PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6

SAMMIE LOUIS STOKES,

Petitioner – Appellant,

v.

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

Respondents – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Aiken. R. Bryan Harwell, Chief District Judge. (1:16-cv-00845-RBH)

Argued: October 26, 2022 Decided: March 22, 2023

Before GREGORY, Chief Judge, HARRIS, and QUATTLEBAUM, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Harris joined. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Paul Alessio Mezzina, KING & SPALDING LLP, Washington, D.C., for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Diana L. Holt, DIANA L. HOLT, LLC, Columbia, South Carolina; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; Ashley C. Parrish, Joshua C. Toll, Isra J. Bhatty, Edward A. Benoit, Alexander Kazam, Nicholas Mecsas-Faxon, KING & SPALDING LLP, Washington, D.C., for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Michael D. Ross, Assistant Attorney

General, J. Anthony Mabry, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees.

GREGORY, Chief Judge:

Sammie Louis Stokes filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising constitutional challenges to his death sentence in South Carolina state court. In 2021, we held that Stokes's death sentence was constitutionally defective because his trial counsel provided ineffective assistance during sentencing. In reaching that conclusion, we relied in part on evidence from an evidentiary hearing a magistrate judge conducted during federal habeas proceedings. Both Stokes and the State of South Carolina ("the State") asked us to consider that evidence when evaluating Stokes's ineffective-assistance-of-counsel claims. The State appealed to the Supreme Court, which granted the State's petition for certiorari, vacated our 2021 judgment, and remanded the case to this Court for further consideration in light of its decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

In *Shinn*, the Supreme Court held that a federal habeas court may not hold an evidentiary hearing unless the restrictive conditions of 28 U.S.C. § 2254(e)(2) are satisfied. On remand, the State claims that *Shinn* requires us to revisit our prior opinion because we relied on evidence produced during the federal evidentiary hearing. However, the State forfeited this argument by choosing not to raise it during earlier proceedings before this Court, even though it was aware that § 2254(e)(2) might not permit the evidentiary hearing the magistrate judge held. We decline to exercise our discretion to excuse the State's forfeiture, which would potentially reinstate an unconstitutional death sentence and result in grave injustice. Because the State abandoned any argument that our prior opinion relied on inadmissible evidence, we reaffirm that opinion and direct the district court to order resentencing.

I.

In 1999, Stokes was convicted of murder and related charges in South Carolina state court and sentenced to death. After an unsuccessful direct appeal, Stokes filed an application for postconviction relief ("PCR") in state court. Stokes's counsel in the state PCR proceedings initially raised a Sixth Amendment ineffective-assistance-of-counsel claim based on his trial attorneys' failure, at sentencing, to present any mitigating evidence regarding Stokes's severely traumatic childhood. However, state PCR counsel later dropped that claim and, as a result, did not exhaust it in state court. The state court ultimately denied Stokes's application for relief after finding that the other constitutional challenges he raised lacked merit. The Supreme Court of South Carolina and the U.S. Supreme Court both denied Stokes's petitions for review.

With the assistance of new counsel, Stokes then filed a habeas petition in the U.S. District Court for the District of South Carolina pursuant to 28 U.S.C. § 2254. His petition alleged multiple ineffective-assistance claims, including the claim that trial counsel failed to investigate, develop, and present personal mitigating evidence during sentencing. The State moved for summary judgment. Because Stokes had not exhausted this or other claims in state court, a magistrate judge held an evidentiary hearing in January 2018 to determine whether there was cause to excuse the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012). In states like South Carolina, where a defendant cannot raise an ineffective-assistance claim until collateral proceedings, *Martinez* authorizes federal courts to excuse a petitioner's procedural default if (1) state PCR counsel's performance was itself constitutionally deficient, and (2) the petitioner's underlying ineffectiveness-of-trial-counsel claim is

"substantial." *Id.* at 14; *see also Gray v. Zook*, 806 F.3d 783, 788 (4th Cir. 2015) (explaining that *Martinez* established a "narrow exception to the general rule . . . that errors committed by state habeas counsel do not provide cause to excuse a procedural default").

Before the hearing, the State argued that 28 U.S.C. § 2254(e)(2) did not allow the court to receive evidence related to the merits of Stokes's underlying constitutional claims. However, it agreed that the court could hear evidence that went to the excuse of default under *Martinez* (which, because of its substantiality requirement, necessarily overlaps with the underlying claim). The State reiterated this limited objection at the beginning of the evidentiary hearing. During the hearing, the magistrate judge at times described the evidence as relating to the *Martinez* issue. However, she permitted Stokes's habeas counsel to introduce lengthy testimony regarding the mitigation evidence that trial counsel could have introduced at Stokes's sentencing, including testimony from the two trial attorneys themselves.

After the evidentiary hearing, the magistrate judge issued a Report and Recommendation that recommended denying all relief. In the Report and Recommendation, the magistrate judge conducted an in-depth analysis of Stokes's ineffective-assistance-of-trial-counsel claims—relying on evidence from the hearing—and concluded that they failed. *See* J.A. 3733[1] ("Petitioner has not met his burden of showing that trial counsel were deficient, and, thus, has also failed to show that they were ineffective."); J.A. 3734 ("[E]ven if Petitioner were able to establish deficiency by trial

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

counsel, his ineffective-assistance-of-trial-counsel claim lacks merit, as he has not shown resulting prejudice for the reasons explained below."). The State "filed no objection and agree[d] with the Magistrate's Report and Recommendation." J.A. 3797. The district court also agreed with the magistrate judge's conclusions and denied Stokes relief. *See* J.A. 3849 (concluding that Stokes "fail[ed] to show *Strickland* prejudice" based on trial counsel's failure to present mitigating evidence).

Stokes then filed an appeal with this Court. During briefing and oral argument, the State never argued that § 2254(e)(2) prohibited us from considering evidence from the federal evidentiary hearing when evaluating his ineffectiveness-of-trial-counsel claims. To the contrary, the State relied heavily on the federal evidentiary hearing record and exhibits submitted during the § 2254 proceedings to argue that Stokes's claims failed on the merits. *See, e.g.*, Resp. Br. 31–32, 36–41, 48–52.

This Court vacated the district court's decision. *Stokes v. Stirling*, 10 F.4th 236, 239 (4th Cir. 2021). Starting with the *Martinez* question, we held that Stokes's state PCR counsel were ineffective because they "fail[ed] to develop and present a claim based on trial counsel's mitigation efforts." *Id.* at 245. We focused on state PCR counsel's failure to adequately investigate Stokes's traumatic personal background or retain an expert who could "screen for mental or psychological defects," even though they "knew about adversity in Stokes's background from trial counsel's cursory investigation" and "hired their own investigator, whose additional interviews generated rich leads about Stokes's psychological, educational, and familial history." *Id.* at 247. We rejected the State's argument that state PCR counsel had abandoned the mitigation claim for strategic reasons,

in part because they admitted at the federal evidentiary hearing that they had no strategic justification for not pursuing it. *Id.* at 247–49. After concluding that Stokes's underlying ineffectiveness-of-trial-counsel claim was a "substantial" one, we excused Stokes's procedural default under *Martinez*. *Id.* at 250–51.

Proceeding to the merits of Stokes's underlying claim, we held that his trial counsel provided ineffective assistance by failing to investigate, develop, and present personal mitigation evidence. *Id.* at 251. As to *Strickland*'s deficient performance prong, trial counsel failed to conduct an adequate investigation into Stokes's "extraordinarily traumatic childhood," during which he suffered chronic sexual and physical abuse and witnessed firsthand his parents' substance abuse and their subsequent deaths. *Id.* at 240; *see Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This omitted evidence was particularly important because trial counsel did not meaningfully contest Stokes's guilt, instead choosing to focus their defense on sentencing. *See Stokes*, 10 F.4th at 241. Although they "had little-to-no experience preparing a mitigation defense," they failed to consult any experienced attorneys, hired an inexperienced investigator, neglected to pursue the investigator's findings, and chose not to consult the expert witnesses they did retain about the compelling mitigating evidence. *Id.* at 251–52. In addition, trial counsel's decision to withhold what personal mitigating evidence they had collected was objectively unreasonable. *Id.* at 252. At the federal evidentiary hearing, they testified that they decided to withhold the evidence because they believed jurors would react negatively to Stokes's life story. *See id.* at 252–53. We concluded that this rationale was objectively unreasonable, particularly considering that trial counsel failed to offer any personal

mitigating evidence. *Id.* The defense's sole witness at sentencing was a retired warden and "prison adaptability expert" who had never spoken to Stokes and said nothing about the trauma Stokes experienced as a child. *See id.* at 253.

Turning to *Strickland*'s prejudice prong, we held that trial counsel's deficient performance prejudiced Stokes. *Id.* at 254–56; *see Strickland*, 466 U.S. at 694–95. While recognizing the substantial aggravating evidence, we determined there was a reasonable probability at least one juror would have voted against a death sentence had they heard the compelling mitigating evidence. *Stokes*, 10 F.4th at 256. Because trial counsel were constitutionally ineffective, we directed the district court to issue the writ of habeas corpus unless the State granted Stokes a new sentencing hearing.[2] *Id.* at 239.

The State sought rehearing en banc, which we denied. It then filed a petition for a writ of certiorari in the Supreme Court. In both its petition for a rehearing en banc and its cert. petition, the State argued that § 2254(e)(2) prohibited this Court from considering evidence from Stokes's federal evidentiary hearing when analyzing the merits of his ineffective-assistance claim. *See* Petition for Rehearing En Banc, Dkt. No. 81, at 14–15; State's Cert. Petition, *Stirling v. Stokes*, No. 21-938, 2021 WL 6102329, at **34–35 (Dec. 21, 2021).

[2] On appeal, Stokes also challenged the district court's decision denying him relief on two additional ineffective-assistance claims. The first alleged that one of Stokes's trial attorneys labored under a conflict of interest because he had previously prosecuted Stokes for assaulting his ex-wife, who testified as a State witness during Stokes's capital sentencing. The other claim focused on trial counsel's decision to rely on retired warden James Aiken, a prison adaptability expert, as the defense's sole witness during sentencing. We did not reach those claims in our opinion.

The Supreme Court did not act on the State's petition until it decided *Shinn v. Ramirez*. In *Shinn*, it held that "under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel" unless § 2254(e)(2)'s "narrow exceptions" apply. 142 S. Ct. at 1734, 1739. This prohibits a petitioner from introducing evidence to support either their underlying constitutional claim or a *Martinez* claim that state PCR counsel were ineffective. *See id.* at 1739–40.

On May 31, 2022, the Supreme Court granted certiorari, vacated this Court's judgment, and remanded to the Fourth Circuit "for further consideration in light of *Shinn*." *Stirling v. Stokes*, 142 S. Ct. 2751, 2751 (2022). On remand, we directed the parties to file simultaneous supplemental briefs addressing two issues: (1) whether the State waived the § 2254(e)(2) argument decided in *Shinn* by failing to raise it during earlier proceedings; and (2) what other issues this Court should consider when weighing *Shinn*'s impact on our prior decision. Those issues are before us now.

II.

We start by considering whether the State waived or forfeited the argument that § 2254(e)(2) prohibited us, in our 2021 opinion, from relying on the evidence produced during the federal evidentiary hearing.[3] We conclude that it forfeited the argument by not

[3] Some of the precedents we quote in this opinion use "waiver" and "forfeiture" interchangeably, but the terms technically have different meanings. "Forfeiture" refers to a party's inadvertent failure to raise an argument; a court has discretion to reach a forfeited issue. *See Wood v. Milyard*, 566 U.S. 463, 471–74 & n.4 (2012). By contrast, "waiver" (Continued)

raising it on appeal and instead using evidence from the hearing to argue that Stokes's ineffective-assistance claims failed on the merits. Because it would produce manifest injustice for Stokes, we decline to exercise our discretion to excuse the State's forfeiture.

A.

It is well-established that "[a] party's failure to raise or discuss an issue in [its appellate] brief is to be deemed an abandonment of that issue." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (quoting *11126 Baltimore Blvd., Inc. v. Prince George's Cty., Md.*, 58 F.3d 988, 993 n.7 (4th Cir. 1995)). "Even appellees waive arguments by failing to brief them." *Mironescu v. Costner*, 480 F.3d 664, 677 n.15 (4th Cir. 2007) (quoting *United States v. Ford*, 184 F.3d 556, 578 n.3 (6th Cir. 1999)); *see Hillman v. I.R.S.*, 263 F.3d 338, 343 n.6 (4th Cir. 2001). In *Hillman*, we explained that an appellee need not state the *precise relief sought* on appeal, because Federal Rule of Appellate Procedure 28(b) clearly exempts appellees from that particular requirement. 263 F.3d at 343 n.6. But we distinguished a statement of the relief sought from a "substantive legal argument" and clarified that failing to brief the latter "risk[s] . . . abandonment of [the appellee's] argument."[4] *Id.* Enforcing waiver and forfeiture rules

refers to a knowing, and intelligent decision to abandon an issue. *Id.* Unlike a forfeited issue, a court does not have discretion to reach an issue that a party has waived. *Id.*

[4] As our dissenting colleague recognizes, the *Hillman* majority concluded that the appellees' "failure to specify in their briefs the alternative *relief* they desired does not prevent us from granting such relief." *Id.* (emphasis added). But the majority drew a distinction between an appellee's failure to request an alternative form of relief (e.g., a remand) and an appellee's "failure to raise a substantive legal argument," explaining that only the latter would result in forfeiture. *Id.* Here, the State makes a substantive legal argument about § 2254(e)(2) that may be forfeited.

against appellees reflects the principle that we "apply [these] rules on a consistent basis" so that they "provide a substantial measure of fairness and certainty to the litigants who appear before us." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013).

On multiple occasions, this Court has declined to address an argument that an appellee did not raise properly on appeal. In *United States v. Clay*, for example, we concluded that the appellee's "newly minted argument, made for the first time at oral argument, is waived in this appeal" because the appellee failed to raise it in its brief. 627 F.3d 959, 966 n.2 (4th Cir. 2010). Similarly, in *Mironescu*, we declined to address whether the district court had violated the Suspension Clause by denying a habeas petitioner (the appellee) an opportunity to present certain claims because the petitioner did not raise the issue on appeal. *See* 480 F.3d at 677 n.15 (citing *Hillman*, 263 F.3d at 343 n.6).

So, too, here. In his opening appellate brief, Stokes cited to evidence from the federal evidentiary hearing to support his *Martinez* claim and his underlying ineffectiveness-of-trial-counsel claims. The State, in its response brief, relied heavily on evidence from that hearing to argue that the district court correctly rejected Stokes's claims on the merits. Even assuming the State preserved a § 2254(e)(2) objection in the district court—which is anything but clear[5]—it abandoned that argument on appeal by inviting this

[5] Before the magistrate judge, the State argued only that § 2254(e)(2) prohibited new evidence of Stokes's *underlying ineffectiveness-of-trial-counsel claim*. But the magistrate judge's analysis of that claim went further than was necessary to conclude that the claim was not "substantial" for purposes of *Martinez*. *See Stokes*, 10 F.4th at 250 n.8. When assessing the underlying claim, the magistrate judge took the new evidence into account, which was exactly what the State had argued was not permitted under § 2254(e)(2). However, the State did not object to the magistrate's analysis in the district (Continued)

Court to consider the new evidence. Courts have held that a government appellee abandons an issue by taking one position at one stage of an appeal and then asserting a contrary position at a later stage, which is exactly what the State attempted to do here. *See Steagald v. United States*, 451 U.S. 204, 208–11 (1981); *United States v. Smith*, 781 F.2d 184, 184–85 (10th Cir. 1986).

The State now claims its appellate brief discussed the evidence from the federal hearing only in relation to the *Martinez* excuse-of-default question—that is, to support its argument that Stokes's underlying ineffectiveness-of-trial-counsel claim was not "substantial." But a cursory look at the State's brief shows that its use of the evidence was not so limited. The brief cited to dozens of pages from the federal evidentiary hearing transcript in an effort to fully establish that "deficient performance and prejudice do[] not exist under *Strickland v. Washington*." Resp. Br. 31 (cleaned up); *see id.* at 31–32, 36–41, 48–50, 51–52.

Nor was it enough that the State belatedly raised the § 2254(e)(2) argument in its petition for a rehearing en banc. This Court "generally do[es] not consider issues raised for the first time in a petition for rehearing." *United States v. Carter*, 471 F. App'x 136, 137 (4th Cir. 2012) (per curiam). We see no reason to depart from that rule here.

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court, which suggests it was content to argue that the magistrate correctly denied Stokes relief on the merits. We have explained that "a litigant who raises an issue before the magistrate judge but fails to make a timely objection directed to that issue before the district judge is in a position similar to that of a litigant who fails to raise the issue at all prior to appeal." *Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 103 (4th Cir. 2020); *see also id.* (stating that such a failure "constitutes a waiver of appellate review"). Ultimately, we need not determine whether the State also forfeited the § 2254(e)(2) argument in the district court, as its failure to raise the issue on appeal is dispositive.

No other precedent in this Circuit requires a contrary result. In *Young v. Catoe*, we remarked that the appellees had raised an alternative ground for affirming the district court's judgment "via the unnecessary vehicle of cross-appeal." 205 F.3d 750, 762 n.12 (4th Cir. 2000). According to the State, *Young* establishes that appellees are not bound by waiver and forfeiture rules. But *Young* suggests only that the party who prevailed in the district court is not required to file a *separate cross-appeal* to preserve an argument. This does not mean that an appellee can ignore an issue in its briefing without forfeiting it.

Nor does our decision in *Mahdi v. Stirling* generally exempt appellees from waiver and forfeiture rules. 20 F.4th 846 (4th Cir. 2021). There, the state PCR court had held that a habeas petitioner waived a particular claim. *Id.* at 895. When the petitioner tried to raise the same claim in federal district court, the court rejected it on the merits without addressing his earlier waiver in state court. *Id.* On appeal, this Court relied on the petitioner's state-court waiver to affirm, even though "neither the Parties nor the district court address[ed]" it. *Id.* In the State's view, *Mahdi* shows that an appellee does not forfeit an argument (there, the petitioner's state-court waiver) by failing to raise it in the district court or on appeal. But at most, *Mahdi* is a reminder that we have discretion to affirm based on a ground that neither party addresses. It does not establish that an appellee is immune from waiver and forfeiture rules.

Finding no support in Fourth Circuit precedents, the State seeks refuge from other circuits, some of which have stated that appellees generally are "not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds." *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir.

2006); *see, e.g.*, *Ms. S. v. Reg'l Sch. Unit 72*, 916 F.3d 41, 48–49 (1st Cir. 2019). But even in those circuits, courts have discretion to enforce waiver and forfeiture rules against appellees; enforcement "depends on the particular facts of the case." *Ms. S.*, 916 F.3d at 49 (quotation marks omitted). In a similar context, our sister circuits have held that the law-of-the-case doctrine may bar appellees from raising in a successive appeal an issue they failed to raise during the first. *See, e.g.*, *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 963 (10th Cir. 2009) (enforcing appellee's waiver when it would be "unfair" to the appellant to excuse it); *Schering Co. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358–59 (7th Cir. 1996) (enforcing appellees' waiver because the appellees, "by reserving their challenge to the district court's evidentiary ruling[,] have put themselves in the position of asking us to reexamine our previous ruling on the basis of [previously available] evidence").

Accordingly, we hold that the State forfeited the § 2254(e)(2) argument by failing to raise it on appeal.

B.

In an effort to avoid the consequences of its forfeiture, the State claims we must reach the issue *sua sponte* because § 2254(e)(2) imposes jurisdictional limits on the authority of federal courts. We disagree.

The Supreme Court "has long rejected the notion that all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012) (quotation marks omitted). A rule is jurisdictional only "[i]f the Legislature *clearly states* that [it] shall count as jurisdictional." *Id.* at 141–42 (emphasis

added). In *Gonzalez*, for example, the Supreme Court held that 28 U.S.C. § 2253(c)(1) satisfies this clear statement rule because it expressly provides that "an appeal may not be taken to the court of appeals" unless a judge issues a certificate of appealability. *Id.* at 142. By contrast, §§ 2253(c)(2) and (c)(3)—which set "threshold condition[s]" for granting a certificate of appealability—are not jurisdictional because they do not clearly "speak in jurisdictional terms." *Id.* at 142–43.

Likewise, § 2254(e)(2) does not "speak in jurisdictional terms" and therefore is not a jurisdictional rule. *Id.* at 143. In full, it provides as follows:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). In other words, this part of the Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes evidentiary rules for federal habeas proceedings. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011) (explaining that § 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court"). Critically, it applies only when a court

already has jurisdiction over the habeas claim. As *Gonzalez* makes clear, even mandatory limits on a court's authority in a case properly before it do not qualify as jurisdictional. While § 2254(e)(2) states that "the court shall not hold an evidentiary hearing" unless the statutory conditions are met, the Supreme Court has repeatedly clarified that the word "shall," without more, does not render a statute jurisdictional. *Gonzalez*, 565 U.S. at 146; *Dolan v. United States*, 560 U.S. 605, 611–12 (2010).

The text of a neighboring AEDPA provision reinforces our conclusion. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). In other words, this provision expressly exempts states from forfeiting arguments concerning a petitioner's procedural default. Section § 2254(e)(2), of course, contains no such language. When read alongside the express no-forfeiture provision in § 2254(b)(3), this indicates Congress chose not to immunize states from forfeiting evidentiary objections based on § 2254(e)(2).

We also find it relevant that in *Shinn* itself, the Supreme Court treated § 2254(e)(2) as a non-jurisdictional provision subject to the ordinary rules of forfeiture. In response to the petitioner's argument that the state of Arizona had forfeited its § 2254(e)(2) defense, the Supreme Court did not hold that § 2254(e)(2) is a non-waivable jurisdictional provision, though that question was raised in the briefing. Brief for Respondents at 61–63 & n.16, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (No. 20-1009), 2021 WL 4197216. Instead, the Court considered whether Arizona had in fact forfeited its defense and then exercised its "discretion to forgive any forfeiture," *see Shinn*, 142 S. Ct. at 1730 n.1—as

would be appropriate if and only if § 2254(e)(2) is a non-jurisdictional rule subject to waiver and forfeiture.

In short, we see no reason to treat this case any differently than the Supreme Court has treated forfeitures of other defenses to federal habeas claims: we have discretion to excuse the forfeiture, but we are not obligated to do so. *See id.*; *Day v. McDonough*, 547 U.S. 198, 208–09 (2006) (timeliness of habeas petitions); *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (nonretroactivity defense).

C.

The next question, then, is whether we should exercise our discretion to excuse the State's forfeiture in this case. We decline to do so because it would produce marked injustice and reward the State for "sandbagging" this Court during earlier proceedings. *Hillman*, 263 F.3d at 343 n.6.

1.

"[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012). In a few different cases, the Supreme Court has explained when it may be appropriate to excuse a state's failure to raise other defenses to federal habeas claims. Excusing a state's forfeiture is warranted in "extraordinary circumstances," where the state "inadvertently" overlooked the issue earlier in the proceedings. *Id.* at 471 (cleaned up). But before reaching the issue, a court "must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the [] issue, and 'determine whether the interests of justice would be better served'" by reaching it. *Day*, 547 U.S. at 210 (quoting *Granberry*

v. Greer, 481 U.S. 129, 136 (1987)); *see also Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 105–06 (4th Cir. 2020) (stating that waiver and forfeiture rules "are devised to promote the ends of justice," and that this Court may reach a forfeited issue "where injustice might otherwise result").[6]

Stokes contends that the State did not merely forfeit the § 2254(e)(2) argument, but made a conscious, intelligent decision to waive it, which would make it unreviewable. *See Day*, 547 U.S. at 210 n.11; *see also Milyard*, 566 U.S. at 471 n.5 ("[A] federal court has the authority to resurrect only forfeited defenses."). However, we have explained that a party may "waive" an issue only in the district court, and that a party's "decision not to advance [an] argument on appeal is better treated as abandonment or forfeiture." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 271 n.6 (4th Cir. 2019) (en banc); *see also United States v. Simms*, 914 F.3d 229, 238 n.4 (4th Cir. 2019) (en banc) (stating that "waiver, in a technical sense, concerns a party's relinquishment of rights before a *district court*" (emphasis in original)). Thus, the State did not irrevocably waive the § 2254(e)(2) argument on appeal.

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[6] This Court also has discretion to reach a forfeited issue "where there is an intervening change in the case law." *Arakas*, 983 F.3d at 105. But that applies only if the issue "was not previously available"—meaning there was "'strong precedent' prior to the change, such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner." *United States v. Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018) (quoting *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605–06 (4th Cir. 1999)). Here, prior to *Shinn*, the Fourth Circuit had not addressed whether § 2254(e)(2) bars a federal evidentiary hearing for claims brought under *Martinez*. *See Moore v. Stirling*, 952 F.3d 174, 182 & n.7 (4th Cir. 2020). In the proceedings before the magistrate judge, the State acknowledged this was an open question. D.S.C. Dkt. No. 159, at 4–5. Thus, the intervening-change-in-law exception is inapplicable here.

That said, the nature of the State's forfeiture is relevant as we consider which direction "the interests of justice" point. *Day*, 547 U.S. at 210. Here, the record strongly suggests that the State made a conscious, strategic decision not to litigate the § 2254(e)(2) issue on appeal. The State recognized the issue early in the proceedings; before the evidentiary hearing, it argued that § 2254(e)(2) prevented the magistrate judge from receiving or considering new evidence on Stokes's underlying ineffectiveness-of-trial-counsel claim. But on appeal to this Court, the State did not merely fail to argue that the statute prohibited us from considering the new evidence; *it relied extensively on the evidence produced during the evidentiary hearing* to argue that Stokes's underlying claim lacked merit. *See* Resp. Br. 31–32, 36–41, 48–50, 51–52; *see also id.* at 71 ("[Stokes] had a full opportunity to present the merits of his claim at an evidentiary hearing."). In short, the State invited this Court to use the evidence for the very purpose it had previously argued (and now belatedly argues) is prohibited. This is worlds apart from the forfeiture the Supreme Court excused in *Day*, which involved "merely an inadvertent error" and where "nothing in the record suggest[ed] that the State 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211.

It is unsurprising that the State does not engage with the Supreme Court's decisions in *Day* or *Wood*, given that considerations of justice and fairness point so strongly against excusing its forfeiture. It is difficult to conceive of a case where a party would be more "significantly prejudiced" by a decision to reach an unpreserved issue. *Id.* at 210. We have already held that Stokes was deprived of his Sixth Amendment right to effective counsel during his capital sentencing. The State now urges us to strike that decision—and rubber-

stamp an unconstitutional death sentence—based on an evidentiary limitation the State knew might apply but invited us to ignore on appeal. If excusing the State's forfeiture in this scenario best served "the interests of justice," *id.*, justice would be a hollow word indeed.

2.

Nothing in *Shinn* requires us to excuse the State's forfeiture here. In *Shinn*, Arizona had not objected to some evidentiary development during habeas proceedings in the district court. *See* 142 S. Ct. at 1730 n.1. On appeal to the Supreme Court, the petitioner argued that Arizona had also failed to raise the § 2254(e)(2) issue during the Ninth Circuit appeal. The Supreme Court disagreed, noting that "Arizona did object to further factfinding before the Ninth Circuit panel" and that the "Ninth Circuit passed upon § 2254(e)(2) when it ordered additional factfinding on remand." *Id.* The Supreme Court then exercised its discretion "to forgive the State's forfeiture before the District Court" because "our deciding the matter now will reduce the likelihood of further litigation in a 30-year-old murder case." *Id.* (quotation marks omitted).

The present case is different than *Shinn* in important respects. The record in *Shinn* indicated that Arizona made "an inadvertent error" by neglecting to raise the § 2254(e)(2) argument in the district court, *Day*, 547 U.S. at 210, but then sought to correct that error by raising the issue on appeal, which gave the Ninth Circuit an opportunity to consider it. Here, by contrast, the State abandoned the § 2254(e)(2) argument as soon as the magistrate judge recommended denying Stokes relief on the merits, and actually relied on the new evidence when arguing that trial counsel were not constitutionally ineffective. This "suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Id.*

And beyond the obvious injustice it would create, overlooking the State's decision not to litigate the § 2254(e)(2) issue certainly would not "enhanc[e] the efficiency of the decisionmaking process and the conservation of scarce judicial resources." *Holness*, 706 F.3d at 592. The State now tells us that our close review of the federal-court record was a waste of time, even though it asked us to look to that very evidence to rule on the merits of Stokes's claims.

To be sure, the *Shinn* Court looked to a state's interest in the finality of a criminal conviction and sentence to justify excusing Arizona's forfeiture of the § 2254(e)(2) argument. But such finality interests do not require us to reach a forfeited issue when doing so would lead to an unjust result. *See Day*, 547 U.S. at 210–11 (recognizing that non-jurisdictional AEDPA rules may be forfeited despite "implicat[ing] values beyond the concerns of the parties," including the "finality [of] state court judgments") (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). In fact, the Supreme Court has noted that a court's discretionary authority to excuse unintentional forfeitures itself affords sufficient respect to federal-state comity interests. *See Milyard*, 566 U.S. at 471 ("With that comity interest in mind, we held that federal appellate courts have discretion, in exceptional cases, to consider a[n argument] inadvertently overlooked by the State in the District Court" (cleaned up).).

3.

Finally, the State points out that the Supreme Court granted certiorari, vacated our prior decision, and remanded for further proceedings, even though Stokes's brief in opposition to certiorari argued that the State had forfeited the § 2254(e)(2) argument. *See*

Brief in Opposition at 33–36, *Stirling v. Stokes*, 142 S. Ct. 2751 (2022) (mem.) (No. 21-938), 2022 WL 769491. But a decision to grant certiorari, vacate, and remand for further consideration in light of new Supreme Court precedent does not resolve questions of waiver or forfeiture. *See, e.g.*, *Dick v. Oregon*, 140 S. Ct. 2712, 2712 (2020) (mem.) (Alito, J., concurring in decision to grant, vacate, and remand) ("I concur in the judgment on the understanding that the Court is not deciding or expressing a view on whether the question was properly raised below but is instead leaving that question to be decided on remand."). Indeed, in previous cases returned to this Court following a grant, vacate, and remand order, we have reaffirmed our prior opinion because a litigant had waived or forfeited the relevant issue. *See United States v. Vanegas*, 612 F. App'x 664, 666 (4th Cir. 2015) (per curiam); *United States v. One Male Juvenile*, 149 F. App'x 213, 214 (4th Cir. 2005) (per curiam). We are not breaking any new ground by doing the same here.

4.

A § 2254 petitioner faces no shortage of procedural obstacles in federal court, most of which are unrelated to the actual merits of his or her constitutional claims. For petitioners like Stokes, who (through no fault of his own) did not exhaust a claim in state PCR proceedings, AEDPA erects a high wall to excusing that procedural default, even as § 2254(b)(3) shields states that fail to timely raise a procedural default defense. And even when new evidence would show cause for excusing a petitioner's procedural default, that evidence is almost never admissible in federal court. *See Shinn*, 142 S. Ct. at 1734.

That the playing field in § 2254 cases tilts heavily in the State's favor comes as no surprise—AEDPA was enacted to "make[] winning habeas relief more difficult." *Brown*

v. Davenport, 142 S. Ct. 1510, 1526 (2022). But here, the State takes a step too far, telling us we must ignore its own flagrant forfeiture so it can enforce a death sentence we have already held was unconstitutional. Nothing in § 2254(e)(2), *Shinn*, or any other precedent requires us to reach such a perverse result, which would transform a "difficult" task for Stokes into a Sisyphean one. *Id.*

Our forfeiture rules exist to "provide a substantial measure of fairness and certainty to the litigants who appear before us," and "we strive to apply [them] on a consistent basis." *Holness*, 706 F.3d at 592. We have not hesitated to enforce these rules against criminal defendants on remand from a grant, vacate, and remand order. *See Vanegas*, 612 F. App'x at 666. Fairness dictates that we hold the State to the same standard, especially in a capital case. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (noting that a death sentence raises "unique" concerns).

Because the State abandoned any argument that our prior opinion conflicts with § 2254(e)(2), and we find no justification for overlooking its forfeiture, we decline to revise our prior opinion.[7]

III.

For the reasons stated above, we reaffirm our prior decision holding that Stokes's trial counsel provided constitutionally ineffective assistance. Accordingly, we direct the

[7] The State separately argues that our prior opinion misapplied the *Strickland* test. These arguments rest in large part on mischaracterizations of our analysis, and they give us no reason to doubt our conclusion that Stokes's trial counsel were constitutionally ineffective.

district court to issue the writ of habeas corpus unless the State grants Stokes a new sentencing hearing within a reasonable time. The district court's order dismissing Stokes's habeas petition is

VACATED AND REMANDED.

QUATTLEBAUM, Circuit Judge, dissenting:

Previously, we reversed the judgment of the district court that dismissed Sammie Stokes' 28 U.S.C. § 2254 habeas petition and instructed the district court to grant the petition due to the ineffective assistance provided by Stokes' trial counsel. But the Supreme Court vacated our judgment and remanded the case to us with instructions to reconsider Stokes' petition in light of *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022). In *Shinn*, the Court held that 28 U.S.C. § 2254(e)(2) prohibits a federal habeas court from conducting evidentiary hearings or otherwise considering evidence not developed in state court based on the ineffective assistance of state post-conviction counsel. *Id.* at 1734. Critically, that is exactly the type of evidence upon which Stokes, and the opinion the majority reinstates, rely. Both rely substantially, if not entirely, on evidence developed at an evidentiary hearing during federal habeas proceedings. Make no mistake about it—Stokes' petition and the opinion the majority reinstates today are inescapably at odds with *Shinn*. So, I would remand for the district court to rule on Stokes' petition based solely on the state court record.

Despite the Supreme Court's express instruction for us to reconsider this case in light of *Shinn*, the majority holds that we can ignore that decision's holding because the State forfeited the § 2254(e)(2) issue by not raising it prior to the State's petition for rehearing. In my view, the State did not forfeit the § 2254(e)(2) argument. But even if it did, I would excuse such forfeiture. In sum, I would do what the Supreme Court instructed us to do—reconsider Stokes' petition in light of *Shinn*. And *Shinn* forecloses habeas relief based on evidence developed in federal court. Accordingly, I dissent.

I.

I begin with a review of *Shinn*. There, two petitioners were convicted of capital crimes in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed the convictions and sentences on direct review. The petitioners were also denied state post-conviction relief. After both filed for federal habeas relief, the respective district courts held that the petitioners' ineffective assistance of trial counsel claims were procedurally defaulted because they did not properly present those claims in state court. *Id.* at 1729.

In one case, the district court permitted the petitioner to supplement the record to include evidence that was not presented in state court to support his request to excuse the procedural default. *Id.* The district court excused the procedural default based on the new evidence but rejected the ineffective assistance of counsel claim on the merits. The Ninth Circuit, like the district court, held that the state post-conviction counsel's failure to develop the trial ineffective assistance of counsel claim constituted sufficient cause to forgive the procedural default. And it reversed and remanded for the development of more evidence on the merits of the ineffective assistance of counsel claim, which it considered to be substantial.

In the other case, the district court held an evidentiary hearing to determine whether cause existed to excuse the procedural default and if declining to hear the claim would result in actual prejudice. The district court forgave the procedural default and held, on the merits, that the state trial counsel provided ineffective assistance of counsel. *Id.* at 1730. Arizona appealed, arguing that § 2254(e)(2) did not permit the evidentiary hearing. The

Ninth Circuit affirmed in that case, holding that § 2254(e)(2) did not apply because the state post-conviction counsel was ineffective in failing to develop the state court record. *Id.* Both petitioners did not dispute, and therefore conceded, that their habeas petitions failed based on the state court records alone. *Id.*

The Supreme Court reversed the Ninth Circuit, holding that the federal habeas courts may not conduct an evidentiary hearing or consider evidence beyond the state court record. The Court reasoned that § 2254(e)(2) did not permit extending *Martinez v. Ryan*, 556 U.S. 1 (2012)[1] to allow ineffective assistance of post-conviction counsel to excuse a prisoner's failure to develop the state court record. It explained that in § 2254(e)(2), Congress limited the authority of federal courts to conduct such hearings. Federal courts, *Shinn* makes clear, "have no power to redefine when a prisoner" has failed to develop the factual basis of a claim in state court proceedings. *Id*. at 1736. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." *Id.* (internal citation omitted) ("§ 2254(e)(2) is a statute that we have no authority to amend.").

Since *Shinn*, the Supreme Court reiterated § 2254(e)(2)'s limitation on the power of federal courts in *Shoop v. Twyford*, 142 S. Ct. 2037 (2022). There, the Court held that the district court's Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) review was limited to "the record that was before the state court." *Id.* at 2046 (internal quotation

[1] *Martinez* recognized 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 v. Ryan*, 566 U.S. 1, 9 (2012).

marks and citation omitted). And the circuit courts that have addressed this question post-*Shinn* have acknowledged the Supreme Court's clear guidance precluding federal courts from conducting evidentiary hearings or considering evidence beyond the state court record. *See, e.g., Houston v. Phillips*, No. 20-6102, 2022 WL 3371349 (6th Cir. Aug. 16, 2022) ("In short, federal habeas courts are prohibited, by statute, from granting evidentiary hearings when petitioners have 'failed to develop the factual basis of [their] claim[s] in State court proceedings.'" (quoting *Shinn*, 142 S.Ct. at 1728)); *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 720 (3d Cir. 2022) ("AEDPA does not allow us to excuse Williams's separate failure to develop the record just because his state post-conviction lawyer did a bad job . . . . We are therefore limited to the facts developed in state court.").

Without question, *Shinn* abrogates the opinion the majority reinstates. The opinion's analysis and conclusions about Stokes' ineffective counsel claim depend almost entirely on the record developed before the magistrate judge in federal court. That is the precise type of evidence that § 2254(e)(2) prohibits. As the Supreme Court explained, federal courts "have no power" to develop or consider this evidence. *Shinn*, 142 S. Ct. at 1736. There is simply no way to square the opinion the majority reinstates with *Shinn*.[2]

[2] And neither Stokes nor the majority suggests that Stokes satisfies the narrow exceptions of § 2254(e)(2). Section 2254(e)(2) permits a federal habeas court to hold an evidentiary hearing where an applicant has failed to develop the basis of the claim in state court only where the applicant shows that: (1) the claim relies on "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence"; and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254 (e)(2).

II.

For good reason, the majority does not even try to justify its decision under *Shinn*. Instead, it concludes that the State forfeited the application of § 2254(e)(2)'s ban on evidentiary hearings by not previously raising it before us in its brief or at oral argument. I disagree.

A.

First, the State preserved the § 2254(e)(2) issue in the district court. As the majority acknowledges, the State objected to the magistrate judge's decision to conduct a hearing to develop evidence outside the state court record several times. Then, in its summary judgment filings, the State asserted that Stokes improperly included and relied "upon documents that were not a part of the state court record." J.A. 2838. It also moved to strike such evidence, noting that § 2254(e)(2) expressly limits the district court's ability to accept new evidence. And, although not in our record, the State filed a pretrial brief on the scope of the district court's ability to accept new evidence, arguing that § 2254(e)(2) "bars the grant of an evidentiary hearing to receive evidence not in the state court record on the underlying claims of ineffective assistance of counsel." *Stokes v. Stirling*, No. 1:16-CV-00845-RBH (D.S.C.), ECF No. 159. It added that the "*Martinez* equitable decision does not trump the clear direction by Congress." *Id.* Over the State's objections, the magistrate judge conducted an evidentiary hearing and considered evidence developed from that hearing. But even upon considering such evidence, it recommended granting summary

judgment to the State and denying Stokes' habeas petition, and the district court, with certain modifications, adopted those recommendations.

When Stokes then appealed to us, it is true that the State did not raise the § 2254(e)(2) issue in its briefs or at oral argument. It certainly could have raised the issue as an alternative ground for relief in its brief or at oral argument. As the Supreme Court has stated, "without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).[3] But just because an appellee is permitted to raise such alternative arguments does not mean that failing to do so forfeits them.

True, an appellant is considered to have abandoned an argument not included in his opening briefs. *See A Helping Hand, LLC v. Baltimore Cnty*., 515 F.3d 356, 369 (4th Cir. 2008). But there is good reason for treating an appellant and an appellee differently. They are in materially different procedural postures. As the losing party before the district court, the appellant seeks relief on appeal. As such, the appellant carries the burden of establishing an error. The appellee, in contrast, won below. The appellee only seeks to maintain the status quo. And without a burden to show that the judgment below should be altered, we should not require the appellant to raise an argument at the risk of forfeiture.

[3] Florida and Georgia call it the "tipsy coachman" rule borrowing from Oliver Goldsmith's poem "Retaliation": "The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home." *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963); *see also Lee v. Porter*, 63 Ga. 345, 346 (1879).

Here, the first time the State sought relief from us was when it moved for rehearing of our panel decision that reversed the district court's order granting it summary judgment. At that point, it raised § 2254(e)(2)'s prohibition against the use of evidence beyond the state court record. And it continued to press the issue in petitioning the Supreme Court for certiorari after we denied its petition for rehearing. So, every time the State bore the burden of showing error, it raised § 2254(e)(2). Under these facts, I would not find the State forfeited the issue.

To be fair, the circuits appear divided on this issue. *See Hernandez v. Starbuck,* 69 F.3d 1089, 1093 (10th Cir. 1995) (unlike the obligations of the appellant, the briefing requirements for the appellee's brief are not considered categorical imperatives since a court of appeals may affirm the district court on any grounds supported by the record, including grounds not relied on by the district court or contained in the appellee's brief); *International Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) ("This rule applies even when the alternate grounds were not asserted until the court's questioning at oral argument."); *Kennedy v. City of Villa Hills, Ky.,* 635 F.3d 210, 214 n.2 (6th Cir. 2011) (noting that appellees do not waive claims by failing to respond to appellant's arguments on appeal); *see also Eichorn v. AT&T Corp*., 484 F.3d 644, 657-58 (3d Cir. 2007) (concluding that appellees were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds); *Laitram Corp. v. NEC Corp*., 115 F.3d 947, 954 (Fed. Cir. 1997) (recognizing that appellees do not select the issues to be appealed); *but see Hamilton v. Southland Christian Sch*, 680 F.3d 1316, 1318-19 (11th Cir.

2012)(concluding that the appellee abandoned a defense by failing to list or state it as an issue on appeal).

In deciding that the State forfeited the issue, the majority joins the Eleventh Circuit's approach. It suggests that result is dictated by *Mayfield v. National Association for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012), *United States v. Clay*, 627 F.3d 959 (4th Cir. 2010), *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), and *Hillman v. I.R.S.*, 263 F.3d 338 (4th Cir. 2001). But while those cases provide some support for the majority's conclusion, they do not settle the issue. *Mayfield* involved the obligations of appellants, not appellees, which, as already explained, are in materially different procedural positions. The pertinent language in *Mironescu* and *Clay* are dicta contained in footnotes. And *Hillman* actually rejected the argument that the taxpayers had forfeited their alternative argument by not including it in their appellee's brief, finding that the "failure to specify in their briefs the alternative relief they desired does not prevent us from granting such relief." *Hillman*, 263 F.3d at 343, n. 6. To be sure, part of the majority's reasoning was that the alternative argument related to the form of available relief rather than a separate substantive argument. But it nonetheless allowed the taxpayers to pursue an argument they had not briefed. So, I do not agree that our precedent compels a finding of forfeiture.

B.

But even if the State forfeited an argument that § 2254(e)(2) precluded the evidentiary hearing, I would excuse. We retain the "inherent authority to consider and decide pertinent matters that otherwise may be ignored as abandoned or waived." *United*

States v. Holness, 706 F.3d 579, 592 (4th Cir. 2013). And for several reasons, we should exercise our discretion to do so here.

First, the Supreme Court instructed us to consider the appeal in light of *Shinn*. And it did so over Stokes' objections that the State had forfeited the § 2254(e)(2) issue. I realize that we should not generally consider the Court's decision to grant certiorari, vacate an opinion and remand to express a view on the merits. *See, e.g., Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). But in *Shinn*, this same issue arose. There, the habeas petitioner "allege[d] that Arizona forfeited any § 2254(e)(2) argument in his case because it did not object to some evidentiary development in the District Court or before the Ninth Circuit panel." *Shinn*, 142 S.Ct. at 1730 n.1. Even so, the Supreme Court said that it had "discretion to forgive any forfeiture," and chose to do so because doing so would reduce the likelihood of further litigation in decades old murder cases. *Id.* We should hesitate to chart a path so at odds with the one traversed by the Supreme Court.

Second, as described above, § 2254(e)(2) does not involve a discretionary decision or claims processing issue. It limits the power of federal courts. To me, exercising our discretion so that our decision does not extend beyond the limits Congress placed on federal courts is appropriate.

Third, declining to excuse any forfeiture reinstates an opinion that, by any measure, is directly foreclosed by the Supreme Court's holding in *Shinn*. Any frustration with the State not raising the § 2254(e)(2) issue to us sooner should not cause us to issue an opinion inconsistent with current Supreme Court law.

Fourth, the majority explains that one of the reasons we should not excuse forfeiture is because doing so would allow an unconstitutional sentence to stand. I disagree with that conclusion for two reasons. One, in determining that the sentence was unconstitutional, the panel majority considered evidence that, by law, we cannot consider. And two, I would not deny his petition. Although I find it hard to see how Stokes could succeed if, as the law requires, his petition is limited to the state court record, I would nevertheless remand the case to the district court to evaluate the petition in accordance with § 2254(e)(2) and *Shinn*.

III.

The decision we reinstate today could not possibly stand under *Shinn*. It is based on evidence that § 2254(e)(2) precludes federal courts from developing and considering. *Shinn* requires that we remand the case to the district court for consideration of Stokes' petition based solely on the state court record.