No. 25-

IN THE

Supreme Court of the United States

STEPHEN COREY BRYANT,

Petitioner,

v.

JOEL ANDERSON, INTERIM COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; LYDELL CHESTNUT, DEPUTY WARDEN, BROAD RIVER ROAD CORRECTIONAL INSTITUTION SECURE FACILITY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When a district court dismisses a federal habeas petition, a circuit court must issue a certificate of appealability for any claim in the petition whose dismissal is debatable among reasonable jurists. In contravention of this Court's precedent, Bryant's capital trial counsel failed to conduct a reasonable investigation and neither discovered nor presented available mitigating evidence of Bryant's brain damage from exposure to alcohol in utero, which substantially impaired his capacity to conform his conduct to the requirements of the law. Bryant's post-conviction counsel then failed to pursue relief based on sentencing counsel's deficient investigation. Did the Fourth Circuit err when it denied a certificate of appealability on Bryant's claim that post-conviction counsel's deficient performance establishes cause for the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012)?

STATEMENT OF RELATED CASES

Bryant v. Stirling, No. 23-4, U.S. Court of Appeals for the Fourth Circuit. Judgment entered January 27, 2025.

Bryant v. Stirling, No. 9:16-cv-01423, U.S. District Court for the District of South Carolina. Judgment entered October 19, 2022.

Bryant v. State, No. 2019-000610, Supreme Court of South Carolina. Petition for a writ of certiorari denied May 11, 2021.

Bryant v. State, No. 2016-CP-43-828, Court of Common Pleas for Sumter County, South Carolina. Judgment entered January 4, 2019.

Bryant v. State, No. 2016-002228, Supreme Court of South Carolina. Judgment entered February 9, 2017.

Bryant v. State, No. 2016-CP-43-829, Court of Common Pleas for Sumter County, South Carolina. Judgment entered July 15, 2016.

Bryant v. South Carolina, No. 15–6215, Supreme Court of the United States. Petition for a writ of certiorari denied November 30, 2015.

Bryant v. State, No. 2013-000518, Supreme Court of South Carolina. Petition for a writ of certiorari denied March 4, 2015.

Bryant v. State, No. 201l-CP-43-00901, Court of Common Pleas for Sumter County, South Carolina. Judgment entered February 14, 2013.

State v. Bryant, No. 2008-103130, Supreme Court of South Carolina. Judgment entered January 7, 2011.

State v. Bryant, No. 2006-GS-43-000699, Court of Common Pleas for Sumter County, South Carolina. Judgment entered September 11, 2008.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen Corey Bryant respectfully petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Fourth Circuit.

INTRODUCTION

Stephen Corey Bryant's mother abused alcohol and drugs while pregnant with him. These toxins permanently damaged Bryant's developing brain, devastating his capacities to exercise judgment, understand consequences, and conform his behavior to the law. Ignoring red flags of Bryant's alcohol exposure in utero, his sentencing attorneys failed to conduct an adequate mitigation investigation, leaving the judge who sentenced him to death unaware of his brain damage. Bryant's counsel in state post-conviction proceedings failed to seek relief based on this ineffective assistance of counsel.

In federal habeas proceedings, Bryant argued that his sentencing attorneys' failure to investigate his background and present mitigating evidence violated his Sixth Amendment right to counsel, and that the similar failure of his post-conviction attorneys to develop and present this claim excuses the procedural default of his claim in state court. The district found the claim procedurally defaulted and concluded that Bryant had not established cause for the default. It reasoned that, because both sentencing and post-conviction counsel conducted *some* mitigation investigation, their performance was sufficient, even if they ignored red flags of Bryant's brain damage and failed to investigate fetal alcohol exposure. This was a clear misapplication of this Court's Sixth Amendment precedent.

Bryant sought review from the Fourth Circuit Court of Appeals, arguing that the district court's ruling on procedural default was at least debatable among reasonable jurists, entitling him to a certificate of appealability. In a one-line order that provides no reasoning, and does not even cite the applicable standards, the circuit court refused to grant Bryant a certificate of appealability on this issue. This Court should grant the petition for a writ of certiorari and review the circuit court's denial of a certificate of appealability. Alternatively, this Court should grant the petition for a writ of certiorari and remand to the circuit court to provide a statement of reasons for its denial of a certificate of appealability.

OPINIONS BELOW

The Fourth Circuit's unreported order denying an expansion of the certificate of appealability appears in the Appendix ("App.") at 17a.[1] The district court opinion is unreported, but available at 2022 WL 10568264, and appears at App. 18a.

JURISDICTION

The Fourth Circuit entered judgment against Bryant on January 27, 2025. Bryant's timely motion for reconsideration was denied on March 10, 2025. App. 53a. On May 28, 2025, the Chief Justice extended the time to file a petition for a writ of certiorari to August 7, 2025. Bryant invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

[1] The decision of the Fourth Circuit reviewing a different issue and affirming the denial of habeas relief is published at *Bryant v. Stirling*, 126 F.4th 991 (4th Cir. 2025), and appears at App. 1a, but is not the subject of this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2253, provides in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT

A. Statutory Background

A habeas petitioner seeking to appeal the dismissal of his section 2254 habeas petition must first obtain a certificate of appealability, or COA. 28 U.S.C. § 2253(c). The purpose of the COA process is only to "screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). A judge or justice should issue a COA whenever "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

A habeas petitioner satisfies section 2253(c)'s "substantial showing" standard when he demonstrates "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When, as here, the district court denies a habeas petition on procedural grounds, a COA should issue when the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

A circuit court considering whether to grant a COA "should limit its examination to a threshold inquiry into the underlying merit of his claims" and ask "only if the District Court's decision was debatable." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003). A claim may be debatable "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Id*. at 338. The COA hurdle is even lower in a capital case, where "the nature of the penalty is a proper consideration" that weighs in favor of granting review. *Barefoot*, 463 U.S. at 893.

B. Factual Background

1. Bryant's Brain Damage and Abuse

Bryant's mother, who met his father in a drug rehabilitation program, abused alcohol and drugs during her pregnancy. JA436, JA612.[2] As a result of alcohol exposure in utero, Bryant's right frontal lobe and corpus callosum are malformed. JA515–16, JA534, JA621–22. The frontal lobe controls executive functioning, and the corpus callosum enables communication between the two hemispheres of the brain. JA610–11.

This prenatal damage to Bryant's brain has left him with severe cognitive deficits. JA528. He suffers from poor working memory and impaired processing—functions essential to the ability weigh and deliberate. JA533. He has faulty executive sequencing, an impaired capacity for abstract thinking, and a poor grasp of language. JA516, JA739–40.

Bryant's alcohol exposure in utero also interrupted the growth and development of his bones—a condition known as dysmorphology. JA609. His skull and face are malformed, his eyes are noticeably small, and he has short stature. JA516, JA609–11.

Bryant has been diagnosed with static encephalopathy, alcohol induced, which is a Fetal Alcohol Spectrum Disorder (FASD). JA534, JA623–24. Put another way, Bryant had profound and enduring damage inflicted on his brain and body

[2] JA citations reference the Joint Appendix filed in the Fourth Circuit in case number 23-4. The documents referenced in this section are from the state-court record.

before he was even born. While his IQ scores are marginally above the current range for a diagnosis of Intellectual Disability Disorder, his FASD has impaired his functioning in society to a degree indistinguishable from that of someone with that disorder. JA536–37, JA636–37, JA758–60.

From a young age, Bryant struggled with language and communication in ways typical of people with intellectual disabilities. JA748, JA756–58. He was never able to acquire the necessary skills for living independently, and he needed help "managing the day-to-day life demands," which is a "very typical pattern for people with cognitive and intellectual disabilities." JA750; *see also* JA506, JA536–37, JA758. Bryant has struggled all his life to read and understand social cues, interact with peers, and form age-appropriate relationships. JA535, JA752–54. From an early age, Bryant struggled with impulsivity and time management, leaving him unable to plan and set goals. JA753, JA756–57. He has "difficulty in regulating his emotions [and] controlling anger." JA753. And he has always had diminished capacity to exercise judgment, understand consequences, and conform his behavior to the law. JA536–37, JA752.

The deficits wrought by FASD are exacerbated in children who are exposed to violence.[3] Bryant suffered overwhelming violence as a child. He was physically and sexually abused not only by his grandfather, uncle, and half-brother, but also by his

[3] Centers for Disease Control and Prevention, Fetal Alcohol Spectrum Disorders (FASDs), *Treatment of FASDs*, https://www.cdc.gov/fasd/treatment/index.html#cdc_treatment_types-early-intervention-and-protective-factors (last visited July 24, 2025).

mother. JA193, JA204–05, JA221–22, JA229, JA284–85. And the sexual abuse extended beyond Bryant's family. As a child, Bryant once returned home from an adult male neighbor's home with "blood in his underwear." JA87. About a year later, while in custody after a juvenile arrest, Bryant was again raped by an adult male. JA87.

Given the extent of his brain damage, physical impairments, and history of violent trauma, it is unsurprising that Bryant struggled developmentally, socially, and academically. He missed developmental milestones and was slow to talk and walk. JA612. During elementary school, he received numerous psychological evaluations and was placed in classes for handicapped children. JA222–23. He had to repeat the first grade. JA222. By age eleven, Bryant was institutionalized in the Department of Juvenile Justice. JA226. By fourteen, Bryant still showed developmental delays and had trouble socializing. JA239. By fifteen, he was diagnosed with chronic depression and medicated. JA226. At seventeen, he was indicted for nonviolent burglary. JA152–53. After his second burglary indictment later that year, he was incarcerated for nearly four years. JA156–57.

2. Convictions

In early adulthood, Bryant's compromised mental health reached a crisis point. When he was 22 years old, he started experiencing recurring intrusive thoughts about the childhood sexual abuse inflicted upon him by his family members. JA230, JA233. In August of 2004, Bryant sought help for these flashbacks, confiding the sexual abuse to his grandmother. JA193–95. He next

sought help from his probation officer, revealing his sexual abuse and asking for counseling. JA184. Bryant's probation officer referred him to a mental health provider, but Bryant could not afford to pay the $75 cost to receive treatment. JA230. In September 2004, Bryant tried to get help at a YWCA, where he again reported the sexual abuse he suffered as a child. JA185, JA229. Having received no mental health treatment, Bryant deteriorated further, and just weeks later began the eight-day course of conduct that led to his capital conviction. *See Bryant*, 704 S.E.2d at 344–45.

Bryant was indicted for multiple criminal charges, including three murders, in South Carolina state court. App. 3a. He pleaded guilty to all charges, App. 3a, which cost him the right under South Carolina law to be sentenced by a jury, *see* S.C. Code Ann. § 16-3-20(B) (requiring capital sentencing proceedings to take place before the trial judge if the defendant pleads guilty); *State v. Jenkins*, 872 S.E.2d 620, 626 (S.C. 2022). Although Bryant's mental health expert suspected fetal alcohol exposure, Bryant's sentencing counsel did not conduct a reasonable mitigation investigation into FASD, nor did they provide the expert with the information necessary to confirm her suspicion. As a result, the judge heard none of the available mitigating evidence of the severe brain damage Bryant incurred in utero. The judge sentenced Bryant to death. App. 3a. Bryant's attorneys appealed a single evidentiary issue to the South Carolina Supreme Court, which affirmed the convictions and sentences. App. 3a.

Bryant sought post-conviction relief (PCR). App. 3a. Ignoring the suspicions of the trial expert, Bryant's PCR counsel did not investigate Bryant's potential fetal alcohol exposure, and they failed to pursue the neuropsychological testing that would have revealed the extent of Bryant's brain damage. JA436–37. They did not allege that Bryant's sentencing counsel were ineffective for failing to investigate and present mitigation of Bryant's fetal-alcohol-related brain damage. The PCR court denied relief, the South Carolina Supreme Court denied discretionary review, and this Court denied certiorari. App. 4a.

C. Proceedings Below

1. District Court and Second PCR

On April 28, 2016, Bryant filed a federal habeas petition pursuant to 28 U.S.C. § 2254 alleging, among other things, that his execution is barred by *Atkins v. Virginia*, 536 U.S. 304 (2002), and that his sentencing counsel provided ineffective assistance in failing to discover evidence of his FASD. App. 43a, 48a. The district court stayed the federal habeas proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to allow Bryant to exhaust his state-court remedies. App. 4a.

Bryant filed two successive PCR applications in the state trial court. The first alleged that Bryant is intellectually disabled and that his execution would therefore violate the Eighth and Fourteenth Amendments under *Atkins*. JA429–35. The second application asserted four additional grounds for relief, including that sentencing counsel conducted an ineffective mitigation investigation into his fetal alcohol exposure and intellectual disabilities. JA99–107.

The PCR court granted the state's motion to dismiss the application raising ineffective assistance, concluding that it was untimely and improperly successive. App. 4a. But it allowed Bryant's *Atkins* claim to continue. App. 4a–5a.

In that proceeding, Bryant finally received the multidisciplinary evaluation that his trial and initial PCR teams had deficiently failed to pursue. Based on that evaluation, Bryant's expert concluded that—though Bryant's documented IQ scores were "marginally above those required to meet the criteria for intellectual disability"—his alcohol exposure in utero damaged his developing brain and left him at least as impaired as a person suffering from intellectual disability. The post-conviction court conducted an evidentiary hearing, during which Bryant presented the evidence described above of his brain damage and his previous attorneys' failures to discover and present evidence of fetal alcohol exposure. The court denied relief on Bryant's *Atkins* claim. App. 6a.

Back in federal court, the state moved for summary judgment, and the district court denied relief on all claims. On Bryant's *Atkins* claim, the district court held that the state-court decision was not contrary to clearly established law under 28 U.S.C. § 2254(d). App. 47a–48a. On Bryant's claim of ineffective assistance of sentencing counsel for failing to develop this mitigating evidence, the district court held the claim was procedurally defaulted and could not be excused by his initial post-conviction counsel's failure to present the claim, despite the equitable exception created by this Court in in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). App. 48a–51a.

The district court granted a COA on Bryant's *Atkins* claim but denied one on the other issues. App. 52a. It did not explain its application of the COA standard to Bryant's claims, or distinguish between the various claims, but merely relied on its merits determination. App. 52a ("[T]he court finds, for the same reasons stated in this order, that the legal standard for the issuance of a certificate of appealability has not been met.").

Bryant moved to alter or amend the judgment pursuant to Rule 59(e), relying on the facts developed in the second state post-conviction process to seek relief or a COA on his claim that sentencing counsel provided ineffective assistance by failing conduct an adequate mitigation investigation, and that PCR counsel's ineffectiveness established cause for the procedural default. The district court denied the Rule 59 motion. App. 54a. It did not separately apply the COA standard, instead issuing a perfunctory denial of the COA based on its conclusion that Bryant had not satisfied the high standard to prevail on his motion to reconsider. App. 77a ("The court finds no clear error or manifest injustice with respect to its ruling on Ground Eight, denies Bryant's motion to alter or amend, and sustains the denial of a certificate of appealability.").

2. Fourth Circuit Court of Appeals

Bryant moved the Fourth Circuit to expand the COA to include the question of whether the default of Bryant's claim regarding ineffective assistance of sentencing counsel was excused under *Martinez*. App. 90a. Without stating the applicable COA standards or providing any reasoning, the court denied Bryant's

motion. App. 17a ("Upon consideration of submissions relative to appellant's motion to expand certificate of appealability, the court denies the motion."). The COA denial is the subject of this petition.

In a published opinion issued January 27, 2025, the Fourth Circuit affirmed the district court's dismissal of Bryant's *Atkins* claim on the alternative grounds that the claim was procedurally defaulted. App. 9a. Bryant does not seek certiorari review of that holding.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's denial of a certificate of appealability defies this Court's precedents.

The COA statute requires that an appellate court "ask whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Because jurists of reason could debate the district court's procedural ruling, Bryant was entitled to a COA on whether the procedural default of his claim for ineffective assistance of trial counsel should be excused for cause and prejudice.

Under the doctrine of procedural default, a federal court will generally not review the merits of a claim that a state court declined to hear because of non-compliance with a state procedural rule. *See Coleman v. Thompson*, 501 U.S. 722, 747–48 (1991). A habeas petitioner can overcome a procedural default by showing cause for the procedural defect and prejudice from a violation of federal law. *Id.* at 750. In *Martinez v. Ryan*, this Court held that ineffective assistance of post-conviction counsel is "cause" to forgive procedural default of a substantial claim of ineffective assistance of sentencing counsel if a petitioner must raise that claim for

the first time during post-conviction proceedings. 566 U.S. at 9. Thus, a habeas petitioner seeking to excuse a procedural default in South Carolina state court—where state law requires that ineffective assistance of counsel claims be raised in initial postconviction proceedings—must show (1) the claim of ineffective assistance of trial counsel was a "substantial claim"; and (2) he had ineffective counsel during the state collateral review proceedings. *See Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

Bryant's is the rare case that meets the *Martinez* standard, even after this Court's ruling in *Shinn v. Ramirez*, 596 U.S. 366 (2022), which held that a federal habeas court generally may not consider evidence beyond the state-court record when assessing whether *Martinez*'s equitable exception should apply. Here, the existing state-court record shows that Bryant's sentencing counsel provided ineffective assistance by unreasonably failing to discover and present evidence of Bryant's severe cognitive deficits caused by prenatal alcohol exposure. The state-court record likewise shows that Bryant's initial post-conviction counsel were ineffective for failing to investigate or raise the claim, establishing cause and prejudice for the procedural default under *Martinez*.

The district court, however, concluded that Bryant had not demonstrated cause for the default. In assessing the effectiveness of trial and initial PCR counsel, the district court addressed only *Strickland*'s performance prong, concluding that neither was deficient. First, the district court decided that "PCR counsel's decision to rely on [expert] testimony in lieu of conducting a deeper investigation fell within

the wide range of reasonable professional assistance." App. 71a–72a. Second, the district court decided that Bryant's underlying claim was not "substantial" because "trial counsel, too, had investigated Bryant's background and history of mental illness, and retained experts accordingly." App. 72a. In short, the district court concluded that sentencing and PCR counsels' performances were not deficient because they did *some* investigation and retained *some* experts. This is a clear misapplication of this Court's case law defining effective assistance of counsel.

To demonstrate deficient performance of counsel under *Strickland v. Washington*, a habeas petitioner must show that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. 668, 686 (1984). This requires articulating specific acts or omissions that fell "outside the wide range of professionally competent assistance." *Id.* at 690. This Court has long looked to the standards for capital defense work published by the American Bar Association (ABA) as "well-defined norms" and "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688).

Under this Court's precedent, a "well-defined norm" at the time of Bryant's sentencing hearing and PCR proceedings provided that mitigation investigations should "comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)). This duty to investigate applied to both Bryant's sentencing counsel and his PCR counsel. *See*

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(A) (2003) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."); *Id.* at 10.7(B)(1) ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case.").

While "strategic choices made after thorough investigation of law and facts" are usually considered reasonable, strategic choices made without a complete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. When, as here, a petitioner claims that defense counsel unreasonably failed to conduct an adequate mitigation investigation, the question is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *Wiggins*, 539 U.S. at 523.

Applying these standards, this Court has repeatedly held that the failure to perform a thorough mitigation investigation constitutes deficient performance, even where—as here—counsel conducted some mitigation investigation and employed mental health experts. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (*per curiam*) ("The decision not to investigate did not reflect reasonable professional judgment"); *Wiggins*, 539 U.S. at 537 (attorneys' failure to investigate client's background and present mitigating evidence of his unfortunate life history at a capital sentencing proceedings violated the Sixth Amendment right to counsel);

Williams v. Taylor, 529 U.S. 362 (2000) (finding deficiency where "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Likewise, the Fourth Circuit itself affirmed the grant of habeas relief on a claim of ineffective assistance of counsel resulting from trial counsel's failure to investigate potentially mitigating evidence of FASD. *See Williams v. Stirling*, 914 F.3d 302, 306 (4th Cir. 2019).

Had the district court properly applied Sixth Amendment precedent, it would have concluded that Bryant's sentencing counsel and his initial PCR counsel provided constitutionally deficient performance by failing to investigate Bryant's FASD. There was no shortage of red flags to alert Bryant's attorneys to his exposure to alcohol in utero. Bryant's physical malformations and cognitive deficits are immediately apparent; he is, for example, consistently unable to report his full date of birth. JA531, JA533, JA606–07. After viewing a childhood photo of Bryant, Bryant's trial expert expressed "concerns that [Bryant] may have had Fetal Alcohol exposure" and her belief that trial counsel should investigate that matter. JA799, 801–02. Had the trial expert possessed the critical information about Bryant's mother's alcohol abuse during pregnancy, she would have referred Bryant to an expert in fetal alcohol disorders. JA801–02. Instead, lacking sufficient information from sentencing counsel, she incorrectly testified that Bryant did not have organic brain damage. JA799–800.

Had Bryant's sentencing attorneys conducted a reasonable mitigation investigation, they would have discovered that Bryant's developing brain was in

fact irrevocably damaged in utero. The sentencing judge appraising Bryant's moral culpability would have been made aware that Bryant's mother "drank alcohol and smoked marijuana" during her pregnancy with him; that he did not meet developmental milestones and had tremendous difficulties in school; and, ultimately, that he suffers from "static encephalopathy secondary to alcohol," which is "cognitively, adaptively, and functionally equivalent to Intellectual Disability," and that his ability to conform his conduct to the law is deeply compromised. JA537. This evidence would have supported the statutory mitigating circumstances that the murder "was committed while the defendant was under the influence of mental or emotional disturbance"; "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and the "mentality of the defendant at the time of the crime" was compromised. S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7).

Sentencing counsel's deficient mitigation investigation should have come to light during the initial PCR process. Bryant's brain damage was on full display during these proceedings; he was, at one point, deemed incompetent to proceed, and experts believed his incompetence might be linked to a neurocognitive disorder. JA730–32, JA794–95. But PCR counsel, like sentencing counsel before them, ignored the red flags of prenatal alcohol exposure, failed to develop the evidence of Bryant's mother's drinking, and failed to seek the neurocognitive testing that would have revealed the extent of Bryant's brain damage. *See Rompilla v. Beard*, 545 U.S. at 391 n.8 (finding ineffective assistance of counsel where counsel ignored "red

flags" in the file and failed to pursue testing, which would have revealed organic brain damage and childhood problems probably related to fetal alcohol syndrome).

In short, counsel's decision not to investigate and present facts of fetal alcohol exposure was unreasonable and outside the range of competent assistance, and the district court's determination that counsel performed adequately is squarely inconsistent with this Court's case law. Bryant therefore met his burden of demonstrating that he was provided ineffective assistance of counsel in the post-conviction process and "that the underlying ineffective-assistance-of-trial-counsel claim ... has some merit." *Martinez,* 566 U.S. at 14.

Yet, to prevail on his COA motion to the circuit court, Bryant did not have to show that the district court erred. As this Court has repeatedly emphasized, "[t]hat a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck v. Davis*, 580 U.S. 100, 116, (2017); *see also Miller-El*, 537 U.S. at 336–37 ("When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."). Because reasonable jurists can debate whether the procedural default of Bryant's ineffective assistance claim can be excused under *Martinez*, the Fourth Circuit should have granted Bryant's motion to expand the COA.

II. In the alternative, this Court should remand to the circuit court for clarification of its decision to deny a certificate of appealability.

In the alternative, this Court should use its inherent authority to remand to the circuit court with instructions to provide its rationale for denying Bryant's motion to expand the COA, so that this Court can meaningfully exercise its appellate jurisdiction over that decision. It has long been clear that an application for a COA constitutes a case under 28 U.S.C. § 1254(1), and that this Court therefore has jurisdiction to review denials of applications for COAs by the courts of appeals. *See Hohn v. United States*, 524 U.S. 236, 241 (1998). The Fourth Circuit's lack of adequate explanation for its denial renders that jurisdiction all but meaningless by leaving nothing of substance for this Court to review.

The COA determination "must not be *pro forma* or a matter of course," but instead "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336, 337. The Fourth Circuit's one-line, summary denial—which does not even state the applicable legal standard—makes it impossible even to confirm that the circuit court applied the correct rules, much less to review its assessment of the merits of Bryant's claim. If this Court does not have enough information to vacate the denial of Bryant's motion to expand the COA, it should grant the petition for a writ of certiorari and remand to the Fourth Circuit to provide a statement of reasons for refusing to hear Bryant's appeal.

CONCLUSION

Petitioner Stephen Corey Bryant requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4

STEPHEN COREY BRYANT,

Petitioner – Appellant,

v.

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

Respondents – Appellees.

FASD UNITED,

Amicus Supporting Appellant.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. David C. Norton, District Judge. (9:16-cv-01423-DCN)

Argued: October 29, 2024 Decided: January 27, 2025

Before NIEMEYER, RUSHING, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Heytens wrote the opinion, which Judge Niemeyer and Judge Rushing joined.

ARGUED: Laura K. McCready, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlotte, North Carolina, for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** John G. Baker, Federal Public Defender, Gretchen L. Swift, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlotte, North Carolina; E. Charles Grose, Jr., GROSE LAW FIRM, LLC, Greenwood, South Carolina; Jonathan P. Sheldon, SHELDON & FLOOD, PLC, Fairfax, Virginia, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. John R. Mills, Nathalie Greenfield, PHILLIPS BLACK, INC., Oakland, California, for Amicus Curiae.

TOBY HEYTENS, Circuit Judge:

Stephen Bryant was sentenced to death by a South Carolina state court. During post-conviction proceedings, a state trial court permitted Bryant to file a new application for relief asserting his execution would violate the Eighth Amendment because he has intellectual disabilities within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). More than a year and a half later, Bryant sought to amend that application to add a claim that he also suffers from fetal alcohol spectrum disorder (FASD) and that "a natural extension of" *Atkins* and *Hall* means the Eighth Amendment prohibits executing people with FASD as well. JA 522. The state post-conviction court denied Bryant's request to add the FASD claim, concluding it was both impermissibly successive and filed too late. We conclude that ruling rested on state procedural grounds that are independent of federal law and adequate to bar federal habeas review. We thus affirm the district court's denial of habeas relief.

I.

In 2008, Bryant pleaded guilty to multiple criminal charges (including murder) in South Carolina state court. A state trial court judge sentenced Bryant to death. Bryant appealed, raising only a single claim: that the sentencing court committed reversible error by excluding testimony corroborating his claim that his father sexually abused him. The state's highest court denied relief.

As permitted by South Carolina law, Bryant next sought post-conviction relief from the state trial court on seven bases. The claims involved ineffective assistance of counsel, incorrect evidentiary rulings, and the prosecution's failure to disclose exculpatory

evidence; none asserted Bryant's execution would violate the Eighth Amendment. The state trial court denied relief, South Carolina's highest court denied discretionary review, and the Supreme Court denied certiorari.

In 2016, Bryant sought a writ of habeas corpus in federal district court. Under a heading labeled "New Claims Not Presented to the State Court" (JA 84), Bryant asserted he "is Intellectually Disabled so his Execution is Barred by *Atkins v. Virginia*," JA 88. Bryant asked the district court to stay the federal proceedings so he could exhaust state remedies, and the district court granted that request.

Bryant also filed two new applications for post-conviction relief with the state trial court. One application—which Bryant calls the second application—asserted that Bryant's death sentence violates the Eighth Amendment "because he suffers from Intellectual Disabilities" and cited three authorities, including *Atkins* and *Hall*. JA 430. The other application—which Bryant calls the third application—raised four ineffective assistance of counsel claims.

The state trial court treated the two applications differently. The court dismissed the third application, concluding it was "both untimely and improperly successive." JA 134. In contrast, the state trial court denied the government's motion to dismiss Bryant's second application. The court noted that the Supreme Court's decisions in *Atkins* and *Hall* render people with intellectual disabilities "categorically exempt from the death penalty." JA 811 n.7. This fact, the state trial court reasoned, raised "unique considerations" and meant "Bryant cannot be precluded from raising Intellectual Disabilities at this time in this manner." JA 810.

In 2018—almost 22 months after the state trial court denied the government's motion to dismiss his second post-conviction application—Bryant moved to amend that application to add a new claim. Along with repeating, verbatim, the previous application's language about intellectual disabilities, the proposed amended application sought to add a claim that Bryant's death sentence "violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder ('FASD')." JA 521. The proposed amended application argued that people with "FASD suffer from impairments to an equal or greater extend [sic] as people suffering from Intellectual Disabilities" and that forbidding their execution "is a natural extension of" *Atkins* and *Hall*, both of which involved defendants with intellectual disabilities. JA 521–22.

The state trial court denied Bryant's motion to amend his second application. The court noted Bryant had been allowed to proceed with "a successive action on a precise claim"—that he "is intellectually disabled . . . and exempt from a death sentence pursuant to *Atkins*." JA 382. But the court concluded there was no authority to permit Bryant to make an "[a]mendment to this restricted action." JA 383. The court further concluded that, even if an amendment were permissible as a matter of pleading, it would be futile because Bryant "candidly admit[ted]" he was "attempting to raise a new claim" by seeking "an extension of" the prohibition against executing people with intellectual disabilities to cover those with FASD. JA 383–84. As a result, the court explained, any FASD claim would not "relate back to the original claim" and thus would violate the statutory limitation applicable to untimely and successive actions as a matter of state law. JA 384 (citing S.C. Code § 17-27-45 (barring claims raised more than one year after final judgment as untimely); § 17-

27-90 (barring successive claims not raised in original post-conviction application)).

The state court proceedings went forward on Bryant's intellectual disability claim alone. After a hearing, the state trial court found Bryant failed to make two showings necessary to trigger *Atkins*' categorical rule: "significantly subaverage general intellectual functioning" and "deficits in adaptive behavior." JA 406 (quotation marks removed). The court thus denied Bryant's application for post-conviction relief. Both sides petitioned for discretionary review, with Bryant arguing the state trial court should have allowed him to amend his second application to add an FASD claim and the state arguing the trial court erred by permitting the second application to go forward on Bryant's ultimately unsuccessful *Atkins* claim. South Carolina's highest court denied both petitions without written explanation.

The parties returned to federal court and the district court lifted the stay. The respondents moved for summary judgment. They noted the state trial court had rejected Bryant's "claim of intellectual disability" on the merits and argued that Bryant procedurally defaulted any federal court scrutiny of that ruling by failing to contest it during his appeal to the state supreme court. JA 944. In response, Bryant did not challenge the state trial court's finding that he was not intellectually disabled under *Atkins* and *Hall*. Instead, Bryant argued that the state trial court's conclusion that he "defaulted" his claim "that his FASD renders him ineligible for a death sentence" could not bar federal habeas relief because that ruling was neither "independent" of federal law nor was it based on an "adequate" state law ground. JA 1010. For that reason, Bryant argued his FASD-based Eighth Amendment claim was "properly before" the federal district court and that the court should conduct "*de*

novo review." *Id.*

A magistrate judge recommended granting summary judgment to the respondents. Relevant here, the magistrate judge concluded that Bryant's FASD claim was "procedurally barred" and that a federal habeas court could not consider it on the merits because Bryant failed to establish "cause and prejudice or some miscarriage of justice." JA 1123–24.

The district court agreed with the magistrate judge's bottom-line recommendation but for different reasons. Unlike the magistrate judge, the district court concluded Bryant's FASD claim was not procedurally defaulted because the state trial court's dismissal of that claim "partially relied upon an application of *Atkins*" and thus was not independent of federal law. JA 1157. Even so, the district court denied relief, concluding the state trial court's rejection of Bryant's "*Atkins* claim" was a merits-based determination that *Atkins* "does not create a categorical bar from executing prisoners who suffer from FASD." JA 1160. Having so construed the state trial court's decision, the district court denied relief because the state court's rejection of Bryant's FASD-based claim was neither "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The district court granted a certificate of appealability limited to "whether [its] decision on Bryant's *Atkins* claims should have been resolved in a different manner," JA 1164, or "whether the [state trial court] properly determined that Bryant's claim was procedurally defaulted," JA 1226–27. Bryant does not challenge the state trial court's finding that he is not intellectually disabled, nor does he assert he can show cause or prejudice for not having raised an FASD claim sooner. See *Dretke v. Haley*, 541 U.S. 386,

388 (2004) ("Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default."). "We review [the] district court's denial of habeas relief de novo," without any deference to the district court. *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012).

II.

"Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). "These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Id.* For procedural default to apply, the state court's justification for refusing to consider the merits of a habeas petitioner's federal claim must satisfy two requirements. First, the basis for the state court's ruling must be "independent of the federal question" the habeas petitioner seeks to raise. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Second, the state court's ruling must rest on "an adequate ground to bar federal habeas review." *Beard v. Kindler*, 558 U.S. 53, 60 (2009). "Because procedural default constitutes an affirmative defense in habeas cases, the burden rests with a state to prove the adequacy of the relied-on procedural bar." *Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010).

We agree with the magistrate judge that the state trial court's refusal to permit Bryant to amend his second application to add an FASD claim rested on state procedural grounds that are both independent of federal law and adequate to preclude federal habeas review. We thus decline to consider the merits of Bryant's FASD claim and affirm the district court's denial of habeas relief. See *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005) (affirming denial of habeas relief on alternative grounds); *Mahdi v. Stirling*, 20 F.4th 846, 895 (4th Cir. 2021) (same).

A.

The state trial court's reasons for refusing to permit Bryant to add an FASD claim were independent of federal law. The court determined such a claim was not within the scope of the order permitting Bryant to file his second application for post-conviction relief, which was limited "solely to an allegation of intellectual disability." JA 383. It then concluded that permitting Bryant to add his new proposed claim would contradict South Carolina's "statutory limitations regarding successive [post-conviction] applications" and the strict "time bars" applicable to such actions. *Id.* None of those conclusions depends on or involves the interpretation of federal law.

Bryant asserts—and the district court agreed—that the state trial court's refusal to permit his proposed amendment "depends on a federal constitutional ruling." Bryant Br. 32 (quoting *Foster v. Chatman*, 578 U.S. 488, 497 (2016)). Recall that the state trial court previously permitted Bryant to file a successive application for post-conviction relief asserting that his death sentence violates the Eighth Amendment as construed in *Atkins* and *Hall* "because he suffers from Intellectual Disabilities." JA 430. According to Bryant, that

means the state trial court "had to interpret *Atkins* to determine whether Bryant's [proposed] amendment" to that application "was allowed" and "necessarily determined that intellectual disability only, and not a functionally equivalent condition, exempts a petitioner from execution." Bryant Reply Br. 4, 5.

We disagree. For one thing, Bryant's current arguments contradict his motion to amend. Before the state trial court, Bryant described his proposed amendment as seeking a "natural extension" of *Atkins* to cover people with FASD rather than providing additional factual support for the claim he had already been permitted to raise. JA 522. The state trial court thus had no need to consider the boundaries of *Atkins* in ruling on Bryant's motion to amend because Bryant admitted he raised a new legal theory for relief—that the Eighth Amendment should be interpreted (but currently is not) to prohibit executing people with FASD. The state trial court determined Bryant was "attempting to raise a new claim" that was barred as untimely and successive, all without reference to federal law. JA 384.

Bryant cannot avoid this problem by describing the FASD claim he sought to add as "an *Atkins* claim" or one that "meets the *Atkins* criteria." Bryant Br. 29; Oral Arg. 8:15–8:35. Federal habeas courts are not bound by a party's proposed labels, cf. *Gonzalez*, 545 U.S. at 534, and the "bit of rhetorical sleight of hand" Bryant attempts here cannot disguise the new—and distinct—claim he sought to add via the proposed amendment, *United States v. Taylor*, 62 F.4th 146, 150 (4th Cir. 2023). Bryant's original second application sought an answer to one factual question: Does Bryant have an intellectual disability as that term is defined in *Atkins* and *Hall*? If so, all agree the Eighth Amendment would forbid his execution. In contrast, Bryant's proposed amendment sought answers to

two new questions, one factual and one legal: (1) does Bryant have FASD; and (2) should the Supreme Court's reasoning in *Atkins* and *Hall* be extended to cover people with FASD? Regardless of the answers to those questions, the FASD-based claim that Bryant sought to add is a distinct Eighth Amendment claim from the one Bryant had been granted permission to assert and the state trial court had no need to consider federal law in denying Bryant's request for permission to allow it. We thus hold the first requirement for procedural default is satisfied.*

B.

We also conclude that the grounds the state trial court gave for refusing to consider the merits of Bryant's FASD claim were adequate to bar federal habeas relief.

"To qualify as an adequate procedural ground, a state rule must be firmly established and regularly followed." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quotation marks removed). "As a general matter," procedural rules "derived from state statutes and supreme court rules" are "firmly established." *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir.

* The Fifth Circuit's decision in *Busby v. Davis*, 925 F.3d 699 (5th Cir. 2019), does not help Bryant. That case involved a state law requiring a state court to "determine whether the defendant has asserted facts, which if true, would sufficiently state an *Atkins* claim." *Id.* at 707. The Fifth Circuit thus interpreted the state court's denial of relief as "a determination that Busby did not make a threshold showing of evidence" to support a finding he was intellectually disabled—a merits determination. *Id.* at 710. Moreover, the petitioner in *Busby* brought an intellectual disability claim rather than a legal claim seeking relief from execution for a new category of individuals under the Eighth Amendment. See *id.* For that reason, we disagree with the district court's decision to "construe the [post-conviction] court's ruling here as a decision on the merits." JA 1159 (relying in part on *Busby*'s reasoning). The state post-conviction court considered only whether a claim based on intellectual disability is factually and legally distinct from one based on FASD, rather than (as in *Busby*) the merits of Bryant's underlying legal argument.

1996) (en banc) (quotation marks removed). This Court has relied on South Carolina's statutory rules in holding claims were procedurally defaulted. See, *e.g.*, *Mahdi v. Stirling*, 20 F.4th 846, 905 (4th Cir. 2021); *Sigmon v. Stirling*, 956 F.3d 183, 198–99 (4th Cir. 2020).

Bryant presents two main arguments against adequacy here. We are not persuaded by either.

1.

Bryant's first argument challenges the state trial court's characterization of his motion to amend his second application as a procedurally improper attempt to raise a new claim. Instead, Bryant contends that South Carolina law lacks any "clear rule governing the amendment of a pending successive [post-conviction relief] application," Bryant Br. 25, and that, without a clear rule, he lacked notice that his proposed amendment would be subject to South Carolina's timeliness and successive statutes.

That argument fails. South Carolina's highest court has made clear that the relevant procedural bars apply whenever "[t]he gravamen of" a particular motion is an attempt "to add new grounds and new claims for post-conviction relief." *Arnold v. State*, 420 S.E.2d 834, 842 (S.C. 1992). That is exactly what the state trial court determined Bryant was seeking to do here through his proposed amendment. See JA 384 (describing Bryant as "attempting to raise a new claim").

2.

Bryant's second argument is that South Carolina courts have made various exceptions to the general bar on successive post-conviction relief applications and that these exceptions prevent the relevant state procedural rules from being "firmly

established." Bryant Br. 29 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Once again, we disagree.

South Carolina law allows successive applications for post-conviction relief when "the court finds a ground for relief asserted which for sufficient reason was not asserted" in the original application. S.C. Code § 17-27-90. South Carolina's highest court has "interpreted . . . the phrase 'sufficient reason' very narrowly." *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Most sufficient reasons involve procedural irregularities that prevented an applicant from receiving a merits adjudication on the original application. See, *e.g.*, *Robertson v. State*, 795 S.E.2d 29, 35 (S.C. 2016) (successive application permitted because original post-conviction counsel was not qualified under state law); *Barnes v. State*, 859 S.E.2d 260, 262 (S.C. 2021) (successive application permitted when clerk failed to ministerially file original application). Bryant also identifies several decisions (including the one in this case) where South Carolina courts have permitted successive claims that an applicant's intellectual disability prohibits their execution from going forward. See Bryant Br. 29–31. According to Bryant, the fact that "South Carolina courts regularly hear successive [post-conviction] applications raising a petitioner's ineligibility for execution" means that "the rules relied upon to foreclose" his proposed amendment "were neither clearly established nor regularly applied, and were therefore inadequate to support procedural default." *Id.* at 31.

That argument fails. The Supreme Court has held that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review" "even if the appropriate exercise of discretion may permit consideration of a federal claim in some

cases but not others." *Beard*, 558 U.S. at 60–61. In addition, "[a] discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies." *Walker v. Martin*, 562 U.S. 307, 320 (2011). For one thing, "[c]loser inspection may reveal that seeming inconsistencies are not necessarily arbitrary or irrational." *Id.* at 320 n.7 (brackets, ellipses, and quotation marks removed). What is more, "[d]iscretion enables a court to home in on case-specific considerations and to avoid the harsh results that sometimes attend consistent application of an unyielding rule." *Id.* at 320. The question is not whether a state procedural rule is discretionary, but whether "discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law[.]" *Id.* (quotation marks removed).

We perceive no violation of those principles here. We may assume—for the sake of argument—that current South Carolina practice provides an exception to the otherwise-applicable procedural limits on subsequent post-conviction relief applications for offenders who assert they are intellectually disabled under *Atkins* and *Hall*. Yet even if this is so, there would be nothing arbitrary or irrational about limiting such an exception to those claiming to fall within a particular class whose execution has already been held to violate the Eighth Amendment and excluding those (like Bryant) who seek to make new law and then benefit from its application in their own case. Indeed, federal habeas law reflects just such a distinction. See *Teague v. Lane*, 489 U.S. 288, 310 (1989) (holding federal courts should generally decline to announce new constitutional rules in cases on collateral review); 28 U.S.C. § 2254(d)(1) (limiting federal habeas relief to situations when a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). Here, as elsewhere, "it would seem particularly strange" to say States may not employ procedural distinctions "that are substantially similar to those to which we give full force" in federal court. *Beard*, 558 U.S. at 62.

Byant identifies no South Carolina authority excusing the normal procedural rules for successive post-conviction relief applications that urge the court to recognize new legal rights or extend an already recognized right to a new context. But that is precisely what Bryant sought to do here; he has identified no authority—much less authority from the Supreme Court—establishing Eighth Amendment limits on capital punishment for offenders with FASD. See, *e.g.*, *Ochoa v. Davis*, 50 F.4th 865, 903 (9th Cir. 2022) (recognizing lack of authority for FASD-based Eighth Amendment claim). And without any preexisting endorsement by South Carolina courts (or any other courts) for his approach, Bryant can hardly contend South Carolina's normal statutory procedures imposed "novel and unforeseeable requirements" on him. *Walker*, 562 U.S. at 320.

Bryant's position would also create the same "unnecessary dilemma for the States" that worried the Supreme Court in *Beard*. 558 U.S. at 61. As Bryant acknowledged at oral argument, he thinks South Carolina's current procedural rules are inadequate to preclude federal habeas review of *any* claim that the Eighth Amendment prohibits a particular person's execution—up to and including global attacks on the constitutionality of capital punishment. Oral Arg. 4:49–7:02. Adopting Bryant's position would thus force South Carolina courts to decide between "preserv[ing] flexibility" to make limited procedural exceptions "at the cost of undermining the finality of state court judgments" and strictly

applying "mandatory rules to avoid the high costs that come with plenary federal review." *Id.* at 61. *Beard* and *Walker* instruct that South Carolina need not make that choice. We thus hold the procedural grounds the state trial court identified were adequate to bar federal court consideration of the merits of Bryant's FASD claim.

* * *

We hold that the sole ground for Bryant's appeal of the district court's denial of his petition for a writ of habeas corpus is procedurally defaulted, thus foreclosing federal review. The district court's judgment is

AFFIRMED.

FILED: October 3, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4
(9:16-cv-01423-DCN)

STEPHEN COREY BRYANT

Petitioner - Appellant

v.

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

Respondents - Appellees

O R D E R

Upon consideration of submissions relative to appellant's motion to expand certificate of appealability, the court denies the motion.

For the Court

/s/ Nwamaka Anowi, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

STEPHEN COREY BRYANT, Petitioner, vs. BRYAN P. STIRLING, *Commissioner, South Carolina Department of Corrections*; LYDELL CHESTNUT, *Deputy Warden, Broad River Correctional Institution Secure Facility*, Respondents.	)	No. 9:16-cv-01423-DCN-MHC **ORDER**

Petitioner Stephen Corey Bryant ("Bryant") is a death row inmate in the custody of the South Carolina Department of Corrections ("SCDC"). He filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 14, 2016. ECF No. 30. This matter is before the court on Magistrate Judge Molly H. Cherry's report and recommendation ("R&R"), ECF No. 116, that the court grant respondents Bryan P. Stirling ("Stirling") and Lydell Chestnut's ("Chestnut," and together, "respondents") motion for summary judgment, ECF No. 91. For the reasons set forth below, the court adopts the R&R and grants the motion.

I. BACKGROUND

Bryant pled guilty to three counts of murder, two counts of first-degree burglary, one count of second-degree burglary, two counts of assault and battery with intent to kill, one count of second-degree arson, armed robbery, possession of a stolen handgun, and threatening the life of a public employee. Circuit Court Judge Thomas A. Russo

sentenced Bryant to death for the murder of one of the three murder victims, Willard Tietjen ("Tietjen").

The R&R ably recites the facts of the case, as summarized by the Supreme Court of South Carolina. R&R at 2 (quoting State v. Bryant, 704 S.E.2d 344, 344–45 (S.C. 2011)). In short, Bryant engaged in an eight-day crime spree that involved multiple robberies and murders. Bryant started by casing isolated rural homes for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Over the course of eight days, Bryant burglarized several homes and murdered three individuals, including Tietjen. Bryant went to Tietjen's home, shot him nine times, and looted his house. Bryant answered several calls made to Tietjen's cell phone by Tietjen's wife and daughter, telling them that he was the "prowler" and that Tietjen was dead. He burned Tietjen's face and eyes with a cigarette. Before leaving, Bryant left two messages on the walls. One said, "victim number four in two weeks, catch me if you can." On another wall, he wrote the word "catch" and some letters in blood. While awaiting trial, Bryant threatened a correctional officer and attacked and seriously injured another.

Bryant was indicted in Richland County in December 2004 and in Sumter County in July 2006. ECF No. 16-12 at 162–89. Prior to and at his guilty plea, Bryant was represented by three attorneys (both individually and collectively, "trial counsel"). Jack D. Howle, Jr. ("Howle") and James Babb ("Babb") handled preliminary matters and trial preparation until July 18, 2008, when John D. Clark ("Clark") was appointed to replace Babb. Due to Babb's prior involvement, all three attorneys were present for Bryant's guilty plea, which Bryant entered on August 18, 2008. ECF No. 16-6 at 60–107. On

September 11, 2008, Judge Russo sentenced Bryant to death for the murder of Tietjen, finding the aggravating circumstance of armed robbery. ECF No. 16-5 at 61–63.

Bryant appealed his case to the Supreme Court of South Carolina. On January 7, 2011, the Supreme Court of South Carolina affirmed Bryant's convictions and sentences. ECF No. 16-6 at 178. Bryant petitioned for rehearing, which the court denied on January 24, 2011. Id. at 184. On May 10, 2011, Bryant filed an application for post-conviction relief ("PCR"). Id. at 112. On May 21, 2011, Bryant filed an amended PCR application. ECF No. 16-7 at 44. On October 1, 2012, Bryant filed a second amended PCR application. Id. at 144. The PCR court held an evidentiary hearing from October 1–3, 2012, id. at 151, and on December 4, 2012, the PCR court dismissed Bryant's application, ECF No. 16-12 at 84. Bryant filed a motion to reconsider, which the PCR court denied. Id. at 146. Bryant then filed a petition for writ of certiorari with the Supreme Court of South Carolina. ECF No. 16-34. On March 4, 2015, the Supreme Court of South Carolina denied Bryant's petition, ECF No. 16-39. On May 6, 2015, the Supreme Court of South Carolina denied Bryant's petition for rehearing, ECF No. 16-41, and issued a remittitur, ECF No. 16-42.

On June 19, 2015, Bryant commenced this action by filing a motion for stay of execution and a motion to appoint counsel. ECF No. 1. Bryant then filed his petition for writ of habeas corpus pursuant to § 2254 on January 14, 2015. ECF No. 30. Bryant filed an amended petition on April 28, 2016. ECF No. 37, Amend. Pet. Along with his amended petition, Bryant contemporaneously filed a motion to stay his habeas proceeding pending the exhaustion of his state court proceedings. ECF No. 38. The court granted the motion to stay on July 26, 2016. ECF No. 52.

On May 3, 2016, Bryant filed two additional PCR applications in state court. ECF Nos. 89-2 at 3, 89-38 at 27. The PCR court presided over both actions and initially allowed Bryant's PCR action based on Atkins v. Virginia to proceed. Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executions of intellectually disabled criminals constituted cruel and unusual punishments prohibited by the Eighth Amendment). The PCR court denied Bryant's other action, based on his PCR counsel's failure to raise claims that should have been discovered, as successive and time-barred. ECF Nos. 89-6, 89-8. Bryant moved to alter or amend the court's order, and the PCR court denied that motion on September 16, 2016. ECF No. 89-9. Bryant then appealed the denial, ECF No. 89-10, and the Supreme Court of South Carolina dismissed the appeal on February 7, 2017, ECF No. 89-15.

On October 1, 2018, the PCR court conducted an evidentiary hearing on Bryant's Atkins-claim application. ECF No. 89-37 at 146. On January 3, 2019, the PCR court denied the application. Id. through ECF No. 89-38 at 24. Bryant filed a motion to reconsider, which the PCR court denied on March 5, 2019. ECF No. 89-38 at 25. Both Bryant and respondents filed petitions for writ of certiorari, and the Supreme Court of South Carolina denied both petitions on May 11, 2021. ECF No. 52. The Supreme Court of South Carolina denied Bryant's subsequent petition for rehearing on May 21, 2021. ECF No. 89-54. This ended Bryant's state court proceedings, and the court lifted the stay in Bryant's habeas proceeding, effective October 4, 2021. ECF No. 87.

On October 15, 2021, respondents filed their motion for summary judgment. ECF No. 91. Bryant filed his response and traverse on February 7, 2022, ECF No. 104, and respondents replied on April 8, 2022, ECF No. 114. On April 19, 2022, Magistrate Judge

Cherry issued the R&R, recommending that the court grant respondents' motion for summary judgment. ECF No. 116, R&R. On July 18, 2022, Bryant filed his objections to the R&R. ECF No. 124. Respondents responded to Bryant's objections on August 8, 2022. ECF No. 127. Bryant's claims are now ripe for resolution.

II. STANDARD

A. R&R Review

This court is charged with conducting a de novo review of any portion of the Magistrate Judge's R&R to which specific, written objections are made. 28 U.S.C. § 636(b)(1). A party's failure to object is accepted as agreement with the conclusions of the Magistrate Judge. See Thomas v. Arn, 474 U.S. 140, 149–50 (1985). The recommendation of the Magistrate Judge carries no presumptive weight, and the responsibility to make a final determination rests with this court. Mathews v. Weber, 423 U.S. 261, 270–71 (1976). The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge . . . or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1). The court is charged with making a de novo determination of any portion of the R&R to which a specific objection is made. Id. However, in the absence of a timely filed, specific objection, the court reviews the R&R only for clear error. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (citation omitted). Furthermore, "[a] party's general objections are not sufficient to challenge a magistrate judge's findings." Greene v. Quest Diagnostics Clinical Labs., Inc., 455 F. Supp. 2d 483, 488 (D.S.C. 2006) (citation omitted). When a party's objections are directed to strictly legal issues "and no factual issues are challenged, de novo review of the record may be

dispensed with." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) (citation omitted). Analogously, de novo review is unnecessary when a party makes general and conclusory objections without directing a court's attention to a specific error in a magistrate judge's proposed findings. Id.

B. Summary Judgment

Summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

C. Habeas Corpus

1. Standard for Relief

This court's review of a habeas petition is governed by 28 U.S.C. § 2254, which was amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1213. See Lindh v. Murphy, 521 U.S. 320 (1997). Section 2254(a) provides federal habeas jurisdiction for the limited purpose of establishing whether a person is "in custody in violation of the Constitution or laws or treaties of the United States." This power to grant relief is limited by § 2254(d), which provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The "contrary to" and "unreasonable application" clauses contained in § 2254(d)(1) are to be given independent meaning—in other words, a petitioner may be entitled to habeas corpus relief if the state court adjudication was either contrary to or an unreasonable application of clearly established federal law.

A state court decision can be "contrary to" clearly established federal law in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." Williams v. Taylor, 529 U.S. 362, 405 (2000). Section 2254(d)(1) restricts the source of clearly established law to holdings of the

Supreme Court as of the time of the relevant state court decision. See id. at 412; see also Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir. 2005).

With regard to "unreasonable" application of the law, a state court decision can also involve an "unreasonable application" of clearly established federal law in two ways: (1) "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.

However, "an unreasonable application of federal law is different from an incorrect application of federal law," and "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410–11 (emphasis in original). Indeed, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all instances, objectively unreasonable." Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (quoting Williams, 529 U.S. at 410).

2. Procedural Default

A petitioner seeking habeas relief under § 2254 may only do so once the petitioner has exhausted all remedies available in state court. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim

to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds, United States v. Barnette, 644 F.3d 192 (4th Cir. 2011). Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012); see also Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008) (explaining that generally, "[f]ederal habeas review of a state prisoner's claims that are procedurally defaulted under independent and adequate state procedural rules is barred.").

But "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions." Martinez, 566 U.S. at 10. One such exception occurs when a prisoner seeking federal review of a defaulted claim can show cause for the default and prejudice from a violation of federal law. Id. "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 10. In order to establish such cause, the following elements must be established:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (quoting Martinez, 566 U.S. at 14, 17–18). A claim is "substantial" if it has "some merit." Martinez, 566 U.S. at 14.

3. Ineffective Assistance of Counsel

A petitioner asserting ineffective assistance of counsel must demonstrate that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the

petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential," and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. When considering prejudice in the context of a death penalty case, "the question is 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." Id. at 695.

Because "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371 (2010), "[e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult," Harrington v. Richter, 562 U.S. 86, 105 (2011). The Supreme Court has explained that "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential.'" Id. (quoting Strickland, 466 at 689). Therefore, a court's review of an ineffective assistance counsel

claim under the § 2254(d)(1) standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

III. DISCUSSION

Bryant's amended petition raises nine grounds for relief. Bryant objects to the Magistrate Judge's findings on Grounds Two, Three, Six, Seven, and Eight. Bryant does not object to the Magistrate Judge's findings on Grounds One, Four, Five, and Nine, and in the absence of any objections, the court reviews those findings for clear error. Finding none, the court proceeds to consider each ground that Bryant raised objections to in turn.

A. Ground Two

In Ground Two, Bryant alleges that his trial counsel was ineffective for failing to provide accurate advice regarding the likely sentence he would receive were he tried by a jury versus if were to plead guilty.

Bryant pled guilty to three counts of murder and other felonies but received no consideration at the time of his guilty plea. At the plea hearing, the prosecution affirmatively stated that no plea negotiations took place. Bryant alleges that despite no plea agreement in place, his trial counsel advised him that there was an "advantage" to pleading guilty to capital murder because it would lessen his chances of receiving a death sentence. Amend. Pet. at 28. Bryant's trial counsel, Babb, allegedly advised Bryant to plead guilty under the belief that doing so would not forfeit Bryant's right to be sentenced by a jury. Bryant further alleges that he pled guilty after trial counsel relayed "empirical and statistical evidence" that indicated he would be more likely to be sentenced to death by a jury. Id. at 32.

In the R&R, the Magistrate Judge further examined the events surrounding the purported advice given by trial counsel. Bryant does not object to the R&R's rendition of those facts, and the court finds that the R&R's recounting of the facts is supported by the record.

In short, Babb testified at the PCR evidentiary hearing that he attended a conference for defense attorneys where he consulted with several well-known capital defense attorneys. Two of those attorneys purportedly relayed statistics to Babb reflecting that a defendant's chances of receiving a death sentence were higher if he maintained his innocence. Babb testified that he began to look into whether Bryant could enter a guilty plea but maintain his right to be sentenced by a jury. This included raising the issue to the South Carolina Supreme Court via a petition for writ of certiorari. Soon after, Babb was replaced as counsel. Howle, who remained on the case, learned that Babb's contemplated strategy was not feasible. Nevertheless, Howle believed that even apart from the statistics, it would be preferable to avoid having the jury hear the evidence twice and instead, "go with the judge hearing it and [] our mitigation." ECF No. 16-8 at 61. Both Babb and Howle testified that they had multiple conversations with Bryant about entering a guilty plea, and Bryant indicated he fully understood the decision. By the time Clark replaced Babb, the decision had largely been made, and Clark did not question the wisdom of the decision. Bryant testified at the hearing that he had planned on going to trial "from the beginning," but he decided to plead guilty based on trial counsel's advice. ECF No. 16-9 at 133.

The PCR court denied Bryant's ineffective trial counsel argument, which asserted failure to provide accurate sentencing advice. The PCR court focused on the fact that

Bryant testified he knew he would be found guilty and sentenced to either life without the possibility of parole or death "either way." ECF No. 16-12 at 104. The PCR court also noted that the supposed statistics were "but part of the counsel's consideration." Id. Bryant's trial counsel had also noted other strategic considerations, including, for example, that the facts in the case would be very difficult for a jury to hear and that a judge would be a more neutral figure. In the R&R, the Magistrate Judge determined that the PCR court's findings were not unreasonable and did not result in an unreasonable application of federal law.

Bryant's sole objection under this ground is that the Magistrate Judge applied the wrong standard when evaluating Bryant's claim. Bryant argues that the Magistrate Judge applied § 2254(e)'s "clear and convincing error" standard even though Bryant's burden under § 2254(d) is to show that the state court's decision was "unreasonable." ECF No. 124 at 6. Upon review, the court does not find that the Magistrate Judge erred and applied the incorrect standard. The Magistrate Judge specifically noted from the onset of the analysis that "[b]ecause the PCR court ruled on the merits of this claim, the court is focused on whether the PCR court's determination is either based on unreasonable factual findings or resulted in a decision that is contrary to, or involved an unreasonable application of, federal law." R&R at 22. Bryant cherry picks two instances where the Magistrate Judge used the phrase "clear and convincing." ECF No. 124 at 6 (citing R&R at 25, 31). But Bryant ignores that the R&R ultimately applied the proper standard and determined that the PCR court's findings were not unreasonable. See, e.g., R&R at 25 (determining that the PCR court's finding that trial counsel "significantly consulted" with Bryant was not unreasonable), id. at 27 (same, for the PCR court's finding that Bryant's

situation was "somewhat unique" because he had acknowledged that he was unlikely to receive a significantly different sentence under either route).

Beyond the fact that the Magistrate Judge applied the proper standard for its findings, the court finds that the Magistrate Judge did not err in its application of § 2254(e) in the two instances identified by Bryant. Bryant argues that § 2254(e) does not apply because "no new evidence has been presented in this court." ECF No. 124 at 6. Bryant is mistaken about when the rule applies. As the United States Supreme Court explained, § 2254(e)(1) "pertains [] to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief." Miller-El v. Cockrell, 537 U.S. 322, 341–42 (2003); see also Merzbacher v. Shearin, 706 F.3d 356, 364 (4th Cir. 2013) (quoting Miller-El, 537 U.S. at 348) ("The two provisions, operating in tandem, require that '[t]o secure habeas relief, petitioner must demonstrate that a state court's finding . . . was incorrect by clear and convincing evidence, and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court.'"); Winston v. Kelly, 592 F.3d 535, 554 (4th Cir. 2010) ("[W]e conclude that § 2254(d)(2) and § 2254(e)(1) will both ordinarily apply even after a district court has properly held an evidentiary hearing."). Circuits that previously held that the clear and convincing evidence standard only applies when the petitioner presents new evidence for the first time in federal court have since modified their approach to conform with this circuit's approach. See Murray v. Schriro, 745 F.3d 984, 1000 (9th Cir. 2014), overruling Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) (explaining that "[a]fter [Cullen v.]Pinholster, a federal habeas

court may consider new evidence only on de novo review, subject to the limitations of § 2254(e)(2)").

In both references to Bryant's lack of clear and convincing evidence, the Magistrate Judge was describing Bryant's failure to overcome the presumption of correctness for the PCR court's factual findings, not the PCR court's decision itself. See R&R at 25, 31. By observing that a state court's factual determinations are presumed correct and must be rebutted by clear and convincing evidence, the Magistrate Judge did not err in its application of the rule.

Bryant does not otherwise object to the substance of the Magistrate Judge's conclusions. In the absence of an objection, the court "must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond, 416 F.3d at 315 (internal quotations and citation omitted). The court finds that the Magistrate Judge did not clearly err in concluding that the PCR court's decision was not unreasonable.

B. Ground Three

In Ground Three, Bryant alleges that the trial court erroneously refused to allow Bryant to present after-discovered witness testimony concerning mitigation and allowed the state to present additional evidence on aggravation of punishment. Bryant further alleges that trial counsel rendered ineffective assistance by failing to object to the aggravating evidence.

On August 18, 2008, Bryant pled guilty to three counts of murder and other crimes but only faced the death penalty for the murder of Tietjen. Sentencing began on September 2, 2008, and the trial court opened the sentencing phase by explaining that the

court was there on that day "to proceed with the sentencing phase with matters associated with that indictment," referring to the indictment for which the state was seeking the death penalty. ECF No. 16-1 at 21. Both parties gave their closing arguments on September 9, 2008. When the trial court reconvened on September 11, 2008, the trial court denied defense counsel's motion to reopen the case to hear evidence from an additional mitigation witness who had come forward. The trial court then allowed the solicitor to present testimony from three witnesses who were either victims or related to victims from Bryant's other crimes not involving Tietjen. Bryant's trial counsel did not object and declined to cross-examine the witnesses. The trial court then gave the defense the opportunity to be heard. Bryant's trial counsel told the court that Bryant's family did "not feel they emotionally could come here and talk." ECF No. 16-5 at 58. Trial counsel also told the court that Bryant did not wish to address the court, but a letter Bryant had written to Tietjen's family, which was already in evidence, conveyed what he would say. The trial court subsequently sentenced Bryant on all crimes to which he had pled guilty, including the lesser crimes and the murder of Tietjen.

The PCR court rejected Bryant's claims that his due process rights were violated and that his trial counsel rendered ineffective assistance of counsel. The PCR court explained that South Carolina law requires a sentencing judge review victim impact statements prior to sentencing and allow the defense the opportunity to respond. The PCR court also indicated that, contrary to Bryant's assertion, the trial court did not consider the non-capital victim impact testimony in sentencing Bryant for capital murder.

The R&R reached two findings under its § 2254(e) analysis: first, it was not unreasonable for the PCR court to find that the trial court did not consider the non-capital

victim impact testimony in deciding whether to sentence Bryant to death. Second, the PCR court's decision was not contrary to clearly established federal law in Payne v. Tennessee, 501 U.S. 808 (1991), Gardner v. Florida, 430 U.S. 349 (1977), or Strickland. Bryant objects to both recommendations.

1. Non-Capital Victim Impact Testimony

To reiterate, the court reviews the portions of the R&R to which Bryant objects de novo. Under that standard, the court finds that the PCR court's finding was not unreasonable. Bryant has failed to present any evidence that the trial court considered the non-capital victim testimony for anything but the sentencing of Bryant's non-capital offenses. Rather, the record indicates that the testimony was, in fact, heard and considered separately. At the time of Bryant's guilty plea, the parties agreed to defer "any sentencing proceedings" until September 2, 2011. ECF No. 16-6 at 51 (emphasis added). The trial court heard mitigation and aggravation evidence on the murder charge subject to the death penalty beginning on September 2, and both sides presented closing arguments on September 9, 2011. The fact that the trial court then heard testimony from the non-capital victims after the court reconvened on September 11 is entirely consistent with the fact that the trial court separated the charges. This conclusion is further supported by the following exchange between the court and the solicitor prior to presentment of the non-capital victim testimony:

> THE COURT: At this time, Solicitor, if there's any further presentation by the State regarding sentencing if there's any individuals who wish to be heard I'll be happy to hear from them at this time.
>
> MR. JACKSON: Your Honor, there are a few individuals that would like to speak on their particular cases that he pled guilty to. Is that what you're referring to?

THE COURT: Yes, sir.

ECF No. 16-5 at 52 (emphasis added). The solicitor's clarification and the trial court's response support respondents' contention that the trial court compartmentalized the evidence. Even if the trial court's procedural record was not a model of clarity, Bryant ultimately shoulders the burden of proving that the trial court erred. But Bryant fails to present any contrary evidence that the trial court, in sentencing Bryant for the murder of Tietjen, considered the non-capital victim witness testimony.

Indeed, as the PCR court noted, South Carolina statute provides that a trial court must hear or review victim impact statements. ECF No. 16-12 at 116 (citing S.C. Code Ann. § 16-3-1550). S.C. Code § 16-3-1550 states that "[t]he circuit . . . court must hear or review any impact victim statement . . . before sentencing." S.C. Code Ann. § 16-3-1550(F). It was reasonable for the PCR court to conclude that the trial court would have erred had it proceeded to sentence Bryant on all crimes without hearing witnesses on the non-capital offenses. Thus, although the court reviews Bryant's claim anew, the court reaches the same finding as the Magistrate Judge regarding the reasonableness of the PCR court's finding.

2. Application of Federal Law

The court reviews de novo Bryant's argument that the PCR court's decision was contrary to established federal law. Bryant first argues that the PCR court failed to address the controlling precedents of Payne and Gardner. In Payne, the United States Supreme Court held that victim impact evidence was relevant to the determination of whether to impose the death penalty at the sentencing phase of capital trials. 501 U.S. at 827. In Gardner, the Supreme Court held that it was unconstitutional for a judge to sentence a defendant to death based, in part, on a confidential presentence report because

the defendant did not have an opportunity to challenge the accuracy or materiality of the information. 430 U.S. at 351. Bryant argues that together, the cases stand for the proposition that due process required that he be allowed to deny or explain the victim impact evidence presented against him.

The court finds that Payne and Gardner are not directly applicable here. As the court found above, the PCR court was not unreasonable in finding that the trial court cabined the victim impact evidence from the three witnesses to its consideration of the non-capital offenses. Based on that finding, the trial court would not have needed to address Payne or Gardner because the non-capital victim impact testimony was not applied to his death penalty sentence. See Kelly v. California, 129 S. Ct. 564, 566 (2008) (explaining that Payne gave "prosecutors a powerful new weapon in capital cases") (emphasis added). Bryant argues that Payne and Gardner cannot be superseded by state statute, but the PCR court did not elevate S.C. Code § 16-3-1550(F) over Payne. Rather the interplay here is that in the absence of contrary authority on the issue, the PCR court concluded that the trial court did not err by hearing non-capital victim impact testimony prior to sentencing Bryant on all charges.[1]

Regardless, even if the cases did apply, the court finds that the PCR court's decision was not contrary to clearly established federal law concerning the right to confront victim-impact witnesses. Even if the court found that the non-capital victim impact testimony could be considered as part of the death penalty phase testimony—which it does not—the record is clear that Bryant was offered the opportunity to respond

[1] Additionally, S.C. Code § 16-3-1550(F) is entirely consistent with Payne because Payne places no bar on victim impact testimony and in fact allows it. Payne, 501 U.S. at 827.

to those witnesses but declined. ECF No. 16-5 at 58. Bryant's trial counsel also acknowledged that he did not seek to cross examine the non-capital victim witnesses. ECF No. 16-8 at 92. Indeed, the PCR court discussed this very issue in its order denying Bryant's Rule 59(e) motion, explaining that the trial court satisfied Gardner because Bryant was provided with the opportunity to confront and respond to the non-capital case impact witnesses. ECF No. 16-12 at 153 ("Applicant did have the opportunity to confront and respond to the impact witnesses which satisfies the requirements of Gardner."). Finally, the Magistrate Judge found that the PCR court was not unreasonable in determining that the trial court acted properly by applying the procedural safeguards for non-capital victim impact statements to the testimony because, again, that testimony was not related to Bryant's capital sentencing. R&R at 39. Bryant does not argue that Supreme Court precedent compels a different finding once the court has decided that the non-capital victim impact testimony was not part of the death penalty sentencing, and the court adopts the R&R's recommendation.

Next, the court reviews the PCR court's opinion to determine whether, pursuant to § 2254, the PCR court unreasonably applied Strickland to Bryant's ineffective assistance of trial counsel claim. Because the court is employing the deferential standards of review under both Strickland and § 2254, the court's review is "doubly deferential." Knowles, 556 U.S. at 123. Under this doubly deferential standard, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 562 U.S. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The court finds that it was reasonable for Bryant's trial counsel to believe that the non-capital victim impact

testimony would not be considered by the trial court in the death penalty sentencing, and, accordingly, that it was reasonable not to object. Under the doubly deferential standard, the PCR court did not err in reaching that same conclusion. Importantly, even if this court questioned the reasonableness of trial counsel's decision, the court finds, at minimum, that fairminded jurists could disagree on that outcome.

C. Ground Six

Ground Six alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on the government's purported failure to disclose evidence from Tietjen's computer to Bryant.

In the days following his crime spree, Bryant made multiple statements in which he recalled discussing Tietjen's preference for "young girls" with Tietjen and seeing pornography on Tietjen's computer. ECF No. 16-12 at 126–127. This included multiple statements in which Bryant recalled seeing a photograph on Tietjen's computer of a girl engaging in sex acts with a horse. Id. at 127–28. At the sentencing hearing, the state presented evidence that Bryant had burned Tietjen's eyes with a cigarette after killing him. One of the notes left by Bryant at Tietjen's house included a statement that said, "No more computer porn for this sick fucker." ECF No. 16-3 at 28.

In October 2004, David Givens ("Givens"), an agent with the South Carolina Law Enforcement Division, conducted a search of Tietjen's computer. Givens testified at the PCR evidentiary hearing that he was instructed to specifically look for the existence of child or bestiality pornography on Tietjen's computer. ECF No. 16-7 at 216. Givens recovered all photographs from Tietjen's image gallery, including "deleted photographs that [we]re [on] the computer," and his internet search history. Id. at 217. Givens

identified several pornographic movies in the computer's program files and pornographic sites in the search history, but "[n]o child or bestiality photos [were] located." Id. at 231. There is no dispute that Givens's notes and the electronic file that he created were not provided to either the defense or the state.

Bryant's trial counsel confirmed that they never received evidence from Tietjen's computer. Trial counsel testified at the PCR evidentiary hearing that had they received evidence, they would have "looked more" into whether Tietjen said something or if Bryant saw something that acted as a trigger for his actions. ECF No. 16-8 at 54. Additionally, Dr. Donna Marie Schwartz-Watts ("Dr. Schwartz-Watts"), a forensic psychiatrist who spoke with and observed Bryant, testified at the PCR hearing that "clearly pornography had a role in this crime" and "explained the mutilation of Mr. Teitjen' [sic] body." ECF No. 16-9 at 69. She later testified that "to me [seeing] the computer, it just verified, it gave some credibility to his accounts." Id. at 71. Bryant claims that the failure to turn over Givens's analysis of the contents of Tietjen's laptop prior to sentencing constituted a Brady violation, and the PCR court's decision finding otherwise was unreasonable and contrary to clearly-established law.

A Brady violation occurs when a defendant can show that the evidence at issue (1) was favorable to the defendant, (2) material to the defense, and (3) the prosecution had the evidence but failed to disclose it. Moore v. Illinois, 408 U.S. 786, 794–95 (1972); United States v. Sarihifard, 155 F.3d 301, 309 (4th Cir. 1998). Evidence is "material" when there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. See Kyles v. Whitley, 514 U.S. 419, 433–34 (1995); United States v. Parker, 790 F.3d 550, 558 (4th Cir. 2015). Mere

speculation as to the materials is not enough. United States v. Caro, 597 F.3d 608, 619 (4th Cir. 2010). In Brady, the Supreme Court explained that its holding applied not only to suppression of materials at the guilt phase of trial, but also at the punishment phase. Brady, 373 U.S. at 87; Basden v. Lee, 290 F.3d 602, 611 (4th Cir. 2002).

The PCR court found that Bryant failed to show how the computer records at issue were material to his sentencing. The PCR court explained that the existence of pornography on Tietjen's computer could not have been a "trigger" for Bryant's actions because "it is uncontested . . . that [Bryant] did not claim to have viewed any images on the victim's computer until after he had killed Mr. Tietjen." ECF No. 16-12 at 134 (emphasis in original). The PCR court also considered whether the computer evidence would have impacted trial counsel's tactical decisions, ultimately finding that they would not have had any material effect. Trial counsel testified at the PCR hearing that they were interested in the existence of evidence to potentially establish that "pornography was a 'trigger' for the Tietjen homicide." Id. at 135. But the PCR court noted that trial counsel admittedly could not explain how viewing the images after the death of Tietjen could have been a trigger for the murder.

As for Bryant's claim that the evidence on the computer may have triggered Bryant's mutilation of Tietjen's eyes, and the mutilation was used as aggravating evidence at sentencing, the PCR court found that this theory had already been identified and was presented by trial counsel and their experts. For example, the PCR court noted that although Dr. Schwartz-Watts stated at the PCR hearing that she would have welcomed the information from the computer, she indicated herself that the additional information "would have corroborated her conclusions." Id. Finally, while the PCR

court acknowledged that the computer evidence should have been provided to the State and defense prior to trial, the PCR court underscored that the lack of child or bestiality pornography—the particular images that Bryant described seeing—confirmed that Brady's materiality prong had not been met. See id. at 135 (noting that the results of "the computer assessment do[] not fully corroborate [Bryant]'s version because it did not support the existence of either child pornography or bestiality"). Indeed, at the PCR hearing, the state prosecutor did not challenge Bryant's lack of corroboration on the general existence of pornography, undermining Bryant's contention that the provision of the evidence would have altered the results of the proceedings. Id.

In light of the foregoing, the court does not find that the PCR court's rejection of Bryant's Brady claim was contrary to or an unreasonable application of Brady. The PCR court carefully considered whether the evidence would have altered trial counsel's tactics or the outcome of the proceedings. Its decision was consistent with those of other federal courts analyzing Supreme Court precedent in Brady. See, e.g., United States v. Runyon, 994 F.3d 192, 210 (4th Cir. 2021) (rejecting the petitioner's Brady argument where the allegedly exculpatory evidence "was not needed to establish the mitigator" such that it was a mere "theoretical possibility" that the evidence would have changed anything at sentencing).

In his objections, Bryant claims that Cone v. Bell, 556 U.S. 449 (2009), is controlling. Bryant cites Cone for the proposition that it is not enough to dismiss a Brady claim merely on the grounds that the suppressed evidence is cumulative. But here, the PCR court did not find that the evidence was cumulative of other evidence about Bryant's supposed trigger. Rather, the PCR court found that the evidence did not support Bryant's

claim that he had been triggered to commit the homicide based on pornography at all. To the extent Bryant is referring to the PCR court's findings on whether the suppressed evidence merely corroborated Dr. Schwartz-Watts's or trial counsel's prior conclusions, the court finds that the PCR court's analysis of those issues was concerned with whether the evidence would have altered trial counsel's tactics—a different consideration. See ECF No. 16-12 at 135; see also Goins v. Angelone, 52 F. Supp. 2d 638, 675 (E.D. Va. 1999), appeal dismissed, 226 F.3d 312 (4th Cir. 2000) (analyzing whether the trial counsel's strategy would have been significantly different had they learned about the suppressed evidence). Contrary to Bryant's assertion, the PCR court did not treat the computer evidence as cumulative evidence.

Finally, Bryant's continued reliance on his assertion that the existence of pornography in Tietjen's internet history "bolstered the mitigating nature of th[e] evidence" that pornography "prompted [Bryant] to mutilate [Tietjen's] eyes" is misplaced. ECF No. 124 at 9. The sentencing judge stated clearly that he was sentencing Bryant to death based on the aggravating circumstance of armed robbery. ECF No. 16-5 at 61–62 ("Regarding count one of that indictment 2006-GS-43-699, the charge of murder, the Court does find beyond a reasonable doubt the existence of the following statutory aggravating circumstance: that the defendant committed murder while in the commission of a robbery while armed with a deadly weapon, to wit, a Smith and Wesson .40-caliber semiautomatic handgun."). While the sentencing judge also noted that he reviewed "nonstatutory aggravating circumstances," id. at 62, the assertion that the mutilation was outcome-determinative in Bryant's death sentence is belied by the record. Bryant can only impermissibly rely on mere speculation to present such a claim. See

United States v. Agurs, 427 U.S. 97, 109–10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Based on the trial court's focus on the aggravating circumstance of armed robbery, Bryant has failed to prove that disclosure of the evidence would have altered the outcome of the proceedings. Thus, the suppressed evidence does not place Bryant's sentencing in such a different light that confidence in his sentence is undermined. See Richardson v. Branker, 668 F.3d 128, 149 (4th Cir. 2012). In sum, the court finds that the PCR court had sufficient reason to (1) find that Bryant did not view any images on Tietjen's computer until after the murder, and (2) to conclude that the materiality prong for sustaining a Brady claim has not been met. Under the standard that this court applies, the PCR court's decision is not unreasonable.

D. Ground Seven

In Ground Seven, Bryant alleges that he is intellectually disabled, and as such, his execution is barred under Atkins. This argument was not raised in either Bryant's direct appeal or his first PCR application. When Bryant attempted to add the claim to his second PCR application, and the state moved to dismiss it, the PCR court denied the motion to dismiss and allowed the claim to proceed. ECF No. 89-37 at 114. Bryant later admitted that he did not meet the diagnostic criteria for an intellectual disability but then attempted to amend his application to claim that he suffers from fetal-alcohol spectrum disorder ("FASD"), and that his execution would still be barred under an extension of Atkins. A second PCR court found that the FASD-based claim was successive and time-barred.

As explained above, under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez, 566 U.S. at 9. Stated another way, where a petitioner fails to comply with a state procedural rule, and that failure provides an adequate and independent ground for the state's denial of relief, federal review will also be barred if the state court has expressly relied on the procedural default. Harris v. Reed, 489 U.S. 255 (1989); Coleman v. Thompson, 501 U.S. 722, 735 (1991).

Here, the PCR court that reviewed Bryant's amended PCR application applied S.C. Code § 17-27-90 and § 17-27-45, which bar successive applications and applications filed beyond the one-year statute of limitations, respectively. See ECF No. 89-38 at 23 ("This Court has found the offered amendments are time barred pursuant to S.C. Code § 17-27-45 and barred as improperly successive pursuant to S.C. Code § 17-27-90, and that Applicant failed to show any qualifying exception to those procedural bars."). "A state procedural rule is adequate if it is consistently or regularly applied" by state courts, Reid v. True, 349 F.3d 788, 804 (4th Cir. 2003), and a rule is independent "if it does not depend on a federal constitutional ruling," Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998) (alterations and internal quotation marks omitted). Bryant disputes that the state procedural rules applied were either adequate or independent.

First, Bryant argues that the state statutes applied by the PCR court and cited in the R&R are not consistently or regularly applied because they provide discretion for courts to allow applicants to amend their successive or time-barred applications. For example, Bryant notes that S.C. Code § 17-27-90 allows an exception where a court

identifies "a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original . . . application." Bryant's objection here is with how the PCR court applied the rules; he does not deny that the statutes themselves have been consistently or regularly applied to procedurally bar applications. As such, the court overrules this objection.

Next, Bryant argues that the PCR court's dismissal of his application was not premised on an independent state procedural rule because the dismissal partially relied upon an application of Atkins. Bryant previously raised this argument, and the Magistrate Judge considered and rejected it. The Magistrate Judge explained that even though Bryant "argues that the state court's conclusion that his FASD claim was procedurally defaulted was not independent because it was based on an interpretation of a federal constitutional ruling . . . . [t]he PCR court did not have to interpret Atkins at all in comparing the claims." R&R at 61. As such, "[t]he procedural bar applied by the PCR court was not dependent on federal law." Id. Now, in his objections, Bryant expands on his prior argument, contending that "[i]n ruling on the amendment, the PCR court then had to review and interpret Atkins, and its definition of intellectual disability, to conclude that Mr. Bryant's claim fell outside of the Atkins purview." ECF No. 124 at 13.

The court agrees with Bryant that Atkins presents a unique situation. In general, "the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." Harris, 489 U.S. at 264 n.10 (citing Fox Film Corp. v. Muller, 296 U.S. 207, 2010 (1935)). This principle is in place so that "a state court need not fear reaching the merits of a federal claim in an alternative holding." Id. (emphasis in

original). But in determining whether a petitioner may raise Atkins for the first time in a successive habeas application, the PCR court does not merely consider Atkins in the alternative; it must directly confront Atkins.

The Fifth Circuit reached this very conclusion in Busby v. Davis, 925 F.3d 699 (5th Cir. 2019). The Fourth Circuit does not appear to have weighed in on the issue, and in the absence of contrary controlling authority, the court finds Busby persuasive. In Busby, the Fifth Circuit was confronted with the state court's decision to deny the petitioner's application as an abuse of the writ without considering the merits of the claim. Id. at 706. The statute that the court relied upon, Tex. Crim. Pro. Art. 11.071 § 5(a), provides that if a subsequent habeas application is filed after an initial application, a court may not consider the merits or grant relief. The federal district court determined that the petitioner's Atkins claim was thus procedurally defaulted. Id. Upon review, the Fifth Circuit disagreed, explaining that while the state court was able to deny the petitioner's ineffective assistance of trial claims as procedurally barred, "the same cannot be said of the Atkins claim." Id. at 707. Specifically, the Fifth Circuit explained:

> [W]hen a defendant who was convicted post-Atkins raises an Atkins claim for the first time in a successive habeas application, the [state] court must determine whether the defendant has asserted facts, which if true, would sufficiently state an Atkins claim to permit consideration of the successive petition. That determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations.

Id. (footnote omitted). As such, the Fifth Circuit concluded that the state court's denial of an Atkins claim meant that it considered the merits of the claim, "and the claim was not procedurally defaulted."[2] Id. at 709.

Relying on Busby, this court departs from the R&R in this narrow respect. However, the court does not depart from the R&R's ultimate recommendation to grant summary judgment in respondents' favor. After determining that the petitioner's claims were not procedurally defaulted, the Busby court went on to find that the state court had considered the merits of his Atkins claim. Id. at 710. Similarly, this court may construe the PCR court's ruling here as a decision on the merits. The PCR court fully confronted the Atkins issue in its order:

> While Applicant may suffer from some form of FASD or associated condition, and may have an impaired brain, this Court does not believe Applicant met his burden of proof that he possesses an intellectual disability consistent with the specific condition at issue. It is only that condition that is the basis of this litigation and only that condition that needs to be proven . . . . It appears to the Court, based on the information presented, that Applicant does not have an intellectual disability as defined under 44-20-30, and Franklin, Stanko, and Blackwell, to qualify for the Atkins exemption.

ECF No. 89-38 at 14. Bryant himself acknowledges that "[t]he PCR court discussed at length the holding in Atkins, the meaning of intellectual disability, and a diagnosis of FASD." ECF No. 124 at 13. Under a merits review, the court returns to the AEDPA's

[2] To be sure, the Fifth Circuit was analyzing the state court's application of Tex. Crim. Pro. Art. 11.071 § 5(a)(3) and whether Atkins's bar to the execution of intellectually disabled persons fell within an exception to the rule. But Busby's analysis applies with equal force here as the South Carolina Supreme Court recently issued a per curium opinion that reversed the lower court's dismissal of an Atkins claim as untimely and successive. Woods v. State, 2019 WL 6898088 (S.C. Dec. 18, 2019) (per curiam). As the R&R observed in a footnote, the opinion, although not binding, likely signals South Carolina' acceptance that Atkins created one of the few exceptions in which successive applications will be allowed.

standard of reviewing for whether the state court adjudication was either contrary to or an unreasonable application of clearly established federal law. The court does not review Bryant's Atkins claim de novo, even if the proper standard of review was not briefed before. Busby, 925 F.3d at 711, 714.

The court does not find that the PCR court's ruling was unreasonable or contrary to clearly established law. The PCR court found that there was no clinical support for setting aside Bryant's testing results in favor of finding that FASD constitutes the functional equivalent of an intellectual disability. ECF No. 89-38 at 14. As the R&R further explained, Atkins does not create a categorical bar from executing prisoners who suffer from FASD. R&R at 63 (citing Garza v. Shinn, 2021 WL 5850883, at *105 (D. Ariz. Dec. 9, 2021) ("There is no authority holding that individuals with FASD are exempt from capital punishment.")). To summarize, the court finds that the PCR court's dismissal of Bryant's Atkins claim was not premised on independent state procedural grounds. However, the court finds that the PCR court considered Bryant's claim on the merits, and its decision to dismiss the claim was not unreasonable or contrary to clearly established law.

E. Ground Eight

Under Ground Eight, Bryant alleges that his trial counsel was ineffective for failing to conduct an adequate investigation into his background, history, character, and mental illness. He further alleges that trial counsel failed to provide available information to the mental health experts performing Bryant's mental health evaluation and failed to present all the available mitigation evidence during sentencing. This ground was raised in Bryant's third PCR application, and the state court found it to be successive

and time-barred. Once again, Bryant argues that the PCR court's procedural bar was not based on an adequate and independent state procedural rule. The court finds that the applicable state statutes, S.C. Code §§ 17-27-45 and 17-27-90, are adequate and independent procedural rules. See Scott v. Bazzle, 2007 WL 2891541, at *5 (D.S.C. Sept. 28, 2007) (noting that South Carolina's statute of limitations for PCR applications is an "independent and adequate state ground[]"). Unlike before, Bryant does not raise any other ground for arguing that the PCR court's decision was premised on a separate constitutional ruling.

Additionally, Bryant argued in his response to the motion for summary judgment that his failure to raise the claim in state court should be excused for cause and prejudice. Specifically, Bryant contended that his PCR counsel performed deficiently by failing to develop and present Bryant's claims that his trial counsel rendered ineffective assistance by failing to investigate his background. ECF No. 104 at 71. Bryant requested an evidentiary hearing before this court to prove that his PCR counsel acted deficiently. Id.

Curiously, Bryant now appears to be arguing in his objections that his PCR counsel also failed to conduct an adequate mitigation investigation and to discover information about Bryant, such as the fact that he failed to meet developmental milestones in his childhood, had difficulties in school, and that his mother drank alcohol and smoked marijuana during her pregnancy with him. ECF No. 124 at 19. These claims are not the same claims that were presented before and not the type contemplated by Martinez v. Ryan, which governs when a petitioner may seek to excuse a procedural default for inadequate assistance of counsel. 566 U.S. at 9. Bryant's argument that his PCR counsel rendered ineffective assistance for failing to conduct an adequate mitigation

investigation is thus not properly before the court. See Samples v. Ballard, 860 F.3d 266, 275–76 (4th Cir. 2017) (finding that the district court did not abuse its discretion in declining to entertain a freestanding claim of ineffective assistance of state habeas counsel as "Martinez did not create such a freestanding claim"). To the extent that Bryant is arguing that the PCR counsel's failure to conduct an investigation led to their failure to raise an ineffective assistance of trial counsel claim in the PCR proceedings, such an argument is unsubstantiated. Even if the court were to consider the merits of Bryant's argument, the court finds that PCR counsel did not act deficiently. PCR counsel presented evidence on Bryant's mental illness and prior history at the evidentiary hearing, reflecting their preparation on those issues. See ECF No. 16-9 at 61 (reflecting that PCR counsel presented testimony from Dr. Schwartz-Watts). Dr. Schwartz-Watts specifically testified about Bryant's "post traumatic stress disorder secondary to some sexual abuse that he experienced in his past," indicating that PCR counsel was aware of the evidence. Id. at 65. Under Strickland, the court finds that PCR counsel's decision to rely on Dr. Schwartz-Watts's testimony—in lieu of an "investigation"—did not fall below an objective standard of reasonableness.

The court turns to Bryant's original claim that his procedural default may be excused based on his PCR counsel's deficiency in failing to raise the claim. See Amend. Pet. at 76. In Martinez, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Martinez, 566 U.S. at 9. To establish cause under Martinez, a petitioner must demonstrate: (1) that his PCR counsel was

ineffective under Strickland and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one." Id. at 14.

Given that Bryant's objections focus on allegations that PCR counsel failed to conduct their own investigation, the court agrees with the R&R that Bryant fails to rebut the presumption under Strickland that PCR counsel's failure to raise the claim fell "within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. Moreover, under the second prong, the court finds that the underlying claim lacks merit, as the record demonstrates that trial counsel retained experts and investigated Bryant's background and mental health. See, e.g., ECF No. 16-4 at 40 (reflecting that trial counsel presented testimony from Dr. Schwartz-Watts); ECF No. 16-4 at 160 (same, for Dr. Marty Loring). Because Bryant fails to show that PCR counsel's performance was deficient or that the underlying ineffective-assistance-of-counsel claim is a substantial one, Bryant has failed to show that procedural default should be excused under Martinez.

F. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 proceedings provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). An applicant satisfies this standard by establishing that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El, 537 U.S. at 336–38. The Magistrate Judge recommended that the

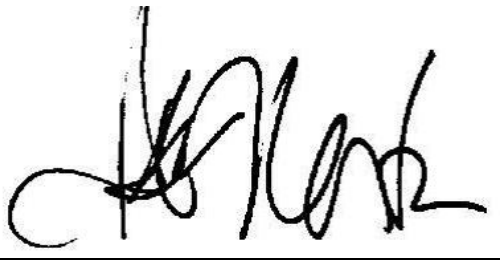
court find that Bryant does not meet this standard because there is nothing debatable about the court's resolution of his petition. Bryant objects.

For the reasons discussed in this order, the court denies a certificate of appealability for all grounds raised, apart from Ground Seven. The court finds that in the absence of clearly-defined precedent, reasonable jurists may debate whether the court's decision on Bryant's Atkins claim should have been resolved in a different manner. In all other respects, the court finds, for the same reasons stated in this order, that the legal standard for the issuance of a certificate of appealability has not been met. Accordingly, the court will deny a certificate of appealability except as specified for Ground Seven.

IV. CONCLUSION

For the reasons set forth above, the court **ADOPTS** the R&R, **GRANTS** respondents' motion for summary judgment, and **DENIES** the petition for writ of habeas corpus. Additionally, the court **DENIES** a certificate of appealability except for Ground Seven as raised in Bryant's amended petition.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 18, 2022
Charleston, South Carolina

FILED: March 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4
(9:16-cv-01423-DCN)

STEPHEN COREY BRYANT

Petitioner - Appellant

v.

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

Respondents - Appellees

FASD UNITED

Amicus Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Rushing, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

STEPHEN COREY BRYANT, Petitioner, vs. BRYAN P. STIRLING, *Commissioner, South Carolina Department of Corrections*; LYDELL CHESTNUT, *Deputy Warden, Broad River Correctional Institution Secure Facility*, Respondents.	)	No. 9:16-cv-01423-DCN-MHC **ORDER**

Petitioner Stephen Corey Bryant ("Bryant") is a death row inmate in the custody of the South Carolina Department of Corrections ("SCDC"). He filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 14, 2016. ECF No. 30. This matter is before the court on cross-motions to alter or amend the court's order granting respondents Bryan P. Stirling ("Stirling") and Lydell Chestnut's ("Chestnut," together, "respondents") motion for summary judgment. ECF Nos. 130, 131. For the reasons set forth below, the court denies both motions to alter or amend.

I. BACKGROUND

Bryant pled guilty to three counts of murder, two counts of first-degree burglary, one count of second-degree burglary, two counts of assault and battery with intent to kill, one count of second-degree arson, armed robbery, possession of a stolen handgun, and threatening the life of a public employee. Circuit Court Judge Thomas A. Russo sentenced Bryant to death for the murder of one of the three murder victims, Willard Tietjen ("Tietjen").

Familiar as the parties are with the facts, the court provides a brief summary of the case, as recited by the Supreme Court of South Carolina. Starting on October 5, 2004, Bryant engaged in an eight-day crime spree that involved multiple robberies and murders. Bryant started by casing isolated rural homes for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Over the course of the eight days, Bryant burglarized several homes and murdered three individuals. In Tietjen's case, Bryant went to Tietjen's home, shot him nine times, and looted his house. Bryant answered several calls made to Tietjen's cell phone by Tietjen's wife and daughter, telling them that he was the "prowler" and that Tietjen was dead. He burned Tietjen's face and eyes with a cigarette. Before leaving, Bryant left two messages on the walls. One said, "victim number four in two weeks, catch me if you can." On another wall, he wrote the word "catch" and some letters in blood. While awaiting trial, Bryant threatened a correctional officer and attacked and seriously injured another.

Bryant was indicted in Richland County in December 2004 and in Sumter County in July 2006. ECF No. 16-12 at 162–89. Prior to and at his guilty plea, Bryant was represented by three attorneys (both individually and collectively, "trial counsel"). Jack D. Howle, Jr. ("Howle") and James Babb ("Babb") handled preliminary matters and trial preparation until July 18, 2008, when John D. Clark ("Clark") was appointed to replace Babb. Due to Babb's prior involvement, all three attorneys were present for Bryant's guilty plea, which Bryant entered on August 18, 2008. ECF No. 16-6 at 60–107. On September 11, 2008, Judge Russo sentenced Bryant to death for the murder of Tietjen. ECF No. 16-5 at 61–63.

Bryant appealed his case to the Supreme Court of South Carolina. On January 7, 2011, the Supreme Court of South Carolina affirmed Bryant's convictions and sentences. ECF No. 16-6 at 178. Bryant petitioned for rehearing, which the court denied on January 24, 2011. Id. at 184. On May 10, 2011, Bryant filed an application for post-conviction relief ("PCR"). Id. at 112. On May 21, 2011, Bryant filed an amended PCR application. ECF No. 16-7 at 44. On October 1, 2012, Bryant filed a second amended PCR application. Id. at 144. The PCR court held an evidentiary hearing from October 1–3, 2012, id. at 151, and on December 4, 2012, the PCR court dismissed Bryant's applications, ECF No. 16-12 at 84. Bryant filed a motion to reconsider, which the PCR court denied. Id. at 146. Bryant then filed a petition for writ of certiorari with the Supreme Court of South Carolina. ECF No. 16-34. On March 4, 2015, the Supreme Court of South Carolina denied Bryant's petition, ECF No. 16-39. On May 6, 2015, the Supreme Court of South Carolina denied Bryant's petition for rehearing, ECF No. 16-41, and issued a remittitur, ECF No. 16-42.

On June 19, 2015, Bryant commenced this action by filing a motion for stay of execution and a motion to appoint counsel. ECF No. 1. Bryant filed his petition for writ of habeas corpus pursuant to § 2254 on January 14, 2015. ECF No. 30. Bryant filed an amended petition on April 28, 2016. ECF No. 37, Amend. Pet. Along with his amended petition, Bryant contemporaneously filed a motion to stay his habeas proceeding pending the exhaustion of his state court proceedings. ECF No. 38. The court granted the motion to stay on July 26, 2016. ECF No. 52.

On May 3, 2016, Bryant filed two additional PCR applications in state court.[1] ECF Nos. 89-2 at 3, 89-38 at 27. The same PCR court presided over both actions and initially allowed Bryant's PCR action based on Atkins v. Virginia to proceed. ECF No. 89-37 at 110–16 (citing Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executions of intellectually disabled criminals constituted cruel and unusual punishments prohibited by the Eighth Amendment)). The PCR court denied Bryant's other application—based on his trial counsel's failure to raise claims that should have been discovered—as successive and time-barred. ECF Nos. 89-6, 89-8. Bryant moved to alter or amend the court's order, and the PCR court denied the motion on September 16, 2016. ECF No. 89-9. Bryant appealed the denial, ECF No. 89-10, and the Supreme Court of South Carolina dismissed the appeal on February 7, 2017, ECF No. 89-15.

Bryant's surviving application asserting the Atkins claim was thereafter assigned to a new judge, Judge William H. Seals, Jr. ECF No. 89-37 at 117. Bryant twice moved to amend his PCR application, and the PCR court denied both motions to amend, ruling that the application would proceed only on Bryant's claim of intellectual disability. Id. at 126, 143. On October 1, 2018, the PCR court conducted an evidentiary hearing on Bryant's Atkins-claim application. ECF No. 89-37 at 146. On January 3, 2019, the PCR court denied the application. Id. through ECF No. 89-38 at 24. Bryant filed a motion to reconsider, which was denied on March 5, 2019. ECF No. 89-38 at 25. Both Bryant and respondents filed petitions for writ of certiorari, and the Supreme Court of South Carolina denied both petitions on May 11, 2021. ECF No. 52. The Supreme Court of South

[1] The court refers to Bryant's counsel at both the preliminary PCR proceedings and the PCR proceedings following the stay in the habeas case as "PCR counsel" but notes the distinction where necessary.

Carolina denied Bryant's subsequent petition for rehearing on May 21, 2021. ECF No. 89-54. This ended Bryant's state court proceedings, and the court lifted the stay in Bryant's habeas proceeding, effective October 4, 2021. ECF No. 87.

On October 15, 2021, respondents filed their motion for summary judgment. ECF No. 91. Bryant filed his response and traverse on February 7, 2022, ECF No. 104, and respondents replied on April 8, 2022, ECF No. 114. On April 19, 2022, Magistrate Judge Molly H. Cherry issued the report and recommendation ("R&R"), recommending that the court grant respondents' motion for summary judgment. ECF No. 116, R&R. On October 18, 2022, the court adopted the R&R with one modification. ECF No. 128. Specifically, the court granted respondents' motion for summary judgment but held that Bryant was entitled to a certificate of appealability as to Ground Seven of Bryant's amended petition. On November 15, 2022, Bryant filed a motion to alter or amend judgment. ECF No. 130. Respondents responded to the motion on November 29, 2022. ECF No. 133. On November 15, 2022, respondents filed their own motion to alter or amend judgment. ECF No. 131. Bryant responded to the motion on November 28, 2022, ECF No. 132, and respondents replied on December 6, 2022, ECF No. 134. As such, Bryant's claims are ripe for resolution.

II. STANDARD

A. Motion to Alter or Amend

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend a judgment. The rule provides an "extraordinary remedy which should be used sparingly." Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (internal quotation marks and citation omitted). The Fourth Circuit recognizes "only

three limited grounds for a district court's grant of a motion under Rule 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice." Wilder v. McCabe, 2012 WL 1565631, at *1 (D.S.C. May 2, 2012) (citing Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993)). To qualify for reconsideration under the third exception, an order cannot merely be "maybe or probably" wrong; it must be "dead wrong," so as to strike the court "with the force of a five-week-old, unrefrigerated dead fish." TFWS, Inc. v. Franchot, 572 F.3d 186, 194 (4th Cir. 2009) (quoting Bellsouth Telesensor v. Info. Sys. & Networks Corp., 1995 WL 520978, *5 n.6 (4th Cir. 1995) (unpublished)). Ultimately, the decision whether to reconsider an order resulting in judgment pursuant to Rule 59(e) is within the discretion of the district court. See Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995).

B. Summary Judgment

Summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

C. Habeas Corpus

1. Standard for Relief

This court's review of a habeas petition is governed by 28 U.S.C. § 2254, which was amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1213. See Lindh v. Murphy, 521 U.S. 320 (1997). Section 2254(a) provides federal habeas jurisdiction for the limited purpose of establishing whether a person is "in custody in violation of the Constitution or laws or treaties of the United States." This power to grant relief is limited by § 2254(d), which provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The "contrary to" and "unreasonable application" clauses contained in § 2254(d)(1) are to be given independent meaning—in other words, a petitioner may be entitled to habeas corpus relief if the state court adjudication was either contrary to or an unreasonable application of clearly established federal law.

A state court decision can be "contrary to" clearly established federal law in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." Williams v. Taylor, 529 U.S. 362, 405 (2000). Section 2254(d)(1) restricts the source of clearly established law to holdings of the Supreme Court as of the time of the relevant state court decision. See id. at 412; see also Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir. 2005).

For an "unreasonable" application of the law, a state court decision can also involve an unreasonable application of clearly established federal law in two ways: (1) "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.

However, "an unreasonable application of federal law is different from an incorrect application of federal law," and "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410–11 (emphasis in original). Indeed, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all

instances, objectively unreasonable." Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (quoting Williams, 529 U.S. at 410).

2. Procedural Default

A petitioner seeking habeas relief under § 2254 may only do so once the petitioner has exhausted all remedies available in state court. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds, United States v. Barnette, 644 F.3d 192 (4th Cir. 2011). Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012); see also Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008) (explaining that generally, "[f]ederal habeas review of a state prisoner's claims that are procedurally defaulted under independent and adequate state procedural rules is barred.").

3. Ineffective Assistance of Counsel

"The doctrine barring procedurally defaulted claims from being heard is not without exceptions." Martinez, 566 U.S. at 10. One such exception occurs when a prisoner seeking federal review of a defaulted claim can show there was cause for the default and prejudice based on ineffective assistance of counsel. Id. "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." In order to establish such cause, the following elements must be established:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only

> "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (quoting Martinez, 566 U.S. at 14, 17–18). A claim is "substantial" if it has "some merit." Martinez, 566 U.S. at 14.

Additionally, a petitioner asserting ineffective assistance of counsel must demonstrate that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential," and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. When considering prejudice in the context of a death penalty case, "the question is 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." Id. at 695.

Because "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371 (2010), "[e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult," Harrington v. Richter, 562 U.S. 86, 105 (2011). The Supreme Court has explained that "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential.'" Id. (quoting Strickland, 466 at 689). Therefore, a court's review of an ineffective assistance counsel claim under the § 2254(d)(1) standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

III. DISCUSSION

Bryant's amended petition raised nine grounds for relief. Bryant objected to the magistrate judge's findings on Grounds Two, Three, Six, Seven, and Eight. In its summary judgment order, the court reviewed Grounds One, Four, Five, and Nine for clear error and, finding none, dismissed those grounds for relief. The court then conducted a de novo review and dismissed Grounds Two, Three, Six, Seven, and Eight. The court further denied a certificate of appealability for all grounds raised, except for Ground Seven.

Now, in his instant motion, Bryant moves the court to alter or amend its order as to Grounds Six and Eight. In the alternative, Bryant requests that the court issue a certificate of appealability for those claims. In addition to opposing Bryant's motion, respondents filed their own motion to alter or amend, wherein they request that the court vacate the certificate of appealability that it granted as to Count Seven. The court considers Grounds Six, Eight, and the certificate of appealability issue in turn.

A. Ground Six

In Ground Six of his amended petition, Bryant alleges that the government committed a Brady violation by failing to disclose evidence from Tietjen's computer to Bryant. See Brady v. Maryland, 373 U.S. 83 (1963).

In October 2004, the South Carolina Law Enforcement Division ("SLED") conducted a search of Tietjen's computer with a focus on finding evidence of child or bestiality pornography. ECF No. 16-7 at 216. SLED Agent David Givens ("Givens") testified that he recovered "several pornographic movies" in the laptop's program files and links to pornography in the internet search history and temporary internet files, but "[n]o child or bestiality photos [were] located." ECF No. 16-3 at 231. Of note, the internet browsing history showed someone had visited adult pornography websites on the day prior to Tietjen's murder.[2] ECF No. 16-8 at 18. Bryant argued—and now maintains—that the browsing history would have been relevant at trial for corroborating Bryant's statements to the police and to explain the impetus for his murder and his post-mortem mutilation of Tietjen's eyes. The court previously explained the relevant background of the search in its order on the motion for summary judgment.

[2] Bryant argues, for the first time, that South Carolina law allows the court to infer that a participant in depicted sexual activity is a minor based on the content's title and other information. ECF No. 130 at 2 n.1 (citing S.C. Code §§ 16-15-395(B) and 405(B)). Bryant argues that based on the titles in Tietjen's viewing history from the day prior to the murder, "[t]he court's insistence that Mr. Tietjen had not viewed child pornography is misplaced." Id. But Bryant ignores that this court was not the one that reached that finding. The PCR court held that the internet history from the prior day consisted only of adult pornography. ECF No. 16-7 at 134. The PCR court relied on testimony from Givens, who stated that his own analysis did not suggest the content depicted underage girls, despite the content's titles. ECF No. 16-12 at 253 (103:22–24) (Q: But your, I guess, analysis didn't show any persons under the age of 18; correct? A: Correct."). The court cannot say that the PCR court's conclusion was unreasonable based on the evidence presented to it at the evidentiary hearing.

> In the days following his crime spree, Bryant made multiple statements in which he recalled discussing Tietjen's preference for "young girls" with Tietjen and seeing pornography on Tietjen's computer. ECF No. 16-12 at 126–27. This included multiple statements in which Bryant recalled seeing a photograph on Tietjen's computer of a girl engaging in sex acts with a horse. Id. at 127–28. At the sentencing hearing, the state presented evidence that Bryant had burned Tietjen's eyes with a cigarette after killing him. One of the notes left by Bryant at Tietjen's house allegedly said, "No more computer porn for this sick fucker." ECF No. 16-3 at 28.

ECF No. 128 at 21.

Although there is no dispute that the laptop and its files were never provided to the state or to trial counsel, the PCR court held that Bryant "failed to prove the materiality prong of Brady." ECF No. 16-7 at 134. In its prior order, this court determined that the PCR court's decision did not involve an unreasonable application of federal law and was not based on an unreasonable determination of the facts. "[T]o obtain federal habeas relief, 'a state prisoner must show that the state court's ruling on the claim being presented . . . was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." De Castro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011) (quoting Harrington, 562 U.S. at 103). Now, Bryant asks the court to apply another layer of clear-error review to the already-deferential habeas standard.

Bryant's latest motion focuses almost exclusively on whether Bryant's "character and actions after the murder"—namely, his post-mortem mutilation of Tietjen's eyes—played a part in his death sentence. See ECF No. 130 at 5–7. Bryant argues that since those circumstances were clearly aggravating factors, as reflected by the state's closing argument, the materiality prong is easily met. But Bryant's argument puts the cart before the horse. As the PCR court, magistrate judge, and this court explained, the browsing

history was not material because it did not consist of the type of evidence that Bryant claims would have mitigated the state's arguments in the first place.

To recount, the PCR court provided no less than three reasons why the result of the proceedings would not have been different had the state disclosed Givens's report. First, it was "uncontested" that Bryant "did not claim to have viewed any images on the victim's computer until after he had killed Mr. Tietjen." ECF No. 16-7 at 134 (emphasis in original). Therefore, the PCR court reasoned, any pornography that was on the computer could not have been a "trigger" for the murder. Id. Second, the evidence "did not corroborate" Bryant's statements about seeing bestiality on Tietjen's laptop because Givens never located any evidence of bestiality. Id. (emphasis in original). Third, Bryant's forensic psychiatrist, Dr. Donna Marie Schwartz-Watts ("Dr. Schwartz-Watts") indicated that if it were the case that the laptop did not contain evidence of child pornography or bestiality, the browsing history would have merely corroborated her conclusions. Id. at 135.

The magistrate judge thoroughly reviewed the PCR order and the record, and the magistrate judge reached several separate conclusions. First, it appeared Bryant was "no longer pursuing" the contention that "the pornography on Tietjen's computer served as the trigger for the murder itself." R&R at 56. Bryant did not object to the finding, and to the extent he is now reviving the argument that the evidence "explains the impetus for [] his murder of Tietjen," ECF No. 130 at 2, the court will not consider it. Second, even if the existence of adult pornography on Tietjen's internet browsing history from the day before the murder "partially corroborated" Bryant's statements to the police about the post-mortem mutilation, Bryant's trial counsel had already presented the theory such that

the PCR court reasonably determined the additional corroboration would have only had a "marginal impact." R&R at 56. Finally, although the PCR court did not address the issue of Bryant's alleged history of being sexually abused as a child, the magistrate judge noted that the link between the forensic evidence and the allegations about his childhood was tenuous, as the truth of one was "not determinative of the truth of the other." Id.

In its order, the court resolved the disputes about the evidence in similar fashion. See ECF No. 128 at 22–25. The court noted that even if it were to believe Bryant's account about the pornography on the laptop, the sentencing judge did not state that the post-mortem mutilation was an aggravating factor, so it was doubtful that the evidence would have changed the outcome of the case. Id. at 25–26. During the sentencing hearing for the count related to Tietjen's murder, the sentencing judge noted that evidence had been presented to establish a statutory aggravating circumstance of armed robbery, and both sides had also submitted "other evidence . . . establishing [] nonstatutory aggravating circumstances" and "statutory and nonstatutory mitigating circumstances." ECF No. 16-5. Bryant seizes upon this portion of the court's order, arguing that although South Carolina law did not require the sentencing judge to disclose more than the statutory aggravating circumstance of armed robbery, this court should have looked to the solicitor's closing argument to realize that Bryant's actions after the murder served as the primary aggravating factor. Bryant claims the browsing history would therefore have mitigated the state's aggravating evidence.

For the reasons discussed above, reconsideration of the court's decision on what type of argument was material to the sentencing court would not be proper without also reconsidering the court's other findings on the materiality of the browsing history itself.

The court does not find clear error regarding its other findings. The PCR court reasonably concluded that trial counsel sufficiently presented the theory about the motivation for the mutilation to the sentencing judge, even without the withheld laptop evidence. The PCR court did not wrongly apply Supreme Court precedent in reaching that decision. Additionally, the PCR court reasonably concluded that the withheld files did not consist of evidence that would have fully corroborated Bryant's account, as further outlined by the magistrate judge.

Finally, for his benefit, the court considers Bryant's claim that the state made a statement in its closing argument which would have been proven false by the withheld laptop files. According to Bryant, the sentencing judge permitted the state to argue that Bryant "got on [the Tietjens'] computer and began to visit porn sites by his own choosing, not sites from [the Tietjens]." ECF No. 130 at 5 (quoting ECF No. 16-5 at 32). The magistrate judge thoroughly considered this issue. R&R at 57–58 n.14. First, the magistrate judge noted the possibility—as raised by Givens—that Bryant may have deleted his own internet browsing history. More importantly, the statement at issue was part of the solicitor's broader argument about how freely Bryant moved around the house after the murder, "like he owned the place." ECF No. 16-5 at 31. As the magistrate judge noted, the statement "was not otherwise a focus of the solicitor's argument, so it is doubtful that a rebuttal would have been impactful." R&R at 57. The court agrees and finds that it was not clear error to afford Bryant's previous argument about the closing argument minimal weight. Ultimately, the PCR court did not issue a decision that was contrary to clearly-established federal law or that resulted in an unreasonable application of the facts in the case.

Thus, the court denies Bryant's motion to reconsider the court's previous order dismissing Ground Six and denies Bryant's alternative motion to reconsider the court's order denying a certificate of appealability for Ground Six.

B. Ground Eight

Under Ground Eight, Bryant alleged that his trial counsel was ineffective for failing to conduct an adequate investigation into his background, history, character, and mental illness. He further alleges that trial counsel failed to provide available information to the mental health experts performing Bryant's mental health evaluation and failed to present all the available mitigation evidence during sentencing. This ground was raised in Bryant's third PCR application, and the state court found it to be successive and time-barred under S.C. Code §§ 17-27-90 and 17-27-45. ECF No. 89-38 at 23. In his petition, Bryant argued that his failure to raise the claim in state court should be excused because of ineffective assistance of counsel. Specifically, Bryant argued that prior PCR counsel did not develop and present evidence of trial counsel's failure to investigate, which prejudiced Bryant's ability to claim he suffers from fetal-alcohol spectrum disorder ("FASD"). ECF No. 104 at 71.

Under Martinez, Bryant may argue that initial PCR counsel was ineffective for failing to raise trial counsel's ineffectiveness. Martinez, 566 U.S. at 10 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). But as the court noted in its prior order, the "curious[]" issue was that Bryant argued for the very first time in his objections that PCR counsel themselves failed to conduct an adequate investigation. ECF No. 128 at 32. In his summary judgment response, Bryant had only

argued that his initial PCR counsel "were [] potentially conflicted" and "failed to raise those claims." ECF No. 104 at 71. Although Bryant had briefly noted in his successive PCR application that PCR counsel "were ineffective for not investigating" the grounds, ECF No. 89-2 at 7, that was not the focus in Bryant's response and traverse in this case. See ECF No. 104 at 71. After the magistrate judge determined that there was minimal evidence of a conflict or deficient performance, Bryant then shifted his focus back to the lack of investigation on PCR counsel's part. Accordingly, the court finds it did not clearly err by affording minimal weight to the argument during its review. See Samples v. Ballard, 860 F.3d 266, 274–75 (4th Cir. 2017) (explaining that in the habeas context, a district court is required to consider legal arguments directed at a specific ground for relief, regardless of whether they were raised before the magistrate judge, but may decline to consider an "ineffective assistance of counsel claim raised for the first time in the objections to the magistrate judge's recommendations") (first citing Cooper v. Ward, 149 F.3d 1167, at *1 (4th Cir. 1998) (unpublished); then citing White v. Keller, 2013 WL 791008, at *4 (M.D.N.C. Mar. 4, 2013)); see also United States v. George, 971 F.2d 1113 (4th Cir. 1992)).

Setting aside the untimeliness of the argument, the court finds that reconsideration on the merits is improper as well. The court's initial discussion of PCR counsel's preparation mirrored the standard under Martinez. To establish cause under Martinez, a petitioner must demonstrate: (1) that his PCR counsel was ineffective under Strickland and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one," i.e., "that the claim has some merit." Martinez, 566 U.S. at 9. The court determined that neither prong had been met because (1) PCR counsel's decision to rely

on Dr. Schwartz-Watt's testimony in lieu of conducting a deeper investigation fell within the wide range of reasonable professional assistance, and (2) Bryant's underlying claim lacked merit because trial counsel, too, had investigated Bryant's background and history of mental illness, and retained experts accordingly. ECF No. 128 at 33–34.

Now, in his motion to alter or amend, Bryant argues that both the magistrate judge and this court ignored "new facts" that were discovered during the federal habeas proceedings, which were "available to Bryant's trial and PCR counsel." ECF No. 130 at 8 (citing ECF No. 39 at 71–73).[3] The "new facts" raised in Bryant's petition consist of affidavits from Bryant's aunt, mother, and fifth grade teachers. The affidavits include, inter alia, testimony that Bryant suffered abuse at the hands of his father, who himself had been abused by Bryant's paternal grandfather; that Bryant's mother drank and smoked marijuana while pregnant with Bryant; that Bryant was sexually abused when he was thirteen years old; and that Bryant had been "slow" since childhood and struggled through school. ECF No. 37 at 71–73. After this case was stayed so that Bryant could exhaust his state-court remedies, Bryant retained additional experts to evaluate him. Notably, Dr. George Woods ("Dr. Woods"), a neuropsychiatrist, conducted a neuropsychiatric examination on Bryant and determined he had signs of "dysmorphology"—i.e., physical signs in his facial bones that his mother drank during pregnancy. ECF No. 89-40 at 174–75. After considering other factors, Dr. Woods concluded that Bryant possesses signs of FASD and suffers from a "mild intellectual disability." ECF No. 89-42 at 128. Dr. Caroline Everington ("Dr. Everington"), an

[3] ECF No. 39 was a procedural entry changing the case number of this case, and the court assumes Bryant is referring to ECF No. 37, which is his first amended habeas petition.

expert in special education, testified that Bryant's behavior was "consistent with someone with [an] intellectual disability," including FASD. Id. at 42–43.

To be clear, Ground Eight in the petition concerns trial counsel's failure to investigate. By virtue of arguing that he has cause to bring the claim despite procedurally defaulting on it, Bryant also contends that PCR counsel failed to adequately investigate. Importantly, then, Ground Eight is not about whether the new evidence would have persuaded the state court. In accordance with that principle, the court does not find it was clear error to weigh the information that trial and PCR counsel possessed just as much as—if not more than—the evidence that Bryant later uncovered (and now avers should have been discovered). In Strickland, the Supreme Court explained:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes that particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 691 (emphasis added). "Thus, counsel must conduct a reasonable investigation, thorough enough to make an informed decision regarding which mitigating evidence to present." Mahdi v. Stirling, 2018 WL 4566565, at *16 (D.S.C. Sept. 24, 2018).

Here, the record reflects that initial PCR counsel made an objectively reasonable investigation in light of the evidence available to counsel at the time. Certainly, PCR counsel did not appear to have information that was as sharpened as the new evidence raised by Bryant. Even so, PCR counsel had information from Dr. Schwartz-Watts, who investigated many of the same conditions and circumstances raised in the new evidence,

even though again, her records may not have been as refined as what was produced later.

During the initial PCR proceedings, Dr. Schwartz-Watts testified about the following:

- Dr. Schwartz-Watts "met with [Bryant's] aunt and his grandmother. ECF No. 16-9 at 63.
- Dr. Schwartz-Watts had access to the reports of Dr. Crawford, Dr. Bally, and Dr. Morgan. Dr. Bally, in particular, conducted "neurological testing" on Bryant. Id.
- In addition to those experts, Dr. Schwartz-Watts interviewed two neurologists and a forensic psychiatrist who consulted for the case. Id.
- Dr. Schwartz-Watts reviewed, among other records, Bryant's "school records." Id. at 64.
- Dr. Schwartz-Watts diagnosed Bryant with post-traumatic stress disorder "secondary to some sexual abuse that he experienced in his past." Id. at 65. She later affirmed her belief that "sexual abuse was the root of his mental illness." Id. at 89–90.
- Dr. Schwartz-Watts obtained affidavits from Bryant's grandfather and mother. Id. at 68. Although both denied at the time that Bryant had been sexually abused, the fact that subsequent counsel was able to obtain an affidavit to the contrary does not evince a failure to investigate on trial or PCR counsel's part.
- Dr. Schwartz-Watts diagnosed Bryant with "permanent impairment" in several areas, based on her scoring of Bryant on the Global Assessment of Functioning scale. Id. at 75.

Additionally, Dr. Schwartz-Watts previously testified at the trial-level sentencing proceedings about the following:

- Dr. Schwartz-Watts testified that she spoke with "the paternal aunt Terry Caulder" and specifically asked whether Bryant's mother abused alcohol during pregnancy. Caulder[4] responded that she "did not see Mrs. Bryant abusing any alcohol during her pregnancy." ECF No. 16-4 at 48.
- Dr. Schwartz-Watts noticed that there were pictures of Bryant as a young child that were "consistent with" fetal exposure to alcohol. However, she ultimately stated, "there's no evidence and I can't say with a reasonable degree of medical certainty that he was exposed to alcohol in utero but there's a question." Id.

[4] Caulder also testified in the same proceedings. See ECF No. 16-4 at 22.

Therefore, the case record shows that PCR counsel, through Dr. Schwartz-Watts, had ample relevant information about Bryant's familial and school history, evidence of sexual abuse, and evaluations of mental impairments. Bryant objects to the court's "focus[] . . . on the testimony of Dr. Schwartz-Watts," ECF No. 130 at 8, but the court finds it was not clear error to do so given that Dr. Schwartz-Watts was essentially the conduit for all the evaluations and record-gathering that took place. Indeed, Dr. Schwartz-Watts had access to the very records that Bryant now claims PCR counsel should have identified, including family-member testimony and school records. Thus, to the extent a failure exists, it fell on Dr. Schwartz-Watts for not conveying the full extent of the evidence to PCR counsel, and not on counsel. Such a failure is not a ground for relief as "there is no right to effective assistance of expert witnesses or mitigation investigators, nor are their deficiencies automatically imputed to counsel[.]" Terry v. Stirling, 2019 WL 4723345, at *13 (D.S.C. Sept. 26, 2019); see Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness.").

As Bryant further stresses, Dr. Schwartz-Watts appeared to discount the possibility that Bryant suffered from FASD during her trial testimony. But that alone leads the court to conclude that it is was reasonable for counsel not to further investigate or raise the issue. In assessing counsel's investigation, the court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" Wiggins v. Smith, 539 U.S. 510, 523 (2009) (quoting Strickland, 466 U.S. at 688–89). On this point, Bryant notes

that during the habeas and second PCR court proceedings, Dr. Schwartz-Watts essentially changed her opinion and stated that based on the new facts, she had "incorrectly testified that [Bryant] did not meet the criteria of Intellectual Disabilities." Amend. Pet. at 74 (quoting ECF No. 38-2, Schwartz-Watts Aff. ¶ 4). Dr. Schwartz-Watts stated that as she is not a psychologist, she was unfamiliar with the Flynn Effect—a concept that purportedly would have qualified Bryant's testing numbers. Schwartz-Watts Aff. ¶ 4. She also testified that the results of the "neuropsychological testing," which she had allegedly "been trying to do [] since 2006," would have altered her opinion as well. ECF No. 130 at 10 (quoting ECF No. 89-42 at 78–86).[5]

These supposed revelations do not move the needle. The record indicates that Bryant was in fact administered neuropsychological tests prior to the first PCR proceedings, notwithstanding Dr. Schwartz-Watts's later assertion that Bryant could not fully complete them due to then-unidentified intellectual disabilities. Dr. Schwartz-Watts Aff. ¶ 7 ("Mr. Bryant's inability to complete neuropsychological testing in the past could be because of previously unidentified Intellectual Disabilities."). Based on the results, it was reasonable for PCR and trial counsel to decide against additional tests. Furthermore, there is limited evidence, at least from what Bryant has presented, that either trial counsel or PCR counsel prevented Bryant from receiving a full battery of neuropsychological tests. Finally, although she is not a psychologist, Dr. Schwartz-Watts indicated she evaluated Bryant and could not conclude to a medical degree of certainty that Bryant suffered from FASD. PCR and trial counsel ostensibly relied on that conclusion, and the

[5] The court is unable to find Bryant's reference but assumes for purposes of this motion that the quoted passage is accurate.

court finds that any failure is most reasonably attributed to the experts in the case, which again, does not constitute a proper ground for relief. In sum, viewed from counsel's perspective at the time, it was not unreasonable to decide that a theory about fetal alcohol syndrome disorder should not be presented as mitigating evidence. The court finds no clear error or manifest injustice with respect to its ruling on Ground Eight, denies Bryant's motion to alter or amend, and sustains the denial of a certificate of appealability.

C. Ground Seven COA

Although respondents oppose Bryant's motion to alter or amend, respondents ask the court to alter its order with respect to the certificate of appealability that it issued for Ground Seven of Bryant's petition. Under Ground Seven, Bryant alleges that he is intellectually disabled, and as such, his execution is barred under Atkins. As noted above, this argument was not raised in either Bryant's direct appeal or his initial PCR applications. When Bryant attempted to add the claim to his subsequent PCR application, and the state moved to dismiss it, the PCR court denied the motion and allowed the claim to proceed on the grounds that Bryant's failure to comply with the state's procedural rules was not an adequate and independent ground for denial of relief in light of the Supreme Court decision in Atkins. ECF No. 89-37 at 114. Bryant later acknowledged that he did not meet the diagnostic criteria for an intellectual disability but attempted to amend his application to state that he suffered from FASD, and thus, his execution was still barred under an extension of Atkins. A second PCR court determined that the amendment to add the FASD-based claim was successive and time-barred.

Under the "adequate and independent" criteria for procedural default, a state rule is independent "if it does not depend on a federal constitutional ruling." Fisher v.

Angelone, 163 F.3d 835, 844 (4th Cir. 1998) (alterations and internal quotation marks omitted). Although the magistrate judge recommended finding that the state court decision did not "depend on" Atkins, this court departed from the R&R in this narrow respect and concluded that the PCR court necessarily had to confront Atkins to decide that the state procedural rules barred Bryant's FASD claim. In doing so, this court relied on the Fifth Circuit's ruling in Busby v. Davis, 925 F.3d 699 (5th Cir. 2019), as persuasive authority. In Busby, the Fifth Circuit held that a state court's review of an Atkins claim "necessarily depend[s] on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations." Id. at 707.

Even so, the court granted summary judgment in respondents' favor on Ground Seven. The court determined that in addition to finding that the FASD claim was time-barred and successive, the PCR court had also conducted a de facto analysis of the FASD claim on the merits. The court then concluded that the PCR court's ruling on the merits was not unreasonable or contrary to clearly established law because federal courts have not extended the bar on capital punishment to inmates with FASD. But based on the lack of binding caselaw on both issues, the court issued a certificate of appealability as to Ground Seven.[6]

[6] An appeal may not be taken from the final order in a habeas corpus proceeding unless a judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability will not issue for claims addressed by a district court absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). An applicant satisfies this standard by establishing that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

Respondents request the court amend the order and deny a certificate of appealability. Respondents' chief disagreement with the court's order rests on what respondents claim is a misapprehension of Bryant's PCR claims. Namely, respondents highlight that Bryant attempted to bring two separate claims. First, Bryant raised an Atkins claim based on an intellectual disability, which proceeded to be heard at an evidentiary hearing before being dismissed. ECF No. 89-37 at 146. Second, Bryant filed a motion to amend his application, ECF No. 89-39 at 95, seeking to add a claim asserting that barring "the death penalty on people suffering from FASD is a natural extension of . . . Atkins," id. at 99. Judge Seals denied the motion to amend and held that the application would be "restricted to the claim of Intellectual Disability as defined by the relevant statutory definition." ECF No. 89-37 at 143.

According to respondents, the distinction is important because it meant the PCR court never "decide[d] the question of whether evidence supported FASD." ECF No. 134 at 2. On that point, the court agrees. There is no dispute that the PCR court chose to exclusively rule on the Atkins claim for intellectual disability; it made that explicitly clear when it denied Bryant's motions to amend his application. With the amendments denied, the PCR court determined with relative ease that Bryant did not meet the specific criteria for showing an intellectual disability under Atkins. See ECF No. 89-38 at 9 n.8 ("The diagnosis of FASD is not critical to this litigation . . . . FASD is not the same as the diagnosis for Intellectual Disability."); id. at 14 ("Dr. Woods'[s] opinion is clouded by a push to accept a 'functional equivalent' of Intellectual Disability in another condition.").

As he emphasizes though, Bryant did not appeal the PCR court's ruling on the Atkins claim to the South Carolina Supreme Court; rather Bryant appealed the denial of

his motion to amend. ECF No. 132 at 2. The court acknowledges that its summary judgment order referred to the PCR court's order of dismissal of the Atkins claim. Instead, the court should have assessed the PCR court's order on Bryant's motion to amend. ECF No. 89-37 at 139. The latter clearly stated that an amendment was barred by procedural rules, including South Carolina Rule of Civil Procedure 15, S.C. Code § 17-27-10, and S.C. Code § 17-27-45. Id. Respondents argue that the PCR court's decision—regardless of which rule the court looks to—could only have been premised on an adequate and independent state ground.

Nevertheless, the court does not find that its ruling resulted in clear error or manifest injustice.[7] In his motion to amend his PCR application, Bryant argued that Atkins should be extended to cover FASD. The PCR court disagreed and determined the argument sought "an extension of the Atkins exemption to cover a new condition not otherwise recognized as an exemption" and therefore did not "relate back to the original claim of an Atkins exemption." Id. at 141. But the PCR court's decision to deny the amendment based on state procedural rules for relation back arguably relied on a direct interpretation of Atkins because it meant determining Atkins could not include mental impairment based on FASD.[8] Bryant also points to evidence that during the hearing on

[7] As the court noted above, to qualify for reconsideration in this manner, an order cannot merely be "maybe or probably" wrong; it must be "dead wrong," so as to strike the court "with the force of a five-week-old, unrefrigerated dead fish." Franchot, 572 F.3d at 194.

[8] Indeed, the order on the motion to amend arguably relied more on Atkins than the subsequent order of dismissal of the Atkins claim. In Atkins, the United States Supreme Court left the procedure of determining what constitutes an intellectual disability to the states. Larry v. Branker, 552 F.3d 356, 369 (4th Cir. 2009) ("Atkins expressly left to the states the task of defining [intellectual disability]."). Accordingly, the PCR court's Atkins order largely relied on the "prongs" of the intellectual-disability

Bryant's motion to amend, the parties contested whether FASD warranted an extension of Atkins. ECF No. 124 at 13. The state asserted that there was "no argument" that an FASD diagnosis "somehow flows into an Atkins analysis." ECF No. 89-40 at 148. Counsel for Bryant replied that "the reasoning for extending [Atkins] to Fetal Alcohol Syndrome Disorder is the same reasoning that applied in Atkins." Id. at 156. Certainly, the PCR court ultimately agreed with the state and determined that the FASD claim could not relate back to the Atkins claim. But the court finds it is at least debatable whether "[i]n ruling on the amendment, the PCR court then had to review and interpret Atkins, and its definition of intellectual disability, to conclude that Mr. Bryant's claim fell outside of the Atkins purview." ECF No. 124 at 13.

To be clear, the court maintains its prior ruling that even if the PCR court reached a decision on the merits within the meaning of the AEDPA, its decision on the merits was not unreasonable or contrary to clearly established federal law. To the extent the PCR court found that FASD does not fall within the scope of Atkins, no Supreme Court decision has contradicted that finding, and district court rulings support the same. E.g., Garza v. Shinn, 2021 WL 5850883, at *105 (D. Ariz. Dec. 9, 2021) ("There is no authority holding that individuals with FASD are exempt from capital punishment."). But the court chooses not to deny a certificate of appealability based on the discussion of whether the amendment was procedurally defaulted. In sum, the court previously found that reasonable jurists may debate whether the PCR court properly determined that

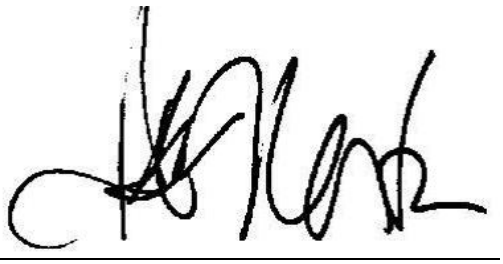
test set forth in South Carolina Supreme Court cases. ECF No. 89-40 at 4 ("This Court is guided by Franklin, Stanko, and Blackwell.")

Bryant's claim was procedurally defaulted. The court finds that its ruling on that uncertainty was not clearly erroneous and did not result in manifest injustice.

IV. CONCLUSION

For the reasons set forth above, the court **DENIES** Bryant's motion to alter and amend and **DENIES** respondents' motion to alter and amend. The court grants a certificate of appealability for Ground Seven raised in Bryant's amended petition.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

May 11, 2023
Charleston, South Carolina

NO. 23-4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN COREY BRYANT,

Appellant,

v.

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

Appellees.

REQUEST TO EXPAND CERTIFICATE OF APPEALABILITY

On Appeal from the United States District Court for the District of South Carolina (No. 9:16-CV-01423-DCN-MHC)

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INTRODUCTION

Stephen Corey Bryant, a person in the custody of Appellees under a sentence of death, seeks an expansion of the certificate of appealability ("COA") granted by the United States District Court for the District of South Carolina when denying his petition for a writ of habeas corpus. The district court granted a COA as to a single issue – that the Eighth Amendment bars Mr. Bryant's execution because his Fetal Alcohol Spectrum Disorder (FASD) impairs his intellectual, adaptive, and executive functioning in a way identical to intellectual disability and is thus encompassed by *Atkins v. Virginia,* 536 U.S. 304 (2002). D.128:26-31, 34-35.

Herein, Mr. Bryant will demonstrate that he is entitled to a COA on at least two additional issues: (1) The State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding computer forensic evidence corroborating Mr. Bryant's statement that Willard Tietjen—for whose murder he was sentenced to death—was viewing pornography of young girls, which would have mitigated the offense and diminished the aggravating circumstances considered by the judge; (2) Mr. Bryant's trial counsel provided ineffective assistance by failing to investigate thoroughly and present compelling mitigating evidence, including that Mr. Bryant suffers from FASD and mental illness, and has a history of severe sexual and physical trauma. Both claims are, at the very least, debatable among reasonable jurists and plainly "adequate to deserve encouragement to proceed further" at this

threshold stage. *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983). This Court should expand the COA to include each.

BRIEF STATEMENT OF THE CASE

Mr. Bryant was indicted in Sumter County, South Carolina, for multiple burglaries, armed robbery, arson, possession of a stolen handgun, and the murders of Clifton Gainey, Clarence Burgess, and Willard Tietjen. Mr. Bryant pleaded guilty to all of the charges against him. A single judge sentenced him to death for the murder of Mr. Tietjen and to life without the possibility of parole for the murders of Mr. Gainey and Mr. Burgess.

On direct appeal to the South Carolina Supreme Court, Mr. Bryant's attorneys raised only a single evidentiary issue and lost. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011). Mr. Bryant's attorneys did not seek certiorari review in the Supreme Court of the United States.

Mr. Bryant subsequently filed an application for post-conviction relief ("PCR") that challenged his trial counsel's effectiveness. D.16-6:112; D.16-7:44, 144. Mr. Bryant also raised a *Brady* claim stemming from the Solicitor's suppression of the internet browsing history for Tietjen's computer, which was rife with pornography featuring teenage girls. That evidence corroborated Mr. Bryant's multiple statements to law enforcement reporting a) that Tietjen had talked of liking young girls and b) that Bryant had seen pornography featuring young girls on

Tietjen's computer. At the PCR hearing, the Solicitor testified that if he had received the report of pornography on Tietjen's computer, he would have "forward[ed] this to defense attorneys" as it had "evidentiary value" and would have been "[u]seful, for sure" for the defense. D.16-9:102-103, 105-106.

On December 3, 2012, the PCR court denied relief. D.16-12:84; *Bryant v. State*, No. 2011-CP-43-00901 (Sumter County, SC). Mr. Bryant filed a petition for a writ of certiorari to the South Carolina Supreme Court, which was denied on March 4, 2015. D.16-39; *Bryant v. State*, S.C. Appellate Case No. 2013-000518. Subsequently, Mr. Bryant filed a petition for writ of certiorari in the United States Supreme Court, which was denied. *Bryant v. South Carolina*, 577 U.S. 1012 (2015).

On January 14, 2016, Mr. Bryant timely filed an initial petition for writ of habeas corpus in the federal district court. D.30. On April 28, 2016, Mr. Bryant both amended and moved to stay his federal habeas proceedings so that he could return to state court to exhaust constitutional claims not previously litigated, including: 1) that he is intellectually disabled and, per *Atkins*, is not eligible for a sentence of death; and 2) that his trial counsel were ineffective for failing to investigate and present available mitigating evidence at sentencing that established his intellectual disability, trauma, and mental illness. D.37. On July 26, 2016, the district court granted Mr. Bryant's motion to stay. D.52.

Contemporaneously with his amended habeas petition and stay motion, Mr. Bryant had filed two successor PCR applications in the Court of Common Pleas for Sumter County: the first raising his *Atkins* claim, and the second raising his ineffectiveness claim. D.89-38:27; D.89-2:3. The PCR court allowed Mr. Bryant's *Atkins* claim to proceed but denied Mr. Bryant's other application as successive and time-barred. D.89-37:110; D.89-37:124.

On May 18, 2018, Mr. Bryant moved to amend his surviving PCR application to reflect that he suffers from FASD and falls within *Atkins*'s categorical exception because of the significant overlaps between how FASD and intellectual disability affect functioning and culpability. That motion was denied by the PCR court on July 25, 2018. D.89-37:139.

On October 1, 2018, the PCR court held an evidentiary hearing. Mr. Bryant presented the testimony of several experts, all of whom testified that Mr. Bryant suffers from significant cognitive, adaptive, and neurodevelopmental deficits as a result of FASD. Evidence was also presented about Mr. Bryant's history of severe sexual and physical trauma and mental illness.

Shortly after the evidentiary hearing, the State submitted a proposed order to the PCR court recommending that relief be denied. Mr. Bryant filed objections to that proposed order; on January 3, 2019, however, the PCR court signed the State's order, denying Mr. Bryant's motion to amend as well as his claims for relief. D.89-

37:146, *Bryant v. State*, No. 2016-CP-43-00828 (Sumter County, SC). Mr. Bryant appealed the denial of PCR relief to the South Carolina Supreme Court, but it was denied in May 2021. D.52, *Bryant v. State*, S.C. Appellate Case No. 2019-000610.

Upon the return of the case to federal district court, the State filed a motion for summary judgment, and Mr. Bryant filed a traverse. D.91; D.104. On April 19, 2022, the Magistrate filed a Report and Recommendation that the State's motion for summary judgment be granted. D.116. On October 18, 2022, the district court adopted the Report and Recommendation but issued a COA as to Ground Seven, which presented Mr. Bryant's interrelated *Atkins* ineffectiveness claims (Claim VII), "find[ing] that in the absence of clearly-defined precedent, reasonable jurists may debate whether the court's decision on Bryant's *Atkins* claim should have been resolved in a different manner." D.128:35. Mr. Bryant filed a Motion to Alter or Amend (D.131), which was denied on June 12, 2023. D.135.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), a habeas petitioner must obtain a COA for each claim they wish to appeal from a final order of a district court. To obtain a COA, the petitioner must make only "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Section 2253 is "a codification of the [Certificate of Probable Cause] standard announced in *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983)," except that Congress substituted

the word "constitutional" for the word "federal." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Accordingly, a COA should issue where "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 & n.4).

The COA requirement exists "to prevent frivolous appeals" only. *Barefoot*, 463 U.S. at 892. The requirement should not "place[] too heavy a burden on the prisoner at the COA stage." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). Instead, a "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims" and ask "only if the District Court's decision was debatable." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003). A claim may be debatable "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Id*. at 338.

"Where the petitioner faces the death penalty, 'any doubts as to whether a COA should issue must be resolved' in the petitioner's favor." *Prystash v. Davis*, 854 F.3d 830, 835 (5th Cir. 2017) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)); *see also Barefoot*, 463 U.S. at 893 ("In a capital case, the nature of the penalty is a proper consideration" to weigh in favor of granting COA, though "the severity of the penalty does not in itself suffice").

REQUEST TO EXPAND CERTIFICATE OF APPEALABILITY

Mr. Bryant respectfully requests that the Court expand the COA to include two issues. (1) Mr. Tiejten's history of browsing the internet for pornography featuring teen girls was material under *Brady* in light of Mr. Bryant's statements to police and accounts of the events underlying Mr. Tiejten's murder (Ground Six). (2) Trial counsel were ineffective for failing to investigate Mr. Bryant's background, history, character, and mental illness; to provide available information to mental health experts; and to present available mitigation at sentencing (Ground Eight). As to both claims, the district court's decision was debatable among reasonable jurists, and a COA should issue. *Miller-El*, 537 U.S. at 327, 348.

I. Mr. Bryant's *Brady* Claim (Ground Six)

During PCR proceedings, Mr. Bryant discovered that the State had violated the requirements of *Brady* and deprived him of due process of law by suppressing forensic evidence of pornographic movies and numerous pornographic websites — including those purporting to depict "teens" in sexual acts[1]—on the computers of Mr. Tietjen. Had this evidence been disclosed to Mr. Bryant, it would have both corroborated his post-arrest statements to police[2] and—given his extensive

[1] On the day prior to Mr. Tietjen's murder, his internet browsing history indicated that he had viewed "freshteens.com," "teen blow job auditions," and "Euro Teens Triple X." D.16-7:254; D.16-8:19 (freshteens.com viewed at 9:30 pm the night before Mr. Tietjen's murder).

[2] After his arrest, Mr. Bryant made multiple statements about pornography on Mr. Tietjen's computer, including that Mr. Tietjen told Mr. Bryant that he liked young girls, that Mr. Bryant

childhood sexual abuse and assault shortly before the crimes at issue here—explained the impetus for his port-mortem mutilation of Tietjen's eyes. D.16-9:69.

There is no dispute that the internet browsing history was favorable to Mr. Bryant and should have been disclosed. The Solicitor testified that the report had "evidentiary value," was "something that would have needed to be turned over," and would have been "[u]seful, for sure" for the defense. D.16-9:102-103, 105-106. The PCR court agreed, concluding that "that the material should have been disclosed and provided to each of [defense counsel] prior to trial." D.16-12:136.

The PCR court denied relief, however, holding that Mr. Bryant had not shown that the internet browsing history was material. [3] D.16-12:134. The PCR court relied upon the fact that Mr. Bryant did not view pornography on Tietjen's computer until after his murder, that the browsing history did not (in the PCR court's estimation) contain child pornography or a specific image that he mentioned containing bestiality, and that the evidence would not have changed the strategy or testimony at the sentencing hearing. D.16-12:134-135.

The district court similarly denied Mr. Bryant's *Brady* claim, concluding that he could not prove the materiality of the withheld evidence and that the PCR

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saw pornography on Mr. Tietjen's computer after he killed him, and that one of the images was a girl engaging in sex acts with a horse. D.16-12:126-29. Mr. Bryant also admitted that he burned Mr. Tietjen's eyes with a cigarette post-mortem and left a taunting note for the victim's family about his pornography use: "No more computer porn for this sick fucker." D.16-12:130.

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court's decision was not contrary to or an unreasonable application of *Brady*. D.128:24. The district court then opined that Mr. Bryant could not establish materiality because the focus of the sentencing hearing was on the armed robbery aggravating circumstance and that aggravator alone. D.128:25 (quoting D.124:9.) ("[t]he sentencing judge stated clearly that he was sentencing Bryant to death based on the aggravating circumstance of armed robbery.").

This conclusion is debatable among jurists of reason for several reasons. First, as the sentencing transcript demonstrates, the focus of sentencing was *not* whether Mr. Bryant committed the aggravating circumstance of armed robbery; indeed, Mr. Bryant had *pleaded guilty* to armed robbery. D.16-1:35-39. Instead, the transcript demonstrates that the sentencing proceedings were centered around Mr. Bryant's character—including the "atrocities" that occurred in the aftermath of Tietjen's murder, his other crimes during this period, and victim impact statements.

The State's closing argument also belies a singular focus on the armed robbery aggravating circumstance during the sentencing hearing. As the United States Supreme Court has instructed, the prosecutor's closing argument is one of the best places to look for evidence of materiality. *See, e.g. Strickler v. Greene*, 527 U.S. 263, 290-91 (1999) (considering the prosecutor's closing argument, which emphasized the importance of the evidence that had been withheld, in determining whether materiality was demonstrated). Indeed, when assessing materiality, "[t]he

likely damage [to the prosecution's case had it complied with its duty under *Brady*] is best understood by taking the word of the prosecutor" in closing argument. *Kyles v. Whitley*, 514 U.S. 419, 444 (1995). *See also, Comstock v. Humphries*, 786 F.3d 701, 711 (9th Cir. 2015) (prosecutor's closing argument reveals the linchpin of their case); *United States v. Caro*, 733 Fed. Appx. 651, 681 (Gregory, J., dissenting in part) ("the majority ignores the fact that materiality can turn on what the Government emphasizes in closing.").

During closing argument, the State expressly referred to more than that single aggravating circumstance: "What can I tell you about ***more*** aggravating ***circumstances***? These are the absolute worse they are and I can't add anything else to it." D.16-5:38 (emphasis added). In asking for a death sentence, the Solicitor argued that it was "what Stephen Corey Bryant did *after* he murdered [Mr. Tietjen, which] breaks all barriers and exceeds all boundaries. It's downright inhuman and indescribable." D.16-5:32-33 (emphasis added). The Solicitor then highlighted "what [Mr. Bryant] did at the Tietjen home"–acting "like he owned the place"–and the egregiousness of Mr. Bryant's post-mortem burning of Mr. Tietjen's eyes and beard, calling Mr. Bryant "sadistic" and a "pathological liar." *Id*.

The closing argument not only reveals the true focus of the sentencing hearing, but also presents false claims about Mr. Bryant's use of Tietjen's computer —a gambit that only the suppression of the evidence to the contrary

allowed. During closing, the State falsely argued "*Mr. Bryant* got on their computer and began to visit porn sites *by his own choosing*, not sites from [Mr. Tietjen and his wife]." *Id*. The State got away with this falsehood because it suppressed the browsing history that disproved it. That evidence would have shown that Mr. Bryant did not visit any pornography sites on Mr. Tietjen's computer; he merely viewed Mr. Tietjen's internet browsing history, which included pornography sites featuring teens and pornographic images and movies in temporary files. D.16-8:18-20, 27, 29.

As the sentencing transcript and the State's own closing argument demonstrate, the focus of its case for a death sentence was not the proving the uncontroverted armed robbery—as the district court claims—but Mr. Bryant's actions *after* the murder of Mr. Tietjen, especially the post-mortem mutilation of Tietjen's eyes and his supposedly purposeful viewing of pornography. This was the true focus of the sentencing – a focus that could not have been maintained if the internet browsing history that debunked it had not been suppressed. As reasonable jurists could disagree with the district court's conclusion and the misapprehensions of the record on which it relies, a COA should issue.

II. Trial Counsel Was Ineffective for Failing to Conduct an Adequate Investigation into Mr. Bryant's Background, History, Character, and Mental Illness and to Provide That Information to Mental Health Experts (Ground Eight)

In his successive state PCR application, Mr. Bryant alleged that trial counsel "failed to investigate, develop, and/or present mitigation evidence," such as "evidence of intellectual disability; inability to function in school, childhood physical trauma, the full nature and extent of the childhood sexual abuse perpetrated on Mr. Bryant by multiple abusers, and other mitigating social history." D.89-2:4-5. Mr. Bryant further contended that *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) excused any default of this claim, as it had not been presented earlier because of the ineffectiveness of initial PCR counsel, who likewise failed to investigate, develop, and present this mitigation evidence. D.89-2:7-8. That evidence included:

- Catherine Bryant, Mr. Bryant's mother, admitted that she drank alcohol and smoked marijuana while she was pregnant with Mr. Bryant. Mr. Bryant was late meeting his developmental milestones. D.46-2:10 (Affidavit of Dr. Donna Schwartz Maddox); D.89-39:106 (Report of Dr. George Woods). At the age of four or five, Mr. Bryant was hit by a car, but his parents did not seek medical treatment. *Id*.
- Mr. Bryant struggled in school. After Mr. Bryant was in first grade for six weeks, his teacher told his mother that he was not fit for school, couldn't begin to learn how to read, and would fail the first grade. His teacher proved

correct – Mr. Bryant failed the first grade. D.46-2:10 (Affidavit of Dr. Donna Schwartz Maddox); D.89-39:107 (Report of Dr. George Woods).

- Catherine Bryant was told by teachers that "Cory was passed from one year to the next to get rid of him, he has a fifth-grade education." *Id*.
- A fifth grade teacher of Mr. Bryant's reported that he was "sweet and slow" and should have been held back in fifth grade, as he could not do fifth grade work. *Id*. Mr. Bryant's fifth grade teachers confirmed that the only reason Mr. Bryant was passed on to the sixth grade was because they were not permitted to hold students back. *Id.*
- While Mr. Bryant endured severe sexual abuse at the hands of several family members, his mother suspected that he was also sexually abused around the age of twelve by a male neighbor. D.89-39:106 (Report of Dr. George Woods). Mr. Bryant was later raped by an adult inmate when he was incarcerated as a juvenile. *Id.*
- Mr. Bryant suffered severe physical abuse at the hands of his father. Mr. Bryant's paternal aunt, Terry Caulder, described her father (Mr. Bryant's grandfather) as "a violent, raging alcoholic" who beat everyone in their family, especially Mr. Bryant's father, who was the primary target. *Id*. "Billy continued the cycle of abuse in his family;" he "beat the hell out of Cory and his mother (Catherine)." *Id*.

- The opinion of Dr. Donna Schwartz-Watts, the mental health expert at trial, who, after reviewing this new evidence, concluded that "Mr. Bryant should receive a full assessment to determine whether he meets the criteria for Fetal Alcohol Syndrome [(FASD)]," along with a "full battery of neurological testing." D.46-2:10-11.

At an evidentiary hearing on his *Atkins* PCR application, Mr. Bryant finally had the opportunity to present all of this evidence, as well as the following expert mental health testimony and diagnoses:

- Following neuropsychological testing and a full assessment for FASD, neuropsychiatrist George Woods testified that Mr. Bryant has "a static encephalopathy secondary to alcohol, alcohol related neurodevelopmental disorder" a varietal of FASD. Dr. Woods noted that Mr. Bryant has facial dysmorphology, which occurs when facial bones do not develop properly because of the mother's consumption of alcohol while the child is in utero, and "impairment of his corpus callosum," which is the part of the brain that "provides information between the right side of the brain and the left side of the brain." D.89-40:169-78. Dr. Woods explained that the damage to Mr. Bryant's brain includes impairment to his executive functioning. D.89-40:187-91. Dr. Woods testified that Mr. Bryant "meets the criteria for developmental disability as well as intellectual disability in his adaptive

functioning" (*id.* at 189); in short, Dr. Woods testified that Mr. Bryant functions like someone with an intellectual disability. D.89-40:196-204; D.89-42:128-33 (Applicant's Exhibit 2).

- Dr. Caroline Everington, an expert in special education, testified that Mr. Bryant suffers from FASD and has a pattern of adaptive functioning deficits consistent with intellectual disability and FASD. D.89-42:21-45.
- Finally, Dr. Schwartz-Watts testified that she had not believed that Mr. Bryant had organic brain damage because she did not have the information provided to Drs. Woods and Everington at the time of Mr. Bryant's original trial or initial PCR proceedings. D.89-42:79, 85. Though Dr. Schwartz-Watts had pretrial "concerns that [Mr. Bryant] may have had Fetal Alcohol exposure," she "could not get any history that he had exposure to alcohol" and thus "didn't have enough evidence to make that diagnosis." D.89-42:80-83, 85. Dr. Schwartz-Watts testified that she believed that FASD should have been investigated at the time of Mr. Bryant's trial. D.89-42:78-86.

Yet before it could even consider all of this powerfully mitigating evidence that trial counsel (and initial PCR counsel) deficiently failed to uncover and present, the PCR court dismissed Mr. Bryant's trial ineffectiveness claim as untimely and successive, also concluding that *Martinez* was not applicable in state court. D.89-3:7-8, 10. The PCR court opined that *Martinez* provided no incentive or "cause to

disregard the [state] procedural bars" because Mr. Bryant's "federal habeas proceedings *will continue regardless of the state actions*." D.89-9:3-4 (emphasis added). "[T]here is no cause to do damage to the State's procedural limitations in an effort to circumvent review in federal court….[T]he application of *Martinez* is for the federal court." *Id.*[4]

When Mr. Bryant returned to federal district court, he presented the evidence and argument developed in the successive PCR in support of his ineffectiveness claim, arguing that, per *Martinez*, his initial PCR's ineffectiveness excused any default of this claim. As Bryant noted, this is *Martinez's* purpose: where "state law restrict[ed] ineffective assistance claims to initial-review collateral proceedings…the ineffectiveness of a petitioner's state [post-conviction] counsel may provide cause in a federal habeas proceeding to excuse the petitioner's failure to challenge the ineffectiveness of his trial counsel." *Martinez*, 566 U.S. at 9; *see also Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

The district court, however, refused to apply *Martinez,* contending: (1) "[t]hese claims are not the same claims that were presented before and not the type contemplated by *Martinez*"; and (2) that even if *Martinez* applied, initial PCR counsel's performance was not deficient, and Mr. Bryant's underlying trial

[4] Mr. Bryant appealed the PCR court's dismissal to the South Carolina Supreme Court, but his application for writ of certiorari was denied. D.89-15.

ineffectiveness claim was not substantial. D.128:32-34. The district court claimed that this new mitigating evidence was irrelevant, holding that initial "PCR counsel's decision to rely on Dr. Schwartz-Watts' testimony—in lieu of an 'investigation'—did not fall below an objective standard of reasonableness." *Id*. These findings are, at the very least, debatable among jurists of reason.

First, the district court's conclusion that the trial ineffectiveness claim and antecedent *Martinez* claim are not "the same claims presented before and not the type contemplated by *Martinez*" is untenable. Throughout the district court and successor PCR proceedings, Mr. Bryant detailed the ways in which trial and initial PCR counsel performed deficiently. Mr. Bryant contended that trial and PCR's counsel's failure to conduct an adequate mitigation investigation prevented the discovery of readily available mitigating evidence from Mr. Bryant's mother, his aunt and a teacher. That evidence included: that Mr. Bryant had failed to meet developmental milestones; that he had difficulties in school; that he was socially promoted in fifth grade; that his mother "drank alcohol and smoked marijuana" during her pregnancy with him; that he endured pervasive physical and sexual abuse as a child; and ultimately that he suffers from FASD and neurological dysfunction. *See* D.37:70-73 (federal petition detailing specific and available facts not found due to ineffective trial and PCR counsel). *See also*, D.89-2:3-4 (PCR application detailing ineffectiveness of trial and PCR counsel); D.89-2:12-13

(Affidavit of Dr. Schwartz-Watts detailing readily available mitigating evidence not provided to her by either trial or PCR counsel); D.89-5:6-7 (detailing PCR counsel's failure to thoroughly investigate, utilize experts and investigators and failure to present compelling mitigating evidence). The district court misconstrued Mr. Bryant's citation of *Martinez*'s equitable exception to default as "a freestanding claim of ineffective assistance of state habeas counsel." D.128:32-33. The district court's misapprehension is incompatible with Mr. Bryant's amended petition, which cites *Martinez* for what it stands for and nothing more: that initial PCR counsel's ineffectiveness "excuses the procedural default" of his trial ineffectiveness claim in Ground Eight. D.37:69-73. Reasonable jurists could certainly disagree with the district court's reshaping of *Martinez*'s exception into a claim of ineffectiveness in a proceeding in which no right of counsel attaches. Accordingly, a COA should issue.

Second, the district court's refusal to engage with Mr. Bryant's mitigating evidence on the ground that it was reasonable for initial PCR counsel "to rely on Dr. Schwartz-Watts testimony…in lieu of an investigation" (D.128:33-34) flies in the face of Supreme Court precedent. That Court has firmly established trial counsel's duty to conduct a reasonable mitigation investigation in capital cases, and it and other courts have readily found counsel who committed equivalent failures deficient. *See, e.g.*, *Sears v. Upton*, 130 S.Ct. 3259 (2010) (counsel

ineffective for not presenting evidence of frontal lobe brain damage and childhood difficulties); *Porter v. McCollum*, 130 S.Ct. 447, 450, 451, 454 (2009) (counsel ineffective for failing to present evidence of severe childhood abuse and brain abnormality); *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel ineffective for failing to investigate and present evidence of possible brain damage and other trauma); *Hooks v.Workman*, 689 F.3d 1148 (10th Cir. 2012) (counsel ineffectively failed to present evidence of petitioner's organic brain damage); *Detrich v. Ryan*, 677 F.3d 958, 984 and 986 (9th Cir. 2012) (counsel ineffectively failed to investigate and present evidence of defendant's organic brain damage resulting from abusive childhood); *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008); *Frierson v. Woodford*, 463 F.3d 982, 993–994 (9th Cir. 2006) (counsel ineffective for failing to present evidence of potential organic brain damage and mental disturbance); *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003) (counsel ineffectively failed to present evidence of mental history and abusive childhood); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (counsel ineffectively failed to present evidence of brain damage caused by exposure to toxins).

This Court's decision in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), presents an important contrast to the district court's conclusion that it was reasonable for trial and initial PCR counsel to rely on the uninformed testimony of a single expert as opposed to conducting investigation and developing mitigating

evidence – particularly evidence of FASD. In *Williams*, this Court found trial counsel was deficient for "not collect[ing] any FAS[D] evidence or consider[ing] its resulting import as part of the mitigation strategy." *Id*. at 316. As the *Williams* court noted, "FAS[D] was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored." *Id*. at 314. The panel found that Williams had established prejudice where "mitigating FAS[D] evidence could have been significant for the jury because it could have established cause and effect, thereby diminishing Williams' culpability." *Id*. at 319.

Just as in Mr. Williams' case, Mr. Bryant has now presented powerful mitigating evidence that revealed to well-qualified experts that he suffers from FASD. This evidence establishes that both trial and initial PCR counsel failed to discover that Mr. Bryant missed important developmental milestones in childhood, had tremendous difficulties in school, and that his mother drank alcohol and smoked pot while pregnant with him. Had counsel pursued a thorough investigation, they could have provided the background necessary for Drs. Woods, Everington, and Schwartz-Watts to diagnose Mr. Bryant with FASD, as they now have.

Where *Williams* establishes that reasonable jurists differ as to the import of such evidence, Mr. Bryant is entitled to a COA. Indeed, this court's decision granting relief in *Williams* demonstrates that "reasonable jurists could debate

whether . . . [Mr. Bryant's claim] should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 & n.4).

This Court, accordingly, should expand the COA to allow Mr. Bryant to appeal Ground Eight.

CONCLUSION

For the foregoing reasons, this Court should expand the COA to permit Mr. Bryant to appeal the denial of his *Brady* claim, his claim of ineffectiveness, and his contention that *Martinez* overcomes any procedural bar to federal review of that claim. Grounds 6 and 8).

RESPECTFULLY SUBMITTED this 30th day of June, 2023.

By: */s/ Gretchen L. Swift*

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CERTIFICATE REGARDING LOCAL RULE 27(A)

I, Gretchen Swift, hereby certify that counsel for Appellee/Respondent were informed on June 29, 2023, by email of the intended filing of this request.

/s/ *Gretchen L. Swift*

CERTIFICATE REGARDING FED. R. APP. P. 27(D)(2)(A)

I, Gretchen Swift, hereby certify that Appellant's Request to Expand Certificate of Appealability contains 5,045 words, including the portions exempted by Fed. R. App. P. 32(f).

/s/ *Gretchen L. Swift*

CERTIFICATE OF SERVICE

I, Gretchen Swift, hereby certify that on this 30th day of June, 2023, I filed the foregoing Request to Expand Certificate of Appealability via ECF with service via electronic delivery to counsel for Respondent:

Melody J. Brown
South Carolina Attorney General's Office

/s/ *Gretchen L. Swift*