim of ineffective assistance of counsel be denied on the basis of an alleged failure to show what trial counsel did rather than what they failed to do?" This Court provided an answer to that question when it decided *Strickland* more than forty years ago. Thus, the Ninth Circuit correctly stated the *Strickland* standard. And because both questions presented incorporate an issue this Court already decided in Respondents' favor, Atkins' petition, at best, seeks error correction when there are no errors to correct.

The Ninth Circuit set forth the standard of review under *Strickland*:

In determining if trial counsel was ineffective, we evaluate (1) whether counsel's performance was deficient, and (2) whether that deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. We apply a strong presumption that counsel's performance was within the wide range of reasonable professional assistance, and will find a performance deficient only if it "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id.* at 688. . . .

App. 8.

Atkins argues the panel applied the wrong standard as nothing in *Strickland* requires a showing of what counsel *did*. Pet. at 25. Rather, the *Strickland* analysis addresses what counsel failed to do or should have done but did not do. *Id.*, citing *Williams v. Taylor*, 529 U.S. 362, 395, 398 (2000); *Wiggins v. Smith*, 539 U.S. 510, 532-536 (2003); *Rompilla v. Beard*, 545 U.S. 374,

381-382, 391-393 (2005).

Strickland undermines Atkins' argument. Under *Strickland*, the petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

This Court further stated that 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."

Strickland, 466 U.S. at 689. And "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* The evaluating court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

And this Court further instructed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after *less than complete investigation* are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91 (emphasis added). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

The plain language of *Strickland* requires a court to evaluate counsel’s actions at the time of the representation. That evaluation must consider whether counsel’s actions were sound trial strategy based on what was known to counsel at the time of the challenged decision. In doing so, the court determines if counsel’s actions were reasonable under the circumstances.

Neither *Strickland* nor any of its progeny direct a reviewing court to ignore what counsel did and to only review what counsel allegedly did not do. That is inconsistent with what this Court said in *Strickland*, which was itself a failure-to-investigate case. The court must determine if what counsel did fell within reasonable professional norms and evaluate counsel’s conduct, as well as the challenged conduct. Therefore, the court’s evaluation necessarily involves reviewing counsel’s strategic decisions to take certain measures and to not take others.

This is especially true when a claim asserts a failure to investigate—counsel is allowed to make reasonable decisions that make further investigation unnecessary. *Strickland*, 466 U.S. at 691. Even *Wiggins* and *Rompilla*—key cases Atkins cites for support, Pet. at 25—recognize that “the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; *reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.*” *Rompilla*, 545 U.S. at 383 (citing *Wiggins*, 539 U.S. at 525) (emphasis added). And this Court continues to consider what investigation counsel did conduct when analyzing this issue under *Strickland*. *Andrus v. Texas*, 590 U.S. 806 (2020) (“Counsel also failed to conduct any independent investigation of the State’s case in aggravation, despite ample opportunity to do so.”).

Strickland and its progeny make plain that what investigation counsel did conduct is part of considering whether fulfilled the duty to investigate. All this to say, Atkins is wrong when he argues that the Ninth Circuit applied an incorrect legal standard. There is no need for this Court to

retread what it has already said about the *Strickland* standard for deficient performance. Instead, the absence of support for Atkins' legal theory shows that he merely seeks error correction, and there is no error to correct. As Respondents explain below, Atkins' theory that there was no investigation done is incorrect, and Atkins fails to show prejudice in any event. See *infra* Section III(D, E).

II. Atkins' Questions Presented Also Seek Merits Review Of Claims The Ninth Circuit Declined To Certify For Appeal, And Atkins Likely Forfeited Any Challenge To The Ninth Circuit's Denial Of His Request To Expand The Certificate Of Appealability.

Atkins' questions presented seek review of the merits of claims that the Ninth Circuit declined to certify for appeal under 28 U.S.C. § 2253(c). But whether to certify a claim for appeal “is not coextensive with a merits analysis” and focuses only on whether a district court decision is debatable. *Buck v. Davis*, 580 U.S. 100, 115-16 (2017). In his petition, Atkins does not challenge the Ninth Circuit’s decision denying his request for an expanded certificate of appealability. As a result, Atkins likely forfeited the certificate of appealability issue or at least leaves significant hurdles in place that he must overcome before this Court could address the second question presented on its merits.

Under Sup. Ct. R. 14.1(a), this Court applies a strong presumption against consideration of a question “neither presented as a question in the petition for certiorari nor fairly included therein” and will only set that rule aside “in the most exceptional cases.” *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-32 (1993) (internal quotation marks and citations omitted). So, unless the question of whether to issue a certificate of appealability is completely subsumed by his questions presented, Atkins must show that this is a most exceptional case. Atkins makes neither showing here.

A certificate of appealability is a jurisdictional prerequisite to appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Standards for obtaining review of procedural rulings, rather than

merits rulings, are different. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The certificate must identify the “issue or issues” that meet the standard for obtaining a certificate. 28 U.S.C. § 2253(c)(3). Although this Court has said that compliance with the requirement of 28 U.S.C. § 2253(c)(3) is not jurisdictional and renders an error resulting in a failure to comply with that provision forfeitable/waivable, no such error occurred here. *Gonzalez v. Thaler*, 565 U.S. 134, 140-45 (2012). The Ninth Circuit expressly refused Atkins’ request for expansion of the certificate of appealability to address two arguments: (1) that trial counsel performed deficiently in the guilt phase by failing to timely investigate his psychological background and have him evaluated by an expert; and (2) that trial counsel Melia was ineffective because she had a financial conflict of interest that discouraged her from requesting a continuance. See App. 14-16.

The questions Atkins now presents for review do not subsume the Ninth Circuit’s reasoning for denying Atkins’ request for an expanded certificate of appealability because the reasoning includes procedural rulings distinct from the merits-based questions Atkins presents in his petition. But even the questions presented subsume the Ninth Circuit’s reasoning for denial of an expanded certificate of appealability, that reasoning presents additional procedural hurdles Atkins must overcome before this Court could review the questions he presents in his petition.

Starting with Atkins’ claim of inadequate investigation of his psychological background, the Ninth Circuit determined he presented a similar claim by relying on the trial record in his first state post-conviction petition, and new information he presented for the first time in federal court did not fundamentally alter the claim. App. 15. And as the Ninth Circuit noted, that petition relied on the trial record alone, not all the new evidence Atkins later presented for the first time in federal court. App. 15.

Whether the Ninth Circuit correctly determined that the new evidence did not fundamentally alter the claim Atkins presented in state court is a significant procedural question independent of the questions Atkins presents in his petition. If the Ninth Circuit was correct, that means Atkins' claim is reviewable under AEDPA and consideration of the record is limited to the evidence presented in state court at the time of Atkins' first state petition. See 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170 (2011). But if the Ninth Circuit is wrong, and the new evidence did fundamentally alter the claim, that raises a host of procedural issues beyond the scope of the questions presented here, including procedural default and admissibility of that new evidence under 28 U.S.C. 2254(e)(2). *Ramirez*, 596 U.S. at 382. Those issues are not subsumed by the questions presented.

Next is Atkins' claim that trial counsel had a financial conflict of interest, which the Ninth Circuit rightfully determined Atkins never presented in state court. App. 16. And as a result, the panel treated the claim as procedurally defaulted before determining that Atkins failed to show cause and prejudice to overcome his default. App. 16-17. So, Atkins again faces issues of procedural default that are not subsumed by the questions he presents in his petition.

But Atkins does not challenge the Ninth Circuit's decisions denying his request for expansion of the certificate of appealability. Instead, he puts the cart before the horse by comingling his uncertified claims into his explanation for why the Court should grant review here. In doing so, Atkins has likely forfeited any challenge to the Ninth Circuit's ruling denying his request for an expanded certificate of appealability. But even if the questions presented subsume and "fairly include" the denial of the certificate of appealability, the aforementioned questions on procedural default present significant barriers to this Court's consideration of the merits of Atkins' questions presented.

III. In Any Event, Atkins Fails To Establish Error Because He Has Shown Neither Deficient Performance Of Counsel Nor Actual Prejudice.

The Ninth Circuit's judgment is not undermined by any error. Atkins has not shown deficient performance under *Strickland*'s objective standard for review, nor has he shown actual prejudice resulting from any alleged deficient performance.

A. Standard for ineffective assistance of trial counsel.

There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. "Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (internal quotation marks omitted).

"[A]t the sentencing phase of a capital case, a defendant is prejudiced only if '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.'" *Thornell v. Jones*, 602 U.S. 154, 163 (2024) (quoting *Strickland*, 466 U.S. at 695). The reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.* at 1310. And the reasonable probability "requires a substantial, not just conceivable, likelihood of a different result." *Id.* (quoting *Pinholster*, 563 U.S. at 189). "This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigation factors." *Id.* at 1314. "To determine whether a prisoner satisfies this standard, a court must 'consider the totality of the evidence before the judge or jury'— both mitigating and aggravating." *Id.* at 1310 (quoting *Strickland*, 466 U.S. at 695).

B. The Nevada Supreme Court reasonably determined that Atkins failed to show deficient performance nor prejudice.

On appeal from denial of the first state habeas petition, the Nevada Supreme Court rejected Atkins' unsupported claim that trial counsel failed to both discover and present "corroborating evidence of the physical and emotional abuse that Atkins suffered throughout his childhood." 1-ER-201. The record belied the claim as defense counsel presented Atkins' father and sister in the penalty hearing, both of whom "testified to repeated physical and emotional abuse Atkins received from his formerly alcoholic father and otherwise established that Atkins grew up in a very dysfunctional environment and was at one point removed from his parents' home and placed in foster care." 1-ER-201. The court further found that Atkins "failed to explain how additional testimony would have altered the outcome of his trial." 1-ER-201.

C. Atkins fails to demonstrate trial counsel was ineffective or that the Ninth Circuit erred in rejecting his claim.

Atkins' assertions that trial counsel performed deficiently because they failed to adequately investigate and present his upbringing are unconvincing. To begin, Atkins focuses extensively on the fact that Ms. Melia substituted for Mr. Sgro in the week preceding the trial. Pet. at 26-31. However, his analysis of the investigation conducted regarding mitigation focuses *solely* on the five days between Ms. Melia's official re-appointment and the trial, and the short period of the guilt and penalty phase. *Id.* He utterly ignores the investigation conducted by Mr. Sgro and Ms. Kozal in the year following the preliminary hearing, or the nearly month-long period between the guilt and penalty phases.

First, the Ninth Circuit applied the proper review for deficiency under *Strickland*. The court reviewed what counsel did through the billing statements but that Atkins failed to meet his burden, based on the limited evidence presented in the first state habeas appeal, that counsel failed to interview specific persons or to conduct specific investigation. App. 8. Again, the evaluation of

Ms. Melia and Mr. Kozal’s performance at trial must necessarily consider the prior investigation, which Ms. Melia specifically reviewed in preparation for trial. 2-ER-339. And as the Ninth Circuit found, the evidence counsel did present in mitigation, including Atkins, Sr., Normand, the former warden, and Dr. Colosimo, necessarily supported the fact that counsel conducted some investigation prior to Ms. Melia’s appointment which was used in the penalty phase. App. 8.

Atkins notes in his brief that counsel admitted that she did not have an opportunity to conduct further investigation in the days leading up to trial. Pet. at 27. However, Ms. Melia made those comments regarding her guilt phase investigation immediately after the guilt phase of trial. 2-ER-339. Atkins provides nothing to address Ms. Melia and Mr. Kozel’s additional preparations for the penalty phase that took place a month after the guilt phase. As this Court has held, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after *less than complete investigation* are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690-91 (emphasis added).

Trial counsel was prepared for guilt phase, and Atkins fails to present any evidence that Ms. Melia specifically was not prepared for the penalty phase. Notably, Ms. Melia served as co-counsel with Mr. Sgro at Atkins’ preliminary hearing a year before the guilt phase of trial, so she was already familiar with facts of the case. App. 29. Although she withdrew from representation after the preliminary hearing, that did not diminish her prior participation in nor knowledge of the matter.

When the court declined a continuance after Mr. Sgro developed a scheduling conflict with the existing trial date, Mr. Sgro recommended Ms. Melia’s appointment. App. 29. Both Mr. Sgro and the trial court inquired whether Ms. Melia was prepared to reappear as Atkins’ counsel ten

days before the guilt phase commenced and found she was prepared to proceed. 3-ER-568-69. The court appointed her five days before trial. App. 29.

A critical fact in Ms. Melia's preparation for the guilt phase was that the prosecution proceeded against co-defendant Doyle through jury verdict in a bifurcated trial using virtually the same testimony and all of the same exhibits as the prosecution ultimately utilized at Atkins' trial three months later. App. 24. She reviewed not only the discovery in the case but the transcripts and evidence from Doyle's trial. 2-ER-339. She also reviewed all defense-related documents and investigation conducted by Mr. Sgro and Mr. Kozal. 2-ER-339. Notably, the trial court noted that Mr. Sgro asked for a continuance of the trial *not* because he was unprepared but due to a scheduling conflict with another murder trial. 2-ER-340. No one required or requested a continuance because they were not prepared. The trial court also noted after the guilt phase that Ms. Melia and Mr. Kozal had done "a very, very good job with what you've done" and the court "was perfectly happy with Ms. Melia." FER-125, 126.

The trial court also took a thirty-day recess between the guilt phase and the penalty phase of the trial. Atkins presents no evidence of Ms. Melia and Mr. Kozel's actions during that time, or inaction; rather, he ignores that period entirely in his petition. See *Bragg v. Galaza*, 242 F.3d 1082, 1088-89 (9th Cir. 2001) (finding a petitioner fails to show deficient performance for failing to interview a witness when the petitioner "does not identify information that [counsel] had not already gained from other witnesses" and merely speculates that interviewing another witness might have provided helpful information).

Atkins fails to demonstrate trial counsel did not conduct an adequate investigation into the penalty phase or that counsel did not make a strategic determination regarding additional investigation in the month between the guilt and penalty phases. Atkins fails to demonstrate trial

counsel were ineffective. He fails to address the mitigation investigation conducted by Mr. Sgro and Mr. Kozel or the actions of Ms. Melia and Mr. Kozel in the month between the guilt and penalty phases.

Second, Atkins' reliance on this Court's caselaw finding trial counsel deficient are easily distinguishable. Atkins' reliance upon *Williams* is misplaced. Pet. at 31. In *Williams*, trial counsel failed to discover "extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. Atkins presented nothing of that sort in this case. Atkins, Sr. testified to his own physical abuse of Atkins and failure as a parent, which Normand corroborated. And Dr. Colosimo gave context to that evidence by linking Atkins' criminal behavior to his past. See App. 40-42. As the Ninth Circuit noted, trial counsel presented evidence that Atkins had an "abusive childhood, grew up in a dysfunctional environment, and likely has a learning disability and impaired thinking." App. 8.

Atkins' reliance on *Wiggins* is also misplaced. Pet. at 33. *Wiggins* is easily distinguished because that case involved trial counsel prematurely discontinuing their investigation of mitigating evidence in favor of a different strategy in the penalty phase. 539 U.S. at 521-22. Here, there was no allegation in the first habeas appeal in state court that counsel improperly focused on a different strategy without first conducting a proper investigation in this case. Atkins' claim on appeal was that counsel failed to call additional witnesses to testify about the abuse and neglect that he experienced as a child.

Finally, just as the mitigation case counsel actually presented in *Rompilla* "bears no relation" to the mitigating evidence later uncovered through review of court files trial counsel failed to review, *Rompilla* "bears no relation" to this case. 545 U.S. at 393; see Pet. at 31. There,

the Supreme Court determined that counsel was ineffective for failing to review court files for the offenses that the prosecutor intended to use for aggravating circumstances. *Id.* at 381-83. Counsel's failure to look at those files resulted in prejudice because counsel "would have found a range of mitigation leads that no other source had opened up" that they were otherwise unaware of, and the evidence counsel would have discovered "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 390, 393.

Here, Atkins never alleged that counsel failed to look at court files or any other publicly available source for information that counsel did not know about. And he made no showing that counsel failed to discover evidence that would have painted a picture far different than the "few naked pleas for mercy" as trial counsel presented in *Rompilla*. 545 U.S. at 393. Rather, in his state appeal, Atkins alleged only that counsel failed to present more of the same type of mitigating evidence they already presented.

The Nevada Supreme Court's decision did not conflict with the principles established in the cases cited by Atkins. The alleged potential mitigating evidence in Atkins' case was not the caliber this Court has identified as one where counsel made an unreasonable decision to forego a mitigation investigation or failed to present plainly available mitigating evidence that would give the jury an entirely different impression of Atkins' family background. Rather, when comparing his claims to the trial record, Atkins' claim boiled down to an argument that counsel failed to present more of the same evidence. He fails to show that counsel's decisions in selecting which witnesses to testify during the penalty phase was objectively unreasonable.

D. The Nevada Supreme Court reasonably determined that Atkins fails to show prejudice.

Even assuming Atkins carried his burden on deficient performance, he fails to establish prejudice. There was extensive aggravating evidence in this case. First, the prosecutor provided

evidence that Atkins was on parole for a prior conviction of assault with a deadly weapon at the time of Mason's murder. App. 11. That evidence satisfied two aggravators, that Atkins committed the murder while he was under a sentence of imprisonment and that he had a prior conviction for a felony involving the use or threat of violence. Second, Atkins' convictions in the guilt phase for first-degree kidnapping and sexual assault satisfied two aggravators—that Atkins committed the murders while engaged in a sexual assault and in first-degree kidnapping. App. 11, 24.³ Third, the prosecutor also established the last two aggravators during the guilt phase. Testimony that Mason threatened to report Atkins, Shawn and Doyle for rape satisfied the aggravator that Atkins committed the murder to avoid or prevent a lawful arrest. App. 16. And the last aggravator, that the murder involved torture, depravity of mind or the mutilation of the victim, through testimony that a four-inch stick was shoved into Mason's rectum. App. 23, 53.

The limited evidence presented in the state habeas appeal did not significantly alter the mitigation evidence presented in the penalty phase. Rather, the evidence regarding Atkins' dysfunctional upbringing and evidence of physical and emotional abuse was cumulative. See 1-ER-201.

As to Atkins' current arguments, most are based upon other claims outside Claim Four (b), Atkins did not present those arguments as a basis for prejudice in the state court process. See 5-ER-903-905 (first post-conviction opening brief in which Atkins alleged trial counsel failed to call Shawn Atkins, Atkins' mother Lorraine Atkins, Atkins' foster parents, and Atkins' uncle).

Atkins relies on *Sears v. Upton*, 561 U.S. 945 (2010), that *Strickland* prejudice is not limited to where defense counsel presented little or no mitigation. Pet. at 33. In *Sears*, this Court

³ The Nevada Supreme Court reversed Atkins' conviction for sexual assault on direct appeal. App. 24. However, the court in the first state habeas appeal found sufficient evidence supported the sexual assault aggravator. ECF No. 94-43 at 12-13; 1-ER 201.

reversed a decision where the state court declined to evaluate whether prejudice resulted because counsel did present some mitigating evidence. 561 U.S. at 954. The Court recognized that it had never held that a court could not find prejudice because the trial attorney presented some mitigating evidence. *Id.* Rather, the proper function of the prejudice analysis is to look at the existing aggravating and mitigating evidence in the record and ask whether the evidence that trial counsel failed to present creates a reasonable probability that the scales would have tipped in the prisoner's favor. *Id.* at 954-55.

The Nevada Supreme Court did not commit the sort of error that the state court made in *Sears*. Rather, the Nevada Supreme Court appropriately noted that "Atkins has failed to explain how additional testimony would have altered the outcome of his trial." 1-ER-201. In other words, the Nevada Supreme Court determined that Atkins failed to carry his burden of showing that, when balanced with the existing evidence in the trial record, the new evidence created a reasonable likelihood of a different outcome at trial. That determination was not unreasonable given Atkins failed to present any evidence to support his allegations, and when the evidence listed in the appeal was cumulative of the evidence counsel did present in mitigation.

Thus, the Ninth Circuit correctly concluded that the Nevada Supreme Court reasonably applied *Strickland* in rejecting the aspects of Claim 4(b) that Atkins presented in state court.

E. Even considering the new evidence presented for the first time in the federal petition, Atkins fails to demonstrate a *Strickland* violation.

As the federal district court found, the declarations Atkins presented for the first time in federal court "provide some new evidence, regarding drug use, violence and dysfunction on the part of Atkins' parents, grandparents and even great-grandparents, but, for the most part that new information is not particularly mitigating as, for the most part, it does not involve Atkins' directly."

App. 44. Some of the new evidence did not directly involve Atkins or were circumstances he may

not have witnessed, particularly in relation to the generational claims. App. 44.

As the Ninth Circuit concluded, none of the new evidence addressed what investigation took place regarding Atkins' upbringing or social history. App. 8. And much of the evidence was cumulative of the testimony of Atkins, Sr., Normand, and Dr. Colosimo regarding Atkins' abusive childhood, dysfunctional upbringing, and learning disability and impaired thinking. App. 8. Presenting the jury more detailed evidence of generational addiction and abuse, Atkins' parents' alcoholism, his poor school performance, and Atkins' emotional instability was unlikely to add to the weight of mitigating evidence already in the record. App. 8.

The new evidence was insufficient to demonstrate prejudice.

First, Atkins alleged Shawn would have testified regarding his and Atkins' parents' meeting and their mother's upbringing. 3-ER-496. Shawn addressed violence by family members, including an uncle, but primarily focused on his Atkins, Sr.'s beatings of his wife and children and Atkins' mother's violence against her husband and others. 3-ER-497-498. There was evidence of family addiction, focused on Atkins, Sr.'s alcoholism, both parents' substance abuse, and their mother's gambling addiction. 3-ER-498-499. Shawn also discussed his foster homes, though notably he was placed in homes separate from Atkins. 3-ER-499. He explained that Atkins performed poorly in school, had a very limited vocabulary, and was mentally limited. 3-ER-500-501. Atkins also hung out with gangs which he never joined, was always in "fight or flight mode," and would react without thinking. 3-ER-501. Shawn also spoke of Atkins' inability to care for himself as a child. 3-ER-501-503.

Atkins' aunt, Evelyn Gomez (Gomez), addressed Atkins' mother's upbringing and prior marriage. 3-ER-512-513. She said Atkins, Sr. was a swindler; the family moved often and were at times homeless; Atkins, Sr. and his wife were alcoholics; and Atkins' education was neglected as

a result. 3-ER-513-515.

Atkins' aunt, Alicia Palencia (Palencia), also addressed Atkins' mother's upbringing. 3-ER-485-486. She described both Atkins, Sr. and Atkins' mother as alcoholics and that she abused illegal substances. 3-ER-486. Atkins, Sr. had a temper and beat dogs, other family members, and the children, and he and his wife were violent to each other. 3-ER-486-487. The family moved often and were at times homeless as Atkins, Sr. and his wife spent their money on alcohol. 4-ER-486-488. She also discussed when Atkins, Sr. burned the Atkins and Shawn's fingers, which caused them to be placed in foster homes. 3-ER-488.

Vaedra Sowerby-Jones (Sowerby-Jones), co-defendant Doyle's former girlfriend and the mother of his child, largely addressed Doyle's violent tendencies, described her view of Atkins' mental capacity, and discussed her concerns of how her testimony in the guilt phase regarding his statements immediately after the murder would impact Atkins. 3-ER-490-494.

First, while Shawn presented more specifics as to violence encountered in their family, much of his testimony was cumulative of the testimony of Atkins, Sr., Normand and Dr. Colosimo. Further, the prosecution impeached Shawn in the guilt phase when he began to shift his story from what he provided to the Federal Bureau of Investigations in an attempt to cover for his brother. See 1-ER-002. That alone provided at least one strategic reason for counsel not to call Shawn in the penalty phase as Shawn's credibility was already placed in question.

Second, Palencia and Gomez's declarations were very similar to one another, with no demonstration that their observations were based upon first-hand knowledge. Several of their statements addressed matters that occurred prior to Atkins' birth. And the bulk of their testimony was covered by Atkins' father's own confessions at trial and Atkins' sister.

Third, as to Sowerby-Jones, the vast majority of her proposed testimony addressed Doyle's violence and actions. The jury heard testimony during the guilt phase of trial that Doyle was previously tried for Mason's murder; his role in the murder, including deciding to drive out to the desert, attempted rape of Mason, and initiating the brutal beating of Mason. That Doyle was also violent against Sowerby-Jones did not demonstrate that Atkins had a decreased culpability in Mason's murder.

Finally, as to Sowerby-Jones' statements regarding Atkins' apparent emotional and mental stability, Dr. Colosimo addressed Atkins' mental health. He was a professional who was detached from any participants in the murder and the perceptions of Atkins' family. Therefore, Sowerby-Jones' impressions were cumulative and carried less value compared to a trained expert's psychological opinions. Her remaining testimony as to Atkins' statements immediately following the murder were presented in the guilt phase and therefore cumulative or were not appropriate as evidence in the penalty phase.

There is nothing in the record to indicate that defense counsel were not aware of these additional witnesses. Clearly, defense counsel were aware of Atkins' background and presented three witnesses that they believed were the best to put before the jury. Counsel presented the testimony of Atkins' father—the person who abused Atkins and who confessed to his repeated abuse of Atkins; Atkins' sister—who corroborated the abuse and maltreatment; and Dr. Colosimo—who tied Atkins' upbringing to his present mental issues. Trial counsel presented the witnesses that would be the most effective to address Atkins' upbringing. Atkins fails to demonstrate trial counsel was deficient or that the decision to present the witnesses they did was not based on sound trial strategy. *Strickland*, 466 U.S. at 689.

Finally, Atkins fails to demonstrate prejudice. As previously argued, the new evidence is not of the caliber of evidence which this Court previously found sufficient to find trial counsel deficient at mitigation in *Williams*, *Wiggins*, or *Rompilla*. Rather, the new evidence was cumulative of the type of evidence that was presented, did not direct impact Atkins, or was not sufficient to alter the mitigation presentation of the defense.

The jury found no mitigating circumstances in the penalty hearing. See 3-ER-535-537. By contrast, the jury found the six aggravators, as detailed above, that were supported by the record. Those aggravators would still outweigh the mitigation evidence, even with the new evidence proposed in the federal petition. There is no reasonable probability that the jury, even with the new evidence would find the matter did not warrant death.

Further, as the Ninth Circuit reasoned, the evidence trial counsel did present in mitigation demonstrated that counsel *did* investigate, discover, and present evidence of Atkins' abusive childhood, dysfunctional family life, and possible learning disability and impaired thinking. App. 8. The information contained in the new declarations, again, were largely cumulative of what counsel did present. App. 8. Presenting cumulative or more detailed evidence of Atkins' dysfunctional upbringing, parents' alcoholism, poor school performance, and emotional instability was unlikely to add weight to the mitigation evidence counsel did present. App. 8. The new evidence of generational addiction and violence, Atkins' family's periods of homelessness, or influence of street gangs on Atkins, had "questionable mitigating value" and did not excuse Atkins' behaviors. App. 8 (citing *Boyde v. California*, 494 U.S. 370, 382 (1990)). Further, such evidence might have worked to Atkins' disadvantage by portraying him as beyond rehabilitation. App. 8 (citing *Pinholster*, 563 U.S. at 201).

Atkins fails to demonstrate that trial counsel was ineffective for failing to present the new evidence. Even considering the new evidence on de novo review, he fails to show that trial counsel's performance was ineffective under *Strickland* when that evidence pertained to things that would have occurred outside of Atkins' presence or, when it did occur in Atkins' presence, was not sufficient to outweigh the six aggravators.

IV. Conclusion.

Atkins fails to demonstrate this Court's review is warranted. There is no split of authority as Atkins misstates this Court's standard for evaluating claims of ineffective assistance of trial counsel. He also fails to demonstrate the Ninth Circuit erred in denying the fact-specific allegations of Atkins' ineffective assistance of trial counsel claim. As there is no basis for review, this Court should deny Atkins' petition.

Respectfully submitted,

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