No. 25-5317

IN THE

# Supreme Court of the United States

STEPHEN COREY BRYANT,

*Petitioner,*

*v.*

JOEL ANDERSON, ACTING DIRECTOR,
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*,

*Respondents.*

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

## REPLY BRIEF

E. CHARLES GROSE, JR.
GROSE LAW FIRM, LLC
305 Main Street
Greenwood, SC 29646

JOHN G. BAKER
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF NORTH CAROLINA

GRETCHEN L. SWIFT
*Counsel of Record*
LAURA K. MCCREADY
Assistant Federal Public Defenders
FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF NORTH CAROLINA
129 West Trade Street, Suite 300
Charlotte NC 28202
(704) 374-0720
gretchen_swift@fd.org

*Counsel for Petitioner Stephen Corey Bryant*

383964

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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Respondents argue at length that a writ of certiorari would serve only to delay Bryant's inevitable execution. But the state-court record shows that Bryant was denied his Sixth Amendment right to effective assistance of counsel when his capital sentencing attorneys unreasonably failed to discover and present the evidence that prenatal exposure to alcohol damaged Bryant's developing brain. The record likewise shows that Bryant's state post-conviction counsel compounded the error by failing to timely present this claim in state court. Bryant's dilemma is precisely why the *Martinez v. Ryan* exception to procedural default exists. 566 U.S. 1 (2012).

The district court's holding that Bryant could not show cause or prejudice to overcome procedural default was based on erroneous findings that neither Bryant's sentencing nor his post-conviction counsel were deficient for failing to investigate his fetal alcohol disorder. Because that ruling was at least debatable among reasonable jurists, Bryant was entitled to an appeal under 28 U.S.C. § 2253(c)(2). The Fourth Circuit's summary denial of a certificate of appealability on this claim was a profound and consequential error that warrants this Court's review.

**I. The decision below is erroneous.**

Bryant sought appellate review of his claim that his post-conviction counsel's deficient performance establishes cause and prejudice under *Martinez* for the procedural default of his Sixth Amendment claim arising from his sentencing attorneys' failure to investigate and present evidence of his brain damage to the judge who sentenced him to death. App. 95a–104a. To invoke the *Martinez* exception, Bryant had to demonstrate that (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. *Martinez*, 566 U.S. at 9; *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). When considering Bryant's request for a certificate of appealability on this claim, the question before the circuit court was whether reasonable jurists could debate the district court's conclusion regarding procedural default. 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As the petition describes, the district court's decision was debatable in two respects.

First, it is at least debatable that Bryant failed to show that his ineffective-assistance claim is substantial. App. 51a, 72a. As explained in the petition, the mental health expert who evaluated Bryant before his sentencing hearing saw a childhood photo that made her suspect a fetal alcohol disorder. Pet. 16. Despite this obvious red flag, Bryant's sentencing counsel did not conduct a reasonable mitigation investigation into fetal alcohol exposure, nor did they provide that expert with the information she needed to confirm her suspicion. Pet. 16–18. As a result, the sentencing judge heard none of the available mitigating evidence of the severe brain damage Bryant incurred in utero.

Second, it is at least debatable that "Bryant fail[ed] to rebut the presumption under *Strickland* that PCR counsel's failure to raise the claim 'fell within the wide range of reasonable professional assistance.'" App. 51a (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Any reasonable attorney, upon inheriting Bryant's case, would have followed the reg flags pointing to the need for further investigation and testing. Bryant's post-conviction counsel nevertheless failed to investigate Bryant's fetal alcohol exposure, failed to pursue the neuropsychological testing that would have revealed Bryant's brain damage, and failed to present the claim that Bryant's sentencing counsel conducted an unreasonable mitigation investigation. Pet. 17–18. In other words, rather than vindicate Bryant's Sixth Amendment right to effective assistance of counsel, post-conviction counsel duplicated trial counsel's unreasonable performance. And Bryant, unlucky to have been appointed two sets of deficient attorneys, never had his strongest claim adjudicated on the merits by a state court.

Respondents' brief largely just repeats the district court's flawed analysis. The district court's sole reason for finding no merit in Bryant's sentencing ineffectiveness claim was that "the record demonstrates that trial counsel retained experts and investigated Bryant's background and mental health." App. 51a. Respondents likewise reiterate that Bryant's sentencing counsel conducted some mitigation investigation and employed mental health experts. Br. in Opp. 19, 24. But this Court's precedent makes clear that a seemingly thorough investigation is nevertheless constitutionally deficient when counsel unreasonably fail to heed red flags indicating a need for additional investigation or testing. *See* Pet. 15–16.

This Court's decision in *Rompilla v. Beard*, 545 U.S. 374, 381 (2005), reveals the flaw in the analyses of the district court and respondents. *Rompilla* was "not a case in which defense counsel simply ignored their obligation to find mitigating evidence." 545 U.S. at 381. On the contrary, Rompilla's trial counsel made "a number of efforts," including interviewing Rompilla's family members and employing three mental health experts. *Id.* But Rompilla's trial counsel—like Bryant's—failed to follow "red flags pointing up a need to test further." *Id.* at 391–92 (internal quotation omitted). As a result, neither the jury nor the mental health experts heard evidence of Rompilla's organic brain damage or fetal alcohol exposure. *Id.* at 392. Here, as in *Rompilla*, the fact that Bryant's counsel conducted some mitigation investigation does not absolve them of unreasonably failing to pursue leads that would have revealed his profound organic brain damage. *Id.* at 383.

Bryant does not, as respondents contend, ask this Court to "disregard all the investigation made by trial counsel and his experts." Br. in Opp. 21.[1] Instead, Bryant focuses, as this Court's precedent makes clear he must, on whether counsel's decision not to investigate Bryant's potential brain damage "*was itself reasonable*," *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Given this Court's consistent recognition that brain damage is a highly compelling reason for a sentencing authority to impose life over death, counsel's decision not to investigate or present Bryant's fetal alcohol disorder was patently unreasonable. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 946 (2010) (holding that counsel were ineffective for failing to

[1] To support their argument, respondents misapply this Court's precedent in *Bobby v. Van Hook*, 558 U.S. 4 (2009). *See* Br. in Opp. 24. In that case, this Court noted that—unlike in *Rompilla*—there were no red flags, and Van Hook's attorneys did not "fail[] to act while potential powerful mitigating evidence stared them in the face." *Id.* at 11. Here, where literally a childhood photo of Bryant's face was the first red flag demonstrating the likelihood of a fetal alcohol disorder, counsel's performance was very different.

investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter v. McCollum*, 558 U.S. 30, 36 (2009) (holding that counsel were ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior"); *Rompilla*, 545 U.S. at 392 (holding that counsel were ineffective for failing to investigate and present evidence that Rompilla suffered from organic brain damage, likely caused by fetal alcohol exposure). The district court's conclusion that neither sentencing counsel nor post-conviction counsel acted unreasonably was—at the very least—debatable, and Bryant is therefore entitled to a certificate of appealability.[2]

## II. Remand would not be futile.

Respondents devote much of their brief to arguing that remand "would merely work to unduly delay these proceedings," Br. in Opp. 21, presumably because, under *Shinn* and § 2254(e), Bryant lacks the right to expand the state-court record in federal habeas review. Br. in Opp. 18. *Shinn* addresses the situation when "a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it." *Shinn*, 596 U.S. 371. That is not the case here. As the petition explains, Bryant can

[2] There is no merit to respondents' assertion that Bryant argues for "a presumption of prejudice" because "he believes evidence exists of FASD." Br. in Opp. 25 n.15. As the petition explains, Pet. 13, the district court did not address the prejudice prong of the *Strickland* test, resting its conclusion on deficient performance alone. Bryant does not presume prejudice by tailoring his argument to the lower court's analysis and what makes it debatable.

claim the *Martinez* equitable exception, and demonstrate that he is entitled to relief, based on the state-court record alone. Pet. 14. *Shinn's* holding that the *Martinez* equitable rule does not permit a federal court to dispense with § 2254(e)(2)'s limits on evidentiary hearings is beside the point, because Bryant does not need to present additional evidence to prevail.

Respondents dwell on Bryant's request in district court for an evidentiary hearing on the *Martinez* issue and the underlying claim. Br. in Opp. 19. Bryant indeed argued for an evidentiary hearing in his February 2022 traverse, which was filed before this Court's May 2022 decision in *Shinn*, 596 U.S. 366. JA1028. Before *Shinn*, the District of South Carolina held evidentiary hearings in cases involving colorable *Martinez* arguments. *See, e.g.*, *Stokes v. Stirling*, No. 1:16- CV-00845-RBH, 2018 WL 4678578, at *2–3 (D.S.C. Sept. 28, 2018) (noting that "the Magistrate Judge determined an evidentiary hearing was necessary for Petitioner's *Martinez* claims"). No one could reasonably construe Bryant's request to avail himself of a then-available procedure as a concession about the sufficiency of the state-court record. Now, post-*Shinn*, Bryant asks only that the federal courts hear his claim, not that they consider new evidence to support it. The existing state-court record is sufficient to establish his good cause for default and his entitlement to relief.

Respondents seem to contend that *Shinn's* application of § 2254(e) prohibits a federal district court not only from introducing evidence outside the state-court record, but also from making findings of fact based on the state-court record, when the state court did not itself issue findings of fact. Br. in Opp. 3–4, 20. That cannot be right. *Shinn* held only that when the requirements of § 2254(e) are not met, a district court cannot "conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." 596 U.S. at 382. It did not divest federal courts of their role as factfinders; it merely limited the corpus of facts they can consider. Indeed, accepting respondents' proposition would make the *Martinez* equitable rule a nullity. A habeas petitioner invoking the *Martinez* exception will always need the federal courts to resolve questions of fact and issues of law, because—by definition—his claim will never have been adjudicated on the merits by a state court.

Respondents are likewise wrong to suggest that the federal district court cannot, in adjudicating Bryant's claim of ineffective assistance of trial counsel, consider the evidence he introduced in his second state post-conviction hearing. Br. in Opp. 20. All the evidence cited in this petition was before the South Carolina Supreme Court when it denied certiorari, afforming the dismissal of Bryant's ineffective-assistance claim on procedural grounds. The federal courts need not turn a blind eye to the evidence Bryant presented in state court, and respondents cite no rule requiring them to do so. The state-court record is sufficiently developed to allow the federal courts to resolve Bryant's claim.

In short, respondents are wrong to contend that "delay" is the only "possible result" of remand. Br. in Opp. 3. Bryant is entitled to appellate review under § 2253(c). If allowed to avail himself of the appellate process, Bryant will demonstrate, using the state-court record, that he is entitled to habeas relief from his sentence of death. There can hardly be a more compelling reason for this Court to grant review.

## III. Conclusion

For the foregoing reasons and those stated in the petition, this Court should grant the petition and either review the Fourth Circuit's denial of a certificate of appealability or remand for the Fourth Circuit to provide a statement of reasons for declining to hear Bryant's appeal.

Respectfully submitted,


JOHN G. BAKER
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

s/ Gretchen L. Swift
GRETCHEN L. SWIFT
*Counsel of Record*
LAURA K. MCCREADY
Assistant Federal Public Defenders
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
129 West Trade Street, Suite 300
Charlotte NC 28202
(704) 374-0720
gretchen_swift@fd.org

*Counsel for Petitioner*
*Stephen Corey Bryant*

E. CHARLES GROSE, JR.
GROSE LAW FIRM, LLC
305 Main Street
Greenwood, SC 29646