

No. 25-5317

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
Correctional Institution Secure Facility,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED
CAPITAL CASE

In 2008, Petitioner Steven Corey Bryant pled guilty to multiple crimes including three murders. For the murder of Willard “T.J.” Tietjen he was sentenced to death. Counsel conducted an expansive investigation into Bryant’s mental conditions, drug abuse, and family history, in preparation for sentencing. Counsel then presented a hefty case in mitigation with family witnesses and also experts in psychiatry, substance abuse and social history. In his state challenges, Bryant never litigated an ineffective assistance of counsel claim that the mitigation investigation was deficient for failure to discover evidence of fetal alcohol syndrome disorder (FASD). Though he raised the claim in a successive action, the state court dismissed the action as untimely and improperly successive. The district court in 28 U.S.C. § 2254 review found the mitigation investigation claim was defaulted and Bryant could not show deficient performance by collateral counsel or a substantial claim given the robust mitigation investigation demonstrated in the sentencing record. Respondent reframes the question as:

Did the Fourth Circuit offend any right held by Petitioner under 28 U.S.C. § 2253(c) in summarily concluding that he failed to meet the substantial showing requirement required for issuance of a certificate of appealability on a factually undeveloped and procedurally defaulted claim?

INTRODUCTION

A state prisoner seeking to appeal the denial of relief after 28 U.S.C. § 2254 review must obtain a certificate of appealability to do so. 28 U.S.C. § 2253(c)(1)(A). To obtain a certificate, the petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). If granted, the certificate must reflect “which specific issue or issues” the court has accepted as meeting the standard. 28 U.S.C. § 2253(c)(3). The statute is silent as to what is required when the court declines to issue a certificate on any particular issue.

Here, Bryant received a certificate of appealability from the district court to review one claim; however, before briefing, he moved in the Fourth Circuit to expand the certificate to include two other claims, one, an ineffective assistance claim alleging “missed” FASD mitigation evidence. After consideration of the motion and a response opposing the requested expansion, the Fourth Circuit summarily denied the motion to expand the certificate. (Pet. App. 17a). The appeal continued only on the claim approved by the district court in its certificate.

Bryant now asks this Court to either find the Fourth Circuit was wrong in concluding that the defaulted and factually undeveloped claim was not sufficient to secure a certificate, presumably with an eye toward return and additional litigation; or, in the alternative, remand to the Fourth Circuit with directions that the Fourth Circuit show its work for further review. (Pet. at 18–19). The statute does not grant Bryant that right and, at any rate, there is no indication the Fourth Circuit misunderstood the relevant inquiry. After all, both parties argued the applicable standard in their written submissions.

And if remanded, what is the possible result? Only delay. The record shows that Bryant presented a defaulted claim—a claim Bryant admitted was defaulted, and attempted to avoid the default under the exception carved out in *Martinez v. Ryan*, 566 U.S. 1 (2012). Bryant met an immediate obstacle to showing deficiency or a substantial claim, as would be required for *Martinez* to excuse the default, because the state court record showed a competent and reasonable investigation with advice of a qualified mental health expert. There was no deficiency and there was no substantial claim in light of the ample evidence discovered and presented at the sentencing proceeding. Moreover, his request to expand the record through a federal evidentiary hearing was denied. To remand would result in precisely the type of unwarranted delay this Court has found unacceptable. *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022) (“a federal habeas court may *never* ‘needlessly prolong’ a habeas case,” and “a *Martinez* hearing is improper if the newly developed evidence never would ‘entitle [the prisoner] to federal habeas relief[.]’”) (internal citations omitted).

To be sure, Bryant represents to this Court that the record shows what he considers powerful evidence of FASD, but that is not precisely correct.¹ That condition was never litigated in state court nor *Strickland*² considered regarding the potential evidence when considered in light of the mitigation investigation for sentencing. To accept Bryant’s theory that the FASD evidence is somehow conclusive or settled

¹ See Supreme Court Rule 15. 2 (“In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted.”).

² *Strickland v. Washington*, 466 U.S. 668 (1984) sets out the now familiar test that a defendant must show to demonstrate ineffective assistance: 1) that deficient performance occurred and 2) counsel’s deficient performance caused prejudice. *Id.* at 687.

would result in one of two errors: (1) it would allow Bryant to have his untested factual assertions accepted as true (a result plainly contrary to fair litigation); or (2) it would allow Bryant to concede (again) that his factual assertions have not been properly tested, which surely will result in nothing more than a request for hearing (again) because that referenced evidence has never been litigated in regard to his ineffective assistance claim which, itself, requires more than merely pointing to other potential mitigation evidence not presented at sentencing.

At bottom, Bryant attempts an end-run of the limitations in 28 U.S.C. § 2254(e)(2), the exact type of action this Court has rejected. *See Shinn v. Ramirez*, 596 U.S. at 389 (“when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner’s defaulted claim unless the exceptions in § 2254(e)(2) are satisfied”); *see also id.* at 390 (“expansion of factfinding in federal court, whether by *Martinez* or other means, conflicts with any appropriately limited federal habeas review.”).

There is no potential error of law or even error of fact for this Court to correct. The Fourth Circuit simply declined to issue a certificate on a factually undeveloped and defaulted claim.

The petition should be denied.

STATEMENT OF THE CASE

A. The Plea and Death Sentence.

Bryant pled guilty on August 18, 2008, to a series of burglaries, an assault with intent to kill, and three murders that he committed in his one-man, eight-day crime spree in October 2004. *State v. Bryant*, 704 S.E.2d 344, 344–45 (S.C. 2011). Bryant also pled guilty to two serious crimes committed after his arrest which included assault with intent to kill a correctional officer. *Id.* at 345. The State sought the death penalty for the murder of Willard Tietjen. The Supreme Court of South Carolina generally summarized the facts of the murder as follows:

. . . [Bryant] went to victim Tietjen's home, shot him nine times, and looted the house. [Bryant] answered several calls made to Mr. Tietjen's cell phone by Mr. Tietjen's wife and daughter, telling both of them that he was the "prowler" and that Mr. Tietjen was dead. He burned Mr. Tietjen's face and eyes with a cigarette. Appellant left two notes on paper and scrawled a message on the wall: "victim number four in two weeks, catch me if you can." On another wall the word "catch" and some letters were written in blood.

Id.

For the trial level proceedings, Bryant was represented by counsel Jack D. Howle, Jr., Esq., and John D. Clarke, Esq.³ The Honorable Thomas A. Russo heard

³ Pursuant to S.C. Code Ann. § 16-3-26(B)(1), South Carolina requires that two qualified counsel for indigent capital defendants be appointed: "One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff." James H. Babb, Esq., had been appointed prior to the plea; however, Mr. Babb was removed due to an incapacitating medical condition, and replaced by Mr. Clark on July 18, 2008. Mr. Howle remained on the case consistently.

and accepted the plea then deferred sentencing on all conviction.⁴ The sentencing hearing began on September 2, 2008. (JA 137). The defense, with the aid of experts, put up a robust case that presented evidence that Bryant was sexually abused as a young child and the trauma from that abuse, along with presentations based on Bryant's developmental history, such as his level of functioning and his chaotic childhood. Counsel called both family witnesses and medical experts during the sentencing proceeding.

Bryant's grandmother, Shirley Freeman, testified in support of Bryant's claim of sexual abuse, as did his aunt, Terry Lee Bryant Caulder. (JA 192–193, 204–205). Dr. Donna Schwartz-Watts, a forensic psychiatrist, testified that she found the reports of sexual abuse “very significant.” (JA 221). Dr. Watts testified that Bryant had reported he was sexually abused as a child by four people: his paternal grandfather, his half-brother, his paternal uncle, and his mother. (JA 221–222). Dr. Watts testified that Bryant reported symptoms of anger, shame and flashbacks. (JA 229–230).

Dr. Watts also found Bryant's involvement in the juvenile justice system at the early age of 11 “very significant” and discussed that he repeated first grade, and had absences and involvement with school counselors, was placed in emotionally handicapped classes, and that he had demonstrated low average intelligence. (JA 222–223). Dr. Watts testified Bryant's juvenile records reflected that Bryant had

⁴ In South Carolina, when the right to a jury trial is waived and a plea is entered, the plea judge makes the sentencing determination. See S.C. Code Ann. § 16-3-20 (B).

been physically assaulted, had been placed on anti-depressants and diagnosed with ADD and dysthymia (chronic depression) at the Department of Juvenile Justice. (JA 226–227). Dr. Watts noted after his arrest, Bryant was determined to have anti-social personality disorder with depressed mood. (JA 230–231). She diagnosed Bryant with Post-Traumatic Stress Disorder (PTSD). (JA 232–233, 235). She also opined that he suffered from a number of substance abuse disorders, as well as ADD and dysthymia by history. (JA 235). Further, Dr. Watts opined that the murders were related to his PTSD, noting he had reported having a feeling of being threatened by the victims. (JA 239–242). On cross-examination, Dr. Watts confirmed that Bryant was not mentally retarded (now intellectually disabled) and had no organic brain damage. (JA 244).

Dr. Alexander Morton, an expert in psycho-pharmacology, addictions and psycho-pharmacy practice, testified about Bryant's past drug use and the effects from that use, that the Bryant family had a genetic predisposition to be unable to control their drug abuse, and opined Bryant abused RAID insecticide, Benadryl, methamphetamine, marijuana, and LSD. (JA 274–278, 284, 309).

Dr. Marty Loring, a social worker and social psychologist, testified at length regarding Bryant's social history. (JA 315–316).⁵ She also prepared a genogram of the family members, identifying such factors as reported drug and alcohol use and

⁵ Dr. Loring received information from investigator Carolyn Graham who found school and other records to aid Dr. Loring in forming her opinion(s). (JA 347). This information was also shared with Dr. Watts. (JA 218).

sexual abuse. (JA 326–333). Dr. Loring described Bryant’s developmental path and characterized it as one of a “psychologically battered child.” (JA 334–338).

On September 11, 2008, Judge Russo imposed sentence on all non-capital convictions and found beyond a reasonable doubt the existence of the aggravating circumstance, “the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon.” Judge Russo then sentenced Bryant death for Mr. Tietjen’s murder. (JA 348–352). Bryant appealed.

B. Direct Appeal Proceedings.

Bryant, through appellate counsel, challenged only the exclusion of testimony that Bryant’s “Aunt Terry” had been “sexually abused by her father.” *State v. Bryant*, 704 S.E.2d at 642. The South Carolina Supreme Court affirmed, and Bryant did not seek further review from this Court.

C. First State PCR Proceedings.

The Supreme Court of South Carolina assigned the Honorable R. Ferrell Cothran to preside over the action and he appointment Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq., to represent Bryant.⁶ PCR counsel raised multiple issues, none related specifically to FASD. (See JA 967). After an evidentiary hearing and post-hearing proposed orders from both parties, Judge Cothran denied relief. The Supreme Court of South Carolina denied Bryant’s petition for appellate review on

⁶ South Carolina provides for indigent capital case PCR applicants, in addition to a hearing and funding for experts and/or other hearing preparation needs, the appointment of two attorneys with a heightened qualification requirement: “at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education.” *Robertson v. State*, 795 S.E.2d 29, 36 (S.C. 2016); see also S.C. Code Ann. § 17-27-160 (B).

March 4, 2015. (*See* JA 873–876). This Court denied his petition for further review on November 30, 2015. *Bryant v. South Carolina*, 577 U.S. 1012 (2015).

D. 28 U.S.C. § 2254 Action.

Having received no relief in state court, Bryant turned to the federal courts. With assistance of counsel, Bryant filed a petition, but soon after requested a stay to return to state court with additional issues not raised in the first PCR action. The claim as relevant here was under “Ground Eight” and read as follows:

VIII. Trial counsel was ineffective for failing to conduct an adequate investigation into Bryant’s background, history, character, and mental illness; failing to provide the available information to the mental health experts in order to ensure an accurate and reliable mental health evaluation; and failing to adequately present all the available mitigating evidence in sentencing.

(JA at 91).

Bryant acknowledged that claim had not been previously raised in state court, (JA 84, 91–94). Bryant later requested and received a stay of his federal action to return to state court to attempt to have new claims adjudicated.

E. Second and Third State PCR Actions.

On May 3, 2016, Bryant filed two successive state PCR actions. One contained an allegation that “he suffers from Intellectual Disabilities,” and claimed exemption from capital punishment under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (establishing exemption of the mentally retarded (now intellectually disabled) defendants from capital punishment). (JA 430). The other alleged a variety of claims including, as relevant here, a claim plea counsel was ineffective in that counsel “failed to investigate, develop, and/or present mitigation evidence *i.e.* 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[.]” (See JA 876; *see also* JA 807 and 972).⁷ The State moved to dismiss both actions as improperly successive and untimely. Ultimately, the state court allowed the *Atkins* claim alone to be heard in a successive action. Bryant appealed the dismissal of all the other claims, but the Supreme Court of South Carolina summarily denied his petition for review on February 9, 2017, finding Bryant “failed to show that there is an arguable basis for asserting that the determination by the lower court was improper.” (JA 1065 and ECF No. 89-15).

During the allowed, narrow litigation, Bryant eventually admitted he did not have evidence to support intellectual disability, but attempted to amend to include a new claim that *Atkins* should be extended to also exempt defendants with FASD from capital punishment. (JA 521–522, 572–573, 974). Given the limited nature of the proceedings, his attempts to amend were not successful and the amendment denied as untimely and improperly successive. (JA 376–378, 382–386).

An evidentiary hearing was convened on October 1, 2018, and testimony was taken on the issue of intellectual disability. (JA 596–805). During the hearing, Bryant referenced evidence of FASD, however, the condition was never litigated. An order of dismissal was filed on January 4, 2019. (JA 389–426). Both parties appealed.

⁷ The claim mirrored the claims raised in his § 2254 petition that Bryant admitted had not been properly exhausted in the state PCR process. (See JA 84). Notably absent in that petition is a claim that he had FASD.

Bryant argued that he should have been allowed to amend “to allege he suffers from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4),” and to argue for an extension of *Atkins*. (JA at 819, 829–841). Bryant argued that he should have been allowed to amend his application and given “sufficient time to complete his FASD investigation[.]” (JA 839 and 841). The State filed a cross-petition maintaining the previously asserted procedural bars. (JA 851). The Supreme Court of South Carolina denied both petitions by Order dated May 7, 2021, and amended May 11, 2021.⁸ (JA 868).

F. Completion of Section 2254 Habeas Proceedings in District Court.

On September 14, 2021, the district court lifted the stay. (JA 9). On October 15, 2021, Respondents made an amended return and moved for summary judgment. (JA 869–957). Further, Respondents asserted the court should deny the request for an evidentiary hearing as a hearing was barred under § 2254(e)(2). (JA 954–955).

On April 19, 2022, the United States Magistrate Judge issued a report and recommendation. (JA 1061). The magistrate addressed the mitigation claim and a separate alleged conflict of PCR counsel claim (Grounds Eight and Nine) together, finding both “grounds were raised in [Bryant]’s third PCR action but were found to be both successive and time-barred.” (JA 1124). Further, the magistrate concluded that the state procedural rules that barred the litigation “were adequate and

⁸ The original order contained a scrivener’s error referring to a review of the court of appeals decision which was corrected by the amendment.

independent state procedural rule[s]" and the bar resulted in a procedural default which prevented a merits review in the federal action. (JA 1124).

As to Bryant's claim that *Martinez v. Ryan*, 566 U.S. 1 (2012),⁹ allowed him to escape the procedural default based on ineffective assistance of PCR counsel, the magistrate disagreed given that Bryant had "fail[ed] to allege facts to support his contention that PCR counsel's investigation or presentation was deficient" but had instead requested a federal hearing "to 'prove'" collateral counsel deficient performance. (JA 1125). Noting the "absence of evidence cannot overcome the 'strong presumption'" that counsel preformed within professional norms, the magistrate concluded the mere allegation of ineffective assistance was insufficient to overcome the presumption and Bryant failed on the first prong under *Martinez*. (JA 1125). The magistrate wrote:

Under Strickland, PCR counsel is presumed to have provided constitutionally reasonable representation. [Bryant] has failed to offer anything to create even a question of whether he can rebut that presumption. Because [Bryant] has failed to meet his Martinez burden, the procedural default of his Grounds Eight and Nine stands. Accordingly, the undersigned recommends that Respondents' motion for summary judgment as to these grounds be granted.

(JA 1126).

⁹ *Martinez* established a narrow, potential excuse for defaulted of trial counsel ineffective assistance claims by allegation collateral counsel was ineffective: "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14.

The magistrate also recommending denying the requested evidentiary hearing noting that Bryant “has been given time here and in state court to investigate the matters he had raised in his petition,” and a hearing was not warranted. (JA 1127).¹⁰

On October 18, 2022, the Honorable David C. Norton, United States District Court Judge, issued an order adopting, in part and rejecting in part, the report, but nonetheless granting summary judgment in Respondents’ favor. (JA 128). As to the mitigation investigation claim, the district court agreed with the magistrate that the ground was defaulted, noting the “adequate and independent state procedural rule[s]” established under state law. (JA 1161) (*See also* Pet. App. 48a–51a; 70a–77a).

The district court also noted Bryant’s objections where he asserted PCR counsel was ineffective for not conducting a sufficient re-investigation, but resolved that his argument did not show or present as an ineffective assistance of trial counsel claim—the narrow basis for *Martinez*. (JA 1161–1162). The district court resolved:

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*.

¹⁰ The April 2022 report pre-dated this Court’s May 23, 2022 opinion in *Shinn v. Ramirez*.

(JA 1163; Pet. App. 51a).

Both parties timely moved to alter or amend the order. Of note, when discussing the *Atkins* related claim, Respondents submitted there was “no ‘fact’ that FASD exists in this petitioner as no opinion on the matter was accepted and found credible after testing within the adversarial system.” (JA 1184). On May 11, 2023, the district court issued an order denying the motions, but finding in relevant part:

According to respondents, the distinction [between the two claims] 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. . . .

(JA 1224) (emphasis added).

The court concluded “that reasonable jurist may debate whether the PCR court properly determined that Bryant’s claim was procedurally defaulted” regarding his extension of *Atkins* argument and affirmed that he would grant a certificate, but only on Bryant’s *Atkins* related claim. (JA 1163–1164, 1222–1227; Pet. App. 51a–52a, 77a–81a). Bryant appealed.

G. The Fourth Circuit Appeal.

The Fourth Circuit denied Bryant’s request to expand the certificate to include a defaulted allegation of failure to investigate potential mitigation/evidence of fetal alcohol syndrome. (See COA4 Doc. 19 at 13–16 and 23). The appeal continued on the single issue in the district court’s certificate. On that issue, the Fourth Circuit found

the state court procedural bars were independent and adequate state-law grounds; thus, the claim was defaulted and unavailable for habeas review. *Bryant v. Stirling*, 126 F.4th 991, 1000 (4th Cir. 2025). Bryant, however, does not raise that issue in his petition to his Court. Rather, Bryant contends that the Fourth Circuit erred in not granting a certificate of appealability on his separate claim that counsel was ineffective in the mitigation investigation for sentencing.

REASONS FOR DENYING THE PETITION

The Fourth Circuit summarily concluded that the district court's ruling applying a procedural bar to a factually undeveloped and defaulted claim need not be reviewed again on appeal—hardly a surprising result. Bryant had never developed his mitigation investigation ineffective assistance claim in state court; that is not contested. Moreover, as the district court pointed out, the state court record shows a robust investigation of mitigation evidence resulting in the presentation of several mitigation lines at sentencing, and a reasonable reliance on counsel's retained expert for mental assessment. Thus, the record readily supports the basis for the district court's finding of default and that the default should not be excused. Bryant shows no basis for any further review or cause to remand to the Fourth Circuit for a detailed order. In short, Bryant has shown no possibility of relief, only the possibility of delay. In these circumstances, there is no compelling reason either in fact or law to grant the petition. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

I. Bryant shows no "compelling reasons" for this Court to review the Fourth Circuit's ordinary application of 28 U.S.C. § 2253(c)(2).

28 U.S.C. § 2253(c)(2) provides the applicable test: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(3) directs that a certificate "shall indicate which specific issue or issues satisfy" that required showing but is silent to any requirement as to an order denying a certificate.

The required showing is plainly set out and has been well-defined by this Court. A petitioner must demonstrate 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, 483–484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983)). That review means a court “look[s] to the District Court’s application of AEDPA to petitioner’s constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A full merits review of the claims is not conducted. *Buck v. Davis*, 580 U.S. 100, 115 (2017). Where the lower court found a claim procedurally defaulted, the review is of both the connotational claim(s) at issue and the procedural ruling. *Slack v. McDaniel*, 529 U.S. at 484. Debatable lies somewhere between a showing of merit and “‘the absence of frivolity’ or the existence of mere ‘good faith’” in the claim at issue. *Miller-El*, 537 U.S. at 338 (quoting *Barefoot v. Estelle*, 463 U.S. at 893). The Fourth Circuit has routinely acknowledged the applicable test. *See, e.g., Cox v. Weber*, 102 F.4th 663, 671 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1131, 220 L. Ed. 2d 425 (2025).

Bryant’s complaint here is, essentially, that he cannot contest the denial in detail because the order does not reflect the Fourth Circuit’s analysis. However, the Fourth Circuit did note in its order that it had considered the submissions by the parties. (Pet. App. 17a). Both filings, one from Bryant and one from Respondents,

referred to the standard and the facts each party considered relevant. (See Pet. App. 90a; COA4 Doc. 22). This is a good indication of what the Fourth Circuit considered.

Further, the record shows the evolving nature of the claim; first made before the stay and additional state proceedings and the FASD referenced included after return to federal court. Bryant even admitted in his February 27, 2022, response in opposition to Respondent's motion for summary judgment that his mitigation investigation claim based on purported evidence of FASD in state court was denied under state procedural bars, was not developed, and asked for a hearing in federal court to develop the claim. (JA 1020–1026). Nothing about this claim has been properly presented—either in state or federal court.

To put a fine point on it, while Bryant supposes that his new evidence is compelling and should be heard, he misses the very ordinary procedural bar that stands firmly in place. Bryant fails to show how remand could do anything further than delay the finality of this habeas action in these circumstances.

II. Bryant's claim that he asked the Fourth Circuit to review was defaulted; thus, Bryant neither developed the claim, nor obtained a ruling under *Strickland* as to counsel's mitigation investigation. Given that the record supports the disposition, and that 28 U.S.C. § 2254 (e)(2) bars an evidentiary hearing for development of the claim in federal proceedings, no further review was warranted.

In its May 11, 2023 order, the district court agreed that the state courts never decided whether the evidence related to FASD offered in litigation of the *Atkins* hearing even supported a diagnosis of FASD. (Pet. App. 79a). (See also JA 1224). Bryant has shown no error of fact or law in that ruling. Further, his present positions

regarding FASD evidence for mitigation suffer from his undeveloped arguments below.

For instance, Bryant never amended his ineffective assistance ground to include any exact reference of FASD¹¹ and made no specific argument in an attempt to excuse the admitted default. Quite the opposite, Bryant maintained that his investigation was incomplete and needed to be developed and presented as observed by the magistrate:

Here, [Bryant] has offered very little to rebut the presumption as to PCR counsel's performance. Generally, he asks for an evidentiary hearing in order to "prove, as a threshold matter that his initial PCR counsel performed deficiently in failing to develop and present these claims." ECF No. 104 at 71. However, he fails to allege facts to support his contention that PCR counsel's investigation or presentation was deficient.

(ECF No. 116 at 65).

Bryant's assertion in the petition to this Court that he "alleged "that his sentencing counsel provided ineffective assistance in failing to discover evidence of FASD," citing 43a and 48a in the petition appendix, (*see* Pet. 9), is wrong. On page 48a there is no reference to FASD, while on p. 43a Bryant has referred the Court to his separate *Atkins* argument and his attempt to amend to argue for an extension of *Atkins*. On that same page, Bryant asserts "[a] second PCR court found that the

¹¹ The mitigation investigation claim was raised in the § 2254 petition before Bryant had settled on raising potential FASD. Rather, he more generally asserted a failure to investigate background, and later, in response to the motion for summary judgment and in the Rule 59 motion, asked the court to focus on his FASD allegation.

FASD-based claim was successive and time-barred.” Both are tied to Bryant’s federal *Atkins* claim, not his ineffective assistance claim. (Pet. App. 43a). Other factual errors or misstatements, and incorrect legal arguments that Bryant blends in, are similarly unsustainable.

a. Bryant incorrectly asserts the record contains evidence of FASD and that evidence is sufficient to resolve the defaulted ineffective assistance of counsel claim.

Bryant attempts to show his case differs from *Shinn v. Ramirez* because, so he claims, there is evidence of FASD in the state court record. But he cannot divorce the references to evidence of FASD from his failed argument for an *Atkins* extension which was also procedurally barred. *Bryant*, 126 F.4th at 998–999. Bryant does not explain how certain theories presented in other contexts establish a sufficient record for a separate ineffective assistance of counsel claim.¹² In fact, though Bryant argues in his petition as if credible evidence of a diagnosis has been accepted, (*see* Pet. 5), it has not. That was plainly confirmed by the district court. (Pet. App. 79a).

The same is true of Bryant’s further argument that FASD effect could be magnified in a child from chaotic and abusive homes. (*See* Pet. 6–7). That general assertion does not bear on the adequacy of investigation into evidence of FASD. At any rate, the state court record shows that the trial level investigation placed great emphasis on developing evidence of family background and dynamics. Dr. Marty

¹² Bryant argued in his objections to the magistrate’s report that evidence admitted in the *Atkins* hearing would be available in support of his “allegations of trial and PCR ineffectiveness,” citing *Trevino v. Thaler*, 569 U.S. 413 (2012) and *Apelt v. Ryan*, 878 F.3d 800 (9th Cir. 2017). (ECF No. 124 at 20). However, *Shinn v. Ramirez* plainly addressed the limitations of evidence offered to excuse a procedural default.

Loring, a social worker and social psychologist, testified at length regarding Bryant's social history. (JA 315–316). Dr. Loring received information from investigator Carolyn Graham who found school and other records to aid Dr. Loring in forming her opinion(s). (JA 347). Further, this information was also shared with Dr. Watts. (JA 218). Reference to family background and dynamics in this context actually supports a reasonable investigation. The record also supports the sharing of information among the team. At bottom, suggesting that the FASD could fit Bryant's background is not the same as showing counsel in this case in context was deficient in the mitigation investigation. Bryant's argument misses the mark.

Consequently, should there be either a remand with directions to consider the claim, or a remand with directions for an order detailing the default and lack of factual development as Bryant seeks, such would merely work to unduly delay these proceedings—an unacceptable outcome according to this Court. *Shinn v. Ramirez*, at 1739 (“a federal habeas court may *never* ‘needlessly prolong’ a habeas case”) (citation omitted). This Court has long held that “federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.” *Williams (Michael) v. Taylor*, 529 U.S. 420, 437 (2000). That is not debatable.

b. Bryant incorrectly describes the *Strickland* test for investigation and assumes conclusions not in the record and contrary to *Strickland's* presumption of reasonable assistance.

Bryant asserts that his “sentencing counsel did not conduct a reasonable investigation into FASD, nor did they provide the expert with the information

necessary to confirm her suspicion” and the fact finder “heard none of the available mitigating evidence of the severe brain damage Bryant incorrect in utero.” (Pet. 8).¹³ As with the factual assertions above, none of these legal conclusions have ever been drawn. Again, the district court found the claim defaulted and analyzed whether the underlying ineffective assistance claim could be substantial.

Further, Bryant missed the mark in district court in not addressing the sentencing record. Bryant concentrated on potential conflict of PCR counsel and PCR counsel’s investigation. (Pet. App. at 51a, 70a–71a). In fact, in ruling on Bryant’s Rule 59 motion, the district court found Bryant’s “focus” was mainly on PCR counsel’s investigation and the district court found no clear error in its analysis “by affording minimal weight to the argument during its review.” (Pet. App. 71a).

Regardless, the district court considered the potential of the underlying, trial level claim, *i.e.*, whether it could be considered “substantial” meaning demonstrating “some merit.” (Pet. App. 71a–72a, citing *Martinez*). In turn, the district court found no evidence of deficiency in PCR counsel’s decision made with the advice and input of a qualified mental health professional, and also found no potentially substantial argument against finding the trial level investigation adequate when counsel similarly had investigated with the advice and assistance of experts. (Pet. App. 72a).

¹³ The allegation of “severe brain damage” is in tension with the remaining record. Indeed, the records show that Bryant had standard IQ tests administered before the age 18 showing 79, 86, and 92 scores, with a final score at age 15 of 93 on a standard test (WISC-III) administered individually by a qualified psychologist who noted Bryant was in the average range of intellectual functioning. (JA 479). The significant “fetal-alcohol-related brain damage” Bryant claims, (*see* Pet. 8–9), would be difficult to square with known facts. Even so, that assertion does not diminish the plainly adequate trial level investigation.

The district court correctly kept the focus on the reasonableness of the investigation, not the credibility or weight of any particular “new” evidence. (Pet. App. 73a–77a). This is correct under *Strickland*. Bryant’s attempt to paint the trial level investigation as unreasonable is also unavailing because Bryant’s interpretation and argument rests on an incorrect reading of this Court’s precedent regarding adequate investigation.

This Court has certainly instructed that capital case counsel has an “obligation to conduct a thorough investigation of the defendant’s background,” *Williams (Terry) v. Taylor*, 529 U.S. 362, 396 (2000), with an eye toward following leads as would be reasonable, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The focus is on the reach and depth of the investigation. However, “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence[.]” *Wiggins*, 539 U.S. at 533. Where this Court has found deficiency the investigation has been remarkably limited. In *Williams*, this Court considered that counsel had made only minimal efforts and then only with a week before trial. *See Williams (Terry)*, 529 U.S. at 395. Such short shrift resulted in failure to discover a chaotic, abusive and deprived childhood and a significant limitation in intellectual functioning. *Id.* at 395–396. Williams’ counsel also missed positive evidence such as “commendations” received while incarcerated and other evidence of prison adaptability. *Id.* at 396. This Court did not hesitate to find deficient performance. *Id.* *See also Wiggins*, 539 U.S. at 524–35 (deficiency found based on an investigation limited to only two limited sources); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam) (counsel deficient an investigation consisting of

only a “short meeting with Porter” with no investigation “Porter’s school, medical, or military service records” and no “interview . . . Porter’s family.”).

This Court’s precedent also illustrates what constitutes a reasonable investigation. In *Bobby v. Van Hook*, 558 U.S. 4 (2009), the investigation reflected family interviews, and consultation with experts, and “review[]” of “military and medical records” and also the defendant’s chaotic childhood. *Id.* at 9–10. Critically, this Court focused on the extent of the investigation and in finding that adequate emphasized that unlike counsel in *Wiggins*, Van Hook’s counsel did not “fail[] to act while potentially powerful mitigating evidence stared them in the face[.]” 558 U.S. at 11. “[L]ike *Strickland* itself, in which defense counsel’s ‘decision not to seek more’ mitigating evidence from the defendant’s background ‘than was already in hand’ fell ‘well within the range of professionally reasonable judgments.’” *Id.* at 11–12 (citing *Strickland*, 466 U.S. at 699).

Consequently, in this case, the district court correctly followed this Court’s precedent in looking to the quality of the trial level investigation and the reasonable reliance on the mental health expert to determine the lack of deficient performance in the investigation. It is Bryant who departs from this established law in asserting the record “shows” counsel was deficient. (Pet. 13). To submit that a court that finds otherwise has erred is contrary to precedent. Bryant is inviting error, not curing one.

In essence, Bryant would have the Court disregard all the investigation made by trial counsel and his experts, including the forensic psychiatrist and the mitigation

investigator, to concentrate on whether additional evidence could be found.¹⁴ That specifically encourages departure from established precedent placing the focus on the reasonableness of the investigation. The district court did not make that mistake in analysis but maintained its focus on the reasonableness of the investigation conducted. In short, the district court is right, Bryant is wrong.¹⁵

Bryant also mistakenly asserts that the district court found no deficiency (actually no substantial claim on deficiency) “because [counsel] did *some* investigation and retained *some* experts,” announcing that is a clear error of law. (Pet. 14). But that is not what the record shows¹⁶ and not what the district court said. The district court

¹⁴ Bryant also leans on the ABA Guidelines in support of his argument the claim is a substantial one. (Pet. 14). As this Court has observed, the guidelines remain merely guidelines, and not “inexorable commands[.]” *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009). Even so, Bryant cites the guideline suggesting that counsel look for “all reasonably available” evidence for either mitigation or for response to evidence in aggravation. (Pet. 14). That is precisely the guideline referenced by this Court in *Wiggins*, and is consistent with the “reasonable investigation” inquiry required under *Strickland*.

¹⁵ Further, Bryant seems to argue that since he believes evidence exists of FASD, then there is a presumption of prejudice. (See Pet. 15–16). Not only does that greatly depart from the *Strickland* test it does not engage or address the district court’s reasoning in any manner. Further, even where evidence of FASD has been litigation and included in a collateral challenge record, the mitigation value is not at all assured. See *Floyd v. Filson*, 949 F.3d 1128, 1140–41 (9th Cir. 2020) (rejecting an ineffective assistance of counsel claim for failure to present expert opinion on fetal alcohol spectrum disorder); *Williams v. Stirling*, 914 F.3d 302, 318 n. 8 (4th Cir. 2019) (“a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury”); *Anderson v. Kelley*, 938 F.3d 949, 957 (8th Cir. 2019) (“In light of the facts that nobody told Anderson’s attorneys his mother drank while she was pregnant and that the experts did not tell them he was brain damaged, it was not constitutionally deficient for his attorneys not to have further investigated FASD.”); *Trevino v. Davis*, 861 F.3d 545, 551 (5th Cir. 2017), *cert. denied*, 138 S.Ct. 1793 (2018) (“Jurors could easily infer from this new FASD evidence that Trevino may have had developmental problems reflected in his academic problems and poor decisionmaking, but that he also engaged in a pattern of violent behavior toward both Cruz and Salinas that he understood was wrong. Taking all of the evidence together, we cannot say this new mitigating evidence would create a reasonable probability that the outcome of Trevino’s sentencing would have been different.”).

¹⁶ The record shows in preparation for sentencing, Dr. Watts had looked for evidence that Bryant’s mother drank during pregnancy and found none. (See ECF No. 16-4 at 48, testifying at sentencing that she had spoken directly to an aunt, Terry Caulder, about possible exposure to alcohol). Further, the record shows that counsel had retained not only an experienced social worker but also an experienced social history investigator to prepare for sentencing. (See ECF No. 16-4 at 160–69; see also

even expanded the explanation of its consideration of the trial level investigation in denying reconsideration, particularly as to the defense expert's view of the information received, her consideration (and rejection) of FASD (for lack of evidence for mother's alcohol use during pregnancy), noting also the "ample relevant information about Bryant's familial and school history, evidence of sexual abuse, and evaluation of mental impairments" that were part and parcel of counsel's investigation. (Pet. App. at 74a–75a).

c. Bryant misconstrues the relevant legal precedent for a certificate to suggest consideration of a fact outside the statutory provisions.

Bryant also indicates that "the nature of the penalty is an appropriate consideration" in whether a certificate should be granted, which is true, then argues further, "that weighs in favor of granting review," which is not. (Pet. 4). This Court actually has instructed, "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause, *but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.*" *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (emphasis added). The remainder of the Court's sentence brings the balance to the point made. That balance is missing from Bryant's assertions.

Dr. Watts' PCR testimony outlining evaluations and interviews in preparation for an opinion in sentencing, ECF No. 16-9 at 62–63; Dr. Watts' PCR testimony confirming mitigation expert worked on case, ECF No. 16-9 at 87; and counsel's PCR testimony confirming Carolyn Graham provided assistance for mitigation investigation, ECF No. 16-4 at 45). The personal and family history analysis for trial specifically covered alcoholism and drug use. (ECF No. 16-4 at 175–78). Dr. Watts would later explain in a proffer in a successive PCR action that Bryant's "mother would not cooperate at all," that an attempted interview was unsuccessful thus she could not obtain confirmation of alcohol use during pregnancy. (JA 796).

Further, in that same case, this Court observed, “Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States’ ability to impose sentences, including death sentences.” *Id.* at 792–893. The fact that a court is considering a capital case cautions careful review, but it does not add weight to a decision to grant a certificate lest a court create a *de facto* requirement for certification in capital cases or a new standard for capital cases which is not included in the plain language of the statute.

In context, though Bryant tinges his argument with a concept that his petition should be granted because he is under a death sentence, that is particularly unavailing considering here when it is precisely because Bryant is under a death sentence that he has been afforded opportunity (and funds and counsel) – more than that afforded the majority of convicted defendants – to litigate claims through direct appeal and collateral actions, state and federal, even returning to the state courts after filing in federal court. In short, this record shows almost continuous litigation from the time of sentencing in September 2008 to the present. Because this capital case has been so heavily litigated and so often reviewed, if equity applies at all, it tips in favor of finality and not another round of review. As such, any additional delay should be avoided, especially where, as demonstrated above, no further review on the certificate of appealability issue is warranted.

CONCLUSION

Based on the foregoing, this Court should deny the petition.

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September 10, 2025