No. 21-938

In the Supreme Court of the United States

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

Petitioners,

v.

SAMMIE LOUIS STOKES,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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Rather than offer this Court any reason to deny certiorari, the Brief in Opposition underscores the need for this Court's review.

Stokes begins his response with an assertion the State[1] requests merely "factbound error correction." (BIO at 12). Not so. Stokes spends much of his argument on discussion of facts, but that does not address the clean and clear legal arguments presented in the petition. In the first issue, the State points out, and as the dissent shows, that the majority failed to consider all the evidence in its prejudice analysis. In doing so, the majority disobeyed this Court's direction in *Strickland v. Washington,* 466 U.S. 668 (1984), as underscored in *Wong v. Belmontes,* 558 U.S. 15 (2009), to consider all the evidence – both developed after trial, whether good or bad, and evidence that was previously presented in sentencing – in determining prejudice. Stokes's assertion that the State has neither asserted nor relied upon an error of law does not square with the petition before the Court.

Further, Stokes acknowledges that the Fourth Circuit panel majority interpreted state law to determine a restriction on the evidence to consider in reweighing for prejudice. (BIO at 29-32). In essence, the panel majority incorrectly viewed the import of an aggravating circumstance in South Carolina to exclude

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[1] The Petitioners listed are Director Stirling of the South Carolina Department of Corrections and Deputy Warden Chestnut. As in the petition, (*see* Pet. p. 1), Respondents are referred to collectively as "the State" for ease of reading.

consideration of highly aggravating evidence. (*See* Pet. at 18-24). Importantly, Stokes has conceded that a sentencer may consider the evidence the panel majority omitted. (BIO at 30). Even in light of his concession, Stokes still suggests that this Court should defer to the panel's interpretation of state law. (BIO at 29). The argument is internally inconsistent and circular. At bottom, he asks the Court to defer to the error. Moreover, this Court has reviewed the very state law at issue before and found an opposite interpretation of state law. *Simmons v. South Carolina*, 512 U.S. 154 (1994). Consequently, Stokes asks the Court to defer to the error *and* to ignore its own precedent. Unsurprisingly, there is no support for such a request.

Stokes also fails to acknowledge the importance of reviewing the Fourth Circuit majority's intrusion into this state matter in habeas review. The claim on which the majority granted relief was defaulted. The State should have been able to rely on that default. State collateral counsel first asserted then intentionally withdrew the mitigation-based ineffectiveness claim. Whether admitting their strategy or not, an investigation and strategic decision was evident. Stokes would ask this Court to overlook this critical fact and view proffered evidence and arguments equally at whatever the stage they are alleged. Even so, more than failing to allow the State to rely on the default, the district court held a hearing and received additional evidence outside the state court record on the resurrected claim. Whether such a step can appropriately be taken in light of 28 U.S.C. § 2254(e)(2) is the precise issue in *Shinn v. Ramirez,* No. 20-1009 (argued Dec. 8, 2021). Stokes submits that there is no

cause to "hold" this case for the Court's disposition of that case, (BIO at 32-36), yet it seems more than logical to wait for disposition of that critical question. Stokes complains that the State "never obtained a [specific] ruling" to preserve the issue. (BIO at 13-14). That is correct, but not for lack of trying. Had the State not objected, it would indeed be in a different setting, but that was not case. The State appropriately raised the alternate ground in rehearing when the majority rejected the findings and conclusions of the district court.

Stokes's various remaining arguments do not weigh against review. He argues that this Court has time-and-again underscored the importance of mitigation in capital cases. (BIO at 14-15). True. But the Court has never directed counsel to present evidence he believed would open the door to more aggravation or undercut a carefully crafted defense shifting blame to the co-defendant. Trial counsel feared both and presented a case in sentencing to avoid these negatives. That is not deficient representation. Further, Stokes points out that the State has not "allege[d] a circuit split." (BIO p. 12 and 14). Also true. But that provides additional support for the State's point that the Fourth Circuit panel majority egregiously departed from this Court's clearly established precedent. Read in conjunction with the petition, the brief in opposition simply brings the majority's error into even sharper focus. This Court has corrected other circuits on this very error, and Stokes offers no cause to allow the Fourth Circuit to evade this Court's correction. Especially, in this state capital case in federal habeas review.

I. The Fourth Circuit panel majority's failure to apply the proper *Strickland* standard in this state capital case in federal habeas proceedings is worthy of this Court's review.

Stokes has argued the State has not "identif[ied] any conflict with this Court's precedent." (BIO at 12). He suggests the Fourth Circuit panel majority's opinion stemmed from "application of properly stated and well-settled principles of law" based on "facts" of record. (BIO at 12-13). His argument and suggestion do not require much in reply as the petition was clear: the panel majority failed to conduct a proper prejudice analysis under *Strickland* and *Belmontes*. (Pet. pp. ii (question I) and pp. 17-27).

A. The Fourth Circuit panel majority applied an incorrect interpretation of state capital sentencing procedure that resulted in violation of the *Strickland* and *Belmontes* directive to consider the whole of the evidence.

The majority created an artificial barrier to considering particularly aggravating evidence by incorrectly interpreting the effect of a statutory aggravating circumstance. That changed the sentencing picture and rendered the prejudice analysis incomplete. In particular, the majority failed to consider a second heinous murder committed by Stokes, the Ferguson murder, and other aggravating facts of crimes against Connie Snipes because the jury did not find certain death eligibility or constitutional narrowing factors. This main point of error is not even

discussed in Stokes's response until the last few pages of his second section. (*See* BIO pp. 27-32). Stokes concedes the sentencing phase is meant to allow a jury to make fair assessment of the defendant's "moral culpability" and return the appropriate sentence. (BIO at 28). It would seem only logical that the whole of the State's evidence should be considered. As this Court has said repeatedly, "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice." *Belmontes*, 558 U.S. at 26 (citing *Strickland*, 466 U.S., at 695-96). Leaving out the second murder and the brutality of the crimes against Snipes certainly tips the possibility of a life sentence in Stokes favor, but it is not in any way a fair assessment of Stokes's moral culpability.

Further, Stokes seeks to perpetuate the majority's error based on misunderstanding of state law. His attempt to draw some type of distinction is unclear. He asserts the majority merely "observed that, at the eligibility phase" that "the jury had specifically declined to find certain aggravating facts" related to the Snipes crimes and the Ferguson murder. (BIO at 30). He also concedes: "To be sure, the jury *was permitted to consider that evidence regardless*…." (BIO at 30) (emphasis added).[2] He then asserts there was no

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[2] There was testimony regarding Ferguson's murder from witnesses including an eyewitness to Stokes's role and participation in the murder, (J.A. 1343-51), and Stokes's own letter confession to police admitted he committed the Ferguson murder, (J.A. 1308-12; 1654-57). Stokes was arrested in the house with Ferguson's dead body, and fingerprint evidence also tied Stokes to this murder. (J.A. 1224-25; 1262-70). While Stokes attempt to cast the jury's statutory aggravating circumstances determination as

error because the majority simply considered that "the jury's refusal to find a charged aggravator demonstrates the weakness of the prosecution's case with respect to that *factor*." (BIO at 30)(emphasis added).[3] The distinction attempted is illusory. South Carolina does not require factual findings after eligibility. (Pet. at 18-22). This Court has confirmed this is so. *See Simmons, supra.* Whatever distinction Stokes attempts to draw is soundly rebuffed by the plain text of the majority opinion's note:

> In emphasizing these aspects of the Snipes murder, and the commission of the Ferguson murder, the district court considered evidence going to the aggravating *factors that the jury did not find*. … While there were surely other "horrific" elements of the Snipes murder that the court may have been referring to, *the court should not have given weight* to Stokes's alleged torture of Snipes or his role in the Ferguson murder.

(App. pp. 35-36 n. 10). (emphasis added).

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reflecting a "weakness of the prosecution's case with respect to that factor," (BIO at 30), he cannot credibly argue a weakness in the evidence. The emphasis on the statutory factor is the very error that continues to be perpetuated in the brief in opposition.

[3] To the extent Stokes is attempting to argue the reviewing court should attempt to divine the impressions of the former jury, that does not comport with this Court's precedent either. Moreover, this Court has made clear that it is a reasonable sentencer's perception at issue in reweighing, not the "idiosyncracies of the particular decisionmaker." *Strickland*, 466 U.S., at 695.

The district court considered the whole of the evidence – evidence that Stokes is now constrained to admit could properly be considered by the sentencer. (BIO at 30). The panel majority chastised the district court for correctly making a whole-of-the-evidence review, but the panel majority erred, the district court did not. Stokes simply cannot distinguish this massive error or lessen its impact. In a case of this importance, this Court should not allow such an egregious misapplication of the *Strickland* prejudice test to stand.

Further, the majority also failed to consider any negative impact from the proffered mitigation. Again, trial counsel had a carefully tailored presentation that showcased Stokes's remorse for participation in the Snipes crimes, and the suggestion that co-defendant Martin[4] was the more culpable actor. (*See* Pet. at 8-9 and 25). Stokes admits the "double-edged" nature of the testimony as given, i.e., showing Stokes to be even more dangerous based on his history.[5] (BIO at 31-32).

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[4] Norris Martin was described as mentally challenged. He worked menial jobs and was employed part-time (cleaning sidewalks, etc.) at City Hall and carried a plastic police badge given to him by the chief of police. (J.A. 814-15; 819-21; 2936; 3317-18; 3322). Stokes's ex-wife told PCR counsel's mitigation investigator that everyone knew Stokes took advantage of Martin. (J.A. 3223). A fact, no doubt, that impressed on PCR counsel the need not to go into mitigation that would elicit even more damaging evidence. (*See* Pet. at 32-34).

[5] Again, Stokes downplays the general "double-edged" nature, but here, the very analysis that Stokes sought to have the jury hear found Stokes to be more likely than the average killer to be violent, which the expert offered for this opinion stated that Stokes had proven. (*See* Pet. at 25).

Yet, the opinion shows the legal analysis was flawed. The majority reasoned any evidence of childhood trauma may have made a difference. (App. p. 36). Stokes responds to this second error by arguing that it is only one sentence in the opinion. (BIO at 32). But it is a most telling sentence. The dissent was correct that this Court has never allowed federal courts to "water down the prejudice analysis to something akin to anything is possible." (App. 64). Stokes simply cannot defend the majority's significant errors.

B. This Court should not defer to the Fourth Circuit panel majority's error in interpretation of state law as it created reversible error in the *Strickland* prejudice analysis and is contrary to this Court's precedent.

Stokes points out that this Court typically relies upon the Court of Appeals for the determinations of state law for states in their own circuit citing *Elk Grove Unified Sch. Dist. v. Newdon*, 542 U.S. 1, 16 (2004). (BIO at 29-30). But here, that would mean deferring to the error at issue – the misunderstanding of the state's capital sentencing proceedings. This Court has reviewed the very state law at issue before and found the opposite interpretation was controlling. *Simmons v. South Carolina*, 512 U.S., at 162 ("the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances."). Consequently, Stokes asks the Court to defer to the error *and* to ignore its own precedent. Stokes's request for this Court to ignore correct application of law is particularly troubling when the Court of Appeals

undermined a state death-sentence in federal habeas proceedings. The procedural posture of the case makes review of this erroneous decision more urgent – federal court intrusion in a state capital case through federal habeas proceedings.

II. The ineffectiveness claim was defaulted.

Again, trial counsel crafted a defense to show Stokes's remorse and to shift blame of the more horrendous aspects of the crimes against Connie Snipes to co-defendant Martin. (Pet. at 8-9 and 29). Trial counsel Sims agreed at the federal habeas proceeding that if you present Stokes's social history you end up getting into the homosexual relationship with Martin and that Stokes was the dominant person in that relationship. (J.A. 3482).[6] Judge Quattlebaum, in the dissent, recognized what trial counsel was trying to do and found it was an objectively reasonable strategy under the circumstances of this particular case. (App.

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[6] Stokes refers to the dominance as "bullying" Martin. (BIO at 21). This does not capture the record. Stokes made Martin sell drugs for him and if he did not return with the correct money, Stokes beat him. (J.A. 2946-47; 3340; 2529). Stokes also sexually assaulted Martin, according to both trial counsel's and PCR counsel's mitigation investigation. (J.A. 2949-50; 2954; 2963-73; 3338-40; 3344-45). Further, investigation showed Stokes had a short temper, people were terrified of him; and, was described as "evil." (J.A. 2950-52; 2971-72; 3339-49; 2529). Trial counsel Johnson testified because of the aggravating facts of the case and the social history evidence, counsel believed presentation of social history evidence may damage Stokes's case with the jury in sentencing. (J.A. 3519-27).

42-54). Even so, the defaulted claim could not be reached unless the federal court excused the default.

To avoid the default, Stokes argues that PCR counsel's decision to withdraw the claim was unreasonable because PCR counsel's investigation was deficient. (BIO at 23). The record shows otherwise. The claim was initially raised in a PCR application filed by direct appeal counsel. Stokes in a letter to appellate counsel insisted this claim be included. (J.A. 2912-14; 3326-27). PCR counsel included the claim again in an amended application. (J.A. 2912-14; 3295-97). The record shows counsel also took reasonable steps to investigate:

- PCR counsel requested and received funding for a mitigation investigator.
- PCR counsel confirmed a thorough mitigation investigation by including *in a 2004 letter* that PCR counsel's team had interviewed practically every person who had ever known Stokes before his incarceration.[7]

(J.A. 2963-65; 2981-82; 3284; 3376).

Only then did PCR counsel withdraw the claim. (J.A. 2912-18). Six days later, PCR counsel sent a letter to both trial counsel telling them they had withdrawn the IAC mitigation claim and not to disclose anything

[7] Importantly, PCR counsel's investigation revealed the same thing trial counsel's did as to additional aggravating evidence. (J.A. 2963-74; 3350-59; 3222; 3383). The dissent recognized this. (App. 59).

in their file to the State. (J.A. 2917-18; 3029; 3329-31). Though there was no firm testimony as to the step-by-step reasoning for the withdrawal, at the federal hearing PCR counsel admitted:

- they would have consulted with each other before withdrawing the mitigation claim;
- they would have had a reason for withdrawing the mitigation claim at the time they withdrew it;
- they would not have withdrawn a claim that had a chance of winning; and,
- that they would have consulted with Stokes before withdrawing the claim.

(J.A. 3014; 3017-18; 3359-61; 3377).

PCR counsels' actions at the time the claim was withdrawn and never reasserted speak louder than their protestations and assertions at a federal habeas proceeding. The record supported the district court's findings.

III. Whether 28 U.S.C. § 2254(e)(2) prohibits a federal hearing on a defaulted claim is a critical determination for this case.

The habeas claim was defaulted. As outlined above, it was asserted but intentionally withdrawn after investigation. Stokes would ask this Court to overlook this critical fact of default and view proffered evidence and arguments equally at whatever the stage they are alleged. The State should be able to rely on procedural default bar. Even so, the district court allowed

development through a hearing held over the State's repeated objection. (J.A. 2848-49; 2850-56; 2862). The State has asked for this Court to hold the instant matter pending disposition of *Shinn v. Ramirez.*

Stokes asserts the State's argument that 28 U.S.C. § 2254(e)(2) prohibited the hearing – the basis of the argument in *Ramirez* – is "forfeited" because the State "never obtained a [specific] ruling." (*See* BIO at 15-16). That is correct, but not for lack of trying. Had the State not objected, it would indeed be in a different setting, but that was not case. Stokes also complains the issue was not part of the Fourth Circuit appellate briefing or argument. (BIO at 34-35). Stokes overlooks the fact the State was the prevailing party in district court. Under Fourth Circuit procedure, the State should not (and did not) cross-appeal. *Young v. Catoe*, 205 F.3d 750, 762, n. 12 (4th Cir. 2000) (describing the State raising an argument for affirmance through "the unnecessary vehicle of cross-appeal"). Further, the State made the argument in the petition for rehearing at its first opportunity after the district court's well-reasoned opinion was rejected. The argument is available, and the opinion in *Ramirez* could very well be dispositive here. Stokes cannot show otherwise.

CONCLUSION

The Court should grant the State's petition.

Respectfully submitted,

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