

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Mar 29 2023

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Keith Kelly, Circuit Court Judge

Case No. 2011-CP-46-0072

James Dejarnette Robertson,

Applicant/Appellant,

-vs-

State of South Carolina,

Respondent.

**RULE 243(c), SCACR, EXPLANATION
CAPITAL CASE**

Counsel does not believe Rule 243(c), SCACR applies in this case. The order remanding the case to the Circuit Court anticipates its return to this Court for review. “We conclude Petitioner's allegation that he was denied a state-created right to qualified counsel constitutes a “sufficient reason” to permit a successive PCR application under section 17-27-90.”¹ This Court remanded the case in a sharply divided opinion. There are two opposing dissents and a plurality opinion expressing three different views of what the trial court was to do on remand. An overarching issue on remand concerned whether this Court should create an exception to the rule

¹ Robertson vs. State, 418 S.C. 505 at 516;795 S.E.2d 29 at 35 (2016).

against successive post-conviction relief applications.² To facilitate that determination, this Court directed the trial court to conduct hearings necessary to answer two questions: whether initial post-conviction counsel met the statutory requirements for appointment³, and, if not, whether prejudice occurred. The trial court granted summary judgement ruling that initial post-conviction counsel did not qualify for appointment.

Regarding the second question, the post-conviction court's view was that prejudice did not occur. That ruling is dramatically oppositional to the facts and evidence. The initial PCR Judge noted on the record that PCR counsel failed to provide any evidence concerning prejudice. The Judge noted that unqualified PCR counsel failed to amend the original PCR application and set forth specific allegations of ineffective assistance of trial counsel. Unqualified PCR counsel failed to conduct any investigation outside the trial transcript. Unqualified PCR counsel failed to discover that the applicant was abandoned by trial and appellate counsel at critical stages in the procedure. Unqualified PCR counsel failed to discover that ineffective assistance of trial counsel resulted in their expert witness memorializing confidential lawyer client information constituting a confession of the intimate details of the actual killings in her notes that were then given to the prosecution and used to obtain a sentence of death. Unqualified PCR counsel failed to investigate, develop or present

² S.C. Code Ann. 17-27-90 (1976).

³ S.C. Code Ann. 17-27-160 (1976).

any mitigation evidence. Unqualified PCR counsel failed to discover that the applicant was denied his right to direct appeal.

In addition, undersigned counsel specifically objected to the Attorney General preparing the findings of fact and conclusions of law. On July 12, 2022 the parties received the following email from the PCR court's law clerk:

Good afternoon,

The claims of deficient performance of PCR are dismissed as they are beyond the jurisdictional limitations of the remand. This court accepted the evidence in a quest to determine prejudice resulting from lack of a certification as required by statute. No other issue is before the Court. Interestingly, the Court learned there does not exist a formal certification process for death penalty PCR, unlike the certification process for lead trial counsel for death penalty defense.

Standard: The question is whether or not Petitioner was prejudiced using the Strickland standard because his PCR lawyers were deficient where, as here, neither PCR lawyer complied with the statute rendering their performance deficient.

After careful review of all materials, including but not limited to, Judge Few's order, transcripts, memorandums, statutes, live testimony and exhibits, the Court finds Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different.


Ms. Brown or Mr. Salter, please prepare an order that reflects the above, share it with opposing counsel, and then email me the order for Judge Kelly review and signature.

The State submitted a proposed order which failed to note that this directive came from the Judge's law clerk. The proposed order was electronically signed without any changes, including on the first page where the incorrect name of the applicant's attorney was noted. Contrary to the Judge's standard operating procedure, none of the pages were initialed by him.

This procedure does not satisfy this Court's precedent requiring independent factual findings of the PCR court. To begin with it is unclear what the law clerk means by "deficient performance of PCR". The clear language suggests that the allegation was that the PCR action itself was somehow deficient. It clearly indicates the law clerk does not understand the difference between deficient performance and prejudice. While proposed orders may not be inherently improper, in a death penalty case, justice demands more than a law clerk's findings of facts and unclear determination of the legal principles. For this reason alone this appeal must move forward.

The matter returns to this Court for its rulings

March 29, 2023.



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