STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2019-001271

REPLY BRIEF OF PETITIONER

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1.

This case is about Due Process and the Eighth Amendment, not typographical errors.

The most striking impression from the state's brief is its arrogance. Despite quoting and citing the cases that repeatedly state that judges should draft their own orders in capital PCR cases, the Attorney General instead defends the original adoption of an error-riddled Order they gave to the judge and then doubles down on defending the Amended Order that was again drafted wholly by the Attorney General. The state's brief respectfully contains no ounce of regret or remorse for the embarrassing situation again before this Court. Nor does the state even bother to pay lip service to obeying this Court's instructions in the future.

Instead of taking this Court's instructions in Pruitt[1] and Hall[2] to heart, the Attorney General defends its decision to again give the judge proposed orders for him to adopt verbatim by saying this Court's remand Order did not explicitly prohibit it. The Attorney General then dismisses the cases cited by petitioner with the refrain that even though courts noted distressing problems with verbatim adoption of PCR orders in capital cases, the cases were ultimately affirmed. It is almost as if the Attorney General is daring this Court to reverse this case. The state is telling this Court through its actions and how it has interpreted the case law that nothing short of a reversal will even give it pause to consider changing its behavior.

Citing the non-capital cases of Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) and Reese v. State, 425 S.C. 108, 820 S.E.2d 376 (2018), the state's brief contains no acknowledgment that its own actions in giving shoddy proposed orders to PCR judges is what

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[1] Pruitt v. State, 310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992).

[2] Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

caused this Court to issue those decisions. Brief of Respondent at 13-14. When the state writes this Court has not shown "any signs of retreat" from the proposed order process, it ignores the crucial difference that petitioner's case is a capital case and ignores the remand Order issued in this case citing Pruitt and Hall. Brief of Respondent at 13, n.5.

Petitioner is not complaining about typographical errors. What this Court called the "frequency and severity of the drafting errors" is evidence the PCR judge did not read the first Order issued in this case. Supp. App. II at 1. The state apparently still disagrees with this Court that the errors were frequent and severe when it cherry picks some of the lesser of the 155 identical errors in an attempt to minimize the problem. Brief Respondent at 10 and n.3. The errors are not the problem; they are *evidence* of the problem.

The PCR court corrected most of the errors using the list *compiled by petitioner.* Supp. App. II at 23. But the Amended Order contained no significant difference from the Original Order. The Attorney General even gave the PCR court a proposed order to deny petitioner's Rule 59 motion which was signed with one change—adding page numbers. Compare Supp. App. II at 567-606 with App. 607-40.

The Eighth Amendment requires a higher standard of reliability in capital cases. See State v. Barnes, 407 S.C. 27, 39, 753 S.E.2d 545, 551 (2014) (recognizing "the Supreme Court's mandate that these trials include heightened reliability.") (Toal, C.J., dissenting). See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Nothing in the Attorney General's brief should give this Court any encouragement that the outcome of petitioner's proceedings below was reliable or comported with due process. When given an opportunity to comply with this Court's instructions on remand, the Attorney General remained (and still remains) flagrantly defiant of Pruitt and Hall when it comes to capital PCR cases. The Attorney General could have complied with the remand Order and encouraged the PCR judge to do the same to prevent harm to the reputation of our judicial system. Instead, almost a decade later, they have refused to listen to this Court and given no indication they will do so in the future. Only a reversal will protect petitioner's constitutional rights and send a message to which the Attorney General might actually listen.

2.

The state incorrectly argues that only cumulative evidence was discovered, and presented at the PCR hearing.

The state's central argument concerning trial counsel's woeful mitigation investigation is that only cumulative evidence was uncovered and presented at the PCR hearing. However, in order for evidence to be cumulative, it must be the equivalent of the evidence presented. See Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 31, 609 S.E.2d 506, 512 (2005) (discussing harmless error, but equating cumulative with equivalent). The state's argument ignores the many key differences between what was presented at trial compared to the PCR hearing which are detailed in the brief of petitioner. The differences between the trial testimony and the PCR testimony of the members of petitioner's family, which again are detailed in the brief, are vital, harrowing, and far from cumulative. Petitioner's experts—to the extent that he had any—were wholly unprepared. In this reply, petitioner will point out some of the examples of the state's flawed analysis.

The state argues that defense counsel Bartosh losing the answering machine tape from Rod Tullis that recorded petitioner begging for help is not prejudicial because other witnesses testified petitioner was depressed and contemplated suicide. Brief of Respondent at 34-35. At trial, the state's most damning allegation was that petitioner was malingering. On the answering machine tape, the jury would have heard for themselves petitioner's depressed state before the crime was committed. The tape was also the only hope of blunting the visceral impact of the 911 call that recorded the shooting. The 911 call contains the screams and cries of the children in the car and its emotional impact is difficult to overstate. Turning the state's argument about the Tullis tape around, then the 911 tape would be merely cumulative to testimony stating that

petitioner shot into a car and children were present. Had petitioner been able to play a tape made mere hours before the shooting showing petitioner was distraught could have made a difference with the jury. Tullis described listening to the tape as "disturbing." App. 2453, l. 17 – 2454, l. 11. The tape cannot be considered cumulative as it is different in kind from all of the other mitigation evidence presented. Bartosh's failure to retain Tullis' answering machine tape made Tullis' testimony critical. No reasonable strategy existed that would have justified the failure to call Tullis or preserve the answering machine tape.

The state argues PCR evidence from Vincent Bell, the paramedic who treated petitioner at the scene, that petitioner wanted to die was cumulative because the jury knew petitioner shot himself. Brief of Respondent at 35. At the conclusion of the penalty phase, Solicitor Gowdy belittled petitioner's suicide attempt with great effect in his closing argument:

> I hear he was hellbent on suicide. But he had all day and ten bullets and not one of them wound up in his head. Suicide? She wanted (sic) wound up with an autopsy. He gave himself a little nick on the neck. Suicide? Ten bullets? All day to do it. Never got around to killing himself.

App. 2114, l. 22 – 2115, l. 2. Bell, a neutral witness, would have testified that petitioner did not originally cooperate with treatment and told the paramedics that he wanted to die and they should let him die. App. 2384, ll. 4-8. Bell testified at PCR regarding his conversation with petitioner:

> Q. All right. What type of questions did you ask him that evening?
>
> A. I asked him basically what happened. He initially said that he shot himself and then my partner, Susan, had asked him, you know, the same type of question, and he said he had shot himself, let me die, and then during that time he also turned around and said – I said, I asked him again what happened. He said I shot myself and then I shot my wife.

App. 2383, ll. 9-16. The jury never heard Bell's testimony that petitioner said he wanted to die.

This evidence would have blunted the solicitor's argument disparaging petitioner's suicide attempt and supported petitioner's claims regarding his severely distressed mental state. In short, it would have helped counter the state's argument that petitioner was not suicidal and was a malingerer.

The state dismisses the wealth of evidence presented through Jan Vogelsang as cumulative and claims "Vogelsang's testimony, though detailed, showed little more than the information previously uncovered in counsel's investigation." Brief of Respondent at 40-41. In support of this argument, the state cites to Lenora Topp's "detailed summaries of her interviews with [petitioner] and Virginia Lindsey" from 2004, which the state claims "reveal virtually identical data to a significant portion of . . . Vogelsang's PCR testimony." Brief of Respondent at 40-41. However, the state blatantly ignores the fact that Topp, who was not hired until a month before trial, *did not testify at trial* and provides no explanation as to why, even assuming counsel's investigation was complete, counsel *failed to present what they learned to the jury.*

Without an expert like Vogelsang, and with the stunted investigation trial counsel performed, the testimony of petitioner's family members was lost because of its disjointed and incoherent presentation. For example, at trial the judge prevented Bessie Smith from testifying about her history of mental illness and her suicide attempt. App. 2082, ll. 6-12. Such testimony would have been admissible through an expert like Vogelsang who could have testified about family members' mental health problems as a basis for her conclusions. See Rule 703, SCRE.

Furthermore, like in Wiggins[3] and Council[4], the jury did not hear evidence of the extreme extent of mental illness in petitioner's family, including the suicide attempts of Virginia Lindsey,

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[3] Wiggins v. Smith, 539 U.S. 510 (2003)

[4] Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008)

Robin Pilgrim, and Bessie Smith. Nor did the jury know anything about the circumstances of petitioner's own suicide attempt when he was a teenager. Trial counsel failed to present evidence regarding the extent of Steven Pilgrim's mental illness, including his and petitioner's belief in "roots." The jury did not hear about the violent household in which petitioner was raised, including his mother shooting at her boyfriend, Steven Pilgrim's CDV conviction, Robin Pilgrim's violent history, and the extent of the violence of petitioner's awful uncles, Paul and Willie. Finally, the jury heard no evidence concerning the rampant drug abuse in petitioner's community. The state's aggravation evidence that petitioner was a drug dealer should have been countered with the testimony that his uncles pressed him into service as a drug courier.

Vogelsang testified regarding all of these tremendous problems petitioner had in his life. Vogelsang's testimony was important because it tied together the mental illness and violence in petitioner's family presented in depth during the PCR hearing. See Brief of Petitioner at 43-46. It cannot be said with any confidence that one juror would not have held out in favor of a life sentence if this evidence had been presented.

The state also improperly argues that much of Vogelsang's evidence would have been inadmissible. Brief of Respondent at 42-43. However, such evidence is routinely admitted during the penalty phase of a capital trial. There is no reason for petitioner's jury not to have heard this mitigation evidence. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In addition, reliable hearsay evidence that is relevant to a capital defendant's defense should not be excluded by rote application of a state hearsay rule. See Green v. Georgia, 442 U.S. 95, 97 (1979).

The state also characterizes Dr. Melikian's testimony as cumulative. This argument ignores the gross failure to prepare Dr. Melikian to testify. Bartosh did not contact Dr. Melikian

until about six weeks before trial. App. 2882, ll. 3-11. She only saw petitioner once for two and a half hours. App. 2882, ll. 21-25. Bartosh left it to Dr. Melikian alone—without any attorney on the conference call—to try to persuade then Judge Few to grant a continuance to allow her to prepare. App. 2893, ll. 1-8. The solicitor ambushed Dr. Melikian about "Jimmy" and petitioner's malingering and completely eviscerated her on cross-examination. App. 2021, l. 17; App. 2029, l. 7; App. 2031, l. 6; App. 2037, l. 25; App. 2039, l. 9. She could not remember why petitioner attempted suicide when he was fifteen. App. 2030, l. 11 – 2031, l. 7. Had she known about the Tullis message, seen the suicide notes, and known about the family history of depression, she could have better withstood cross-examination and fully explained the *severity* of petitioner's depression.

Bartosh's failure to investigate and prepare a minimally adequate mitigation case cannot be deemed constitutionally sufficient. Trial counsel's deficient performance gave the jury an incomplete picture of petitioner and prevented them from considering important mitigating evidence. This evidence directly related to whether petitioner suffered from a "mental or emotional disturbance" and his mentality at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2) and (7). The feeble mitigation presentation at trial deprived petitioner of his rights to a constitutionally adequate sentencing phase defense against the death penalty pursuant to the Sixth, Eighth, and Fourteenth Amendments. This Court should grant petitioner a new sentencing trial.

3.

The state incorrectly asserts there was no evidence that petitioner could adapt to prison, that lead counsel Bartosh made a strategic decision not to offer prison adaptability evidence to respond to the future dangerous evidence offered by the state, and that there was no reasonable probability that one juror would have voted for life if evidence of petitioner's adaptability to prison had been introduced.

The expert testimony from James Aiken that petitioner could be managed and adapt to prison life was admissible during the penalty phase of his trial as mitigating evidence. Exclusion of that evidence would have been reversible error on direct appeal. See Skipper v. South Carolina, 476 U.S. 1, 8 (1986); State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d. 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d. 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d. 138, 140-141 (1987), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d. 315 (1991).

There is no doubt in this case that the state portrayed petitioner as a dangerous man, and a future danger who would have considerable freedom of movement inside prison if sentenced to life imprisonment. For example, Celeste Nesbitt claimed she saw petitioner abuse his wife on three different occasions. App. 1775, ll. 15-24; App. 1777, ll. 5-9; App. 1779, ll. 5-6. Sharon Smith maintained she saw petitioner hit his wife while they were at her house. App. 1821, ll. 5-8. The state also presented evidence that petitioner was arrested for trafficking in crack cocaine. App. 1833, l. 19 – 1834, l. 1. Further, the state called three separate witnesses regarding petitioner's 1996 conviction for assault and battery with intent to kill (ABIK) including Stanford Wilkins who testified petitioner shot at him twice through the windshield and hit him once in the arm. App. 1943, ll. 2-5; App. 1950, ll. 4-15; App. 1952, l. 3 – 1953, l. 10.

The classification director for the South Carolina Department of Corrections, James Sleigh, testified during the state's case in aggravation about the manner in which inmates who receive life sentences live their daily lives in prison. During his testimony, Sleigh told the jurors that an inmate serving a life sentence, such as petitioner would be if sentenced to life by the jury, had access to the yard. They would frequently interact with other inmates while working, going to school, or eating their meals in the cafeteria. They were also allowed "contact visitation." In addition, they would have regular personal contact with correctional officers and other prison employees. App. 1909, l. 2 – 1910, l. 3.

The state's narrative to the sentencing jury was that petitioner was a very dangerous man, in and out of prison, who if sentenced to life imprisonment instead of death, would have a lot of freedom of movement, privileges, and contact with correctional officers and other prison employees which made him a future danger. See Kelly v. South Carolina, 534 U.S. 246, 253 (2002) ("A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee.").

The state asserts that James Aiken's expert testimony that the Department of Corrections would be able to control and manage petitioner and other inmates did not counter or rebut evidence of petitioner's past violence and aggression. It specifically cited the evidence by Stanford Wilkins and others who testified during the trial about petitioner's past violent acts. See Brief of Respondent at 52, n. 32. The state is incorrect.

As this Court will recall, James Aiken was a long-serving correctional officer who became a warden at the central correctional institution. He later was the commissioner of corrections for the state of Indiana and also for the United States Virgin Islands. Brief of

Petitioner at 110. Aiken opined as an expert that the South Carolina Department of Corrections could manage an "offender," such as petitioner, who was the only offender on trial, for the remainder of his life without causing unreasonable risk of harm to prison staff, prison inmates, as well as the general community. App. 2491, ll. 18-21. Aiken also noted as an expert that petitioner did not have relationships with gangs in prison nor with security threat groups. App. 2492, ll. 7-11.

As to petitioner's prior incarcerations and his altercations with other inmates, Aiken explained that petitioner could be managed inside of prison while serving a life sentence and he explained when putting matters in proper context "we have to evaluate prison behavior using prison standards and not community standards." App. 2507, ll. 14-23. Aiken's opinion was that petitioner would be managed if given a life sentence. App. 2507, l. 9 – 2508, l. 8.

The PCR court made three erroneous rulings regarding Aiken's PCR testimony. It incorrectly ruled there was "no showing" that petitioner "would have been adaptable to prison." App. 3625. This ignores the clear import of the expert testimony of James Aiken.

The PCR court also improperly speculated that lead counsel made a strategic decision not to call a prison adaptability expert such as Aiken. App. 3627. This speculation that Bartosh strategically chose not to call a prison adaptability expert when he only began preparing for trial one month before it started, and where this defense "team" at trial was a disorganized disaster, was unreasonable speculation on the part of the PCR court. Karen Quimby's assertion that she understood adaptability to prison was mitigating evidence hardly supports a conclusion that a strategic decision was made not to present adaptability evidence. Co-counsels Quimby and Brannon had no input into the case in mitigation. Supp. App. 189-90; App. 3631-32. Brief of Petitioner at 110; Brief of Petitioner at 113-114. Again, petitioner had the absolute right to

present evidence of his adaptability to prison through the expert testimony of James Aiken, since petitioner had the right to place before the jury all relevant evidence in mitigation of punishment pursuant to Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978); and Eddings v. Oklahoma, 455 U.S. 104 (1982).

Finally, the PCR court's conclusion that not offering the James Aiken adaptability evidence did not undermine confidence in the death sentence or show a reasonable probability of a different verdict if the jury had heard that evidence was error. This Court has correctly stated that finding harmless error on direct appeal is very difficult since any one juror can force a life sentence rather than a death verdict. See State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). Respectfully, a ruling in post-conviction relief that there was not a reasonable probability that the mitigating evidence the jury never heard would not have made a difference in one juror's vote should be made with the same deference.

Moreover, the state was simply wrong inasmuch as it argues that Aiken's prison adaptability evidence did not rebut or put into context the state's evidence and argument of future dangerousness which it presented against petitioner during its case in aggravation. See Gardner v. Florida, 430 U.S. 349 (1977). In fact, the three concurring judges in Skipper v. South Carolina, 476 U.S. 1 (1986) (Powell, Rehnquist, JJ, and Burger, C.J.) urged that Skipper's death sentence, which had been vacated, should have been vacated on the narrower legal grounds that Skipper was not allowed to rebut evidence and argument of future dangerousness against him pursuant to Gardner. See Skipper v. South Carolina, 476 U.S. 1 at 9.

Jurors are going to be concerned about the welfare of prison guards and prison employees in making a decision of life imprisonment without parole or the death penalty. Expert testimony that petitioner would be managed while inside a prison serving a life sentence was very

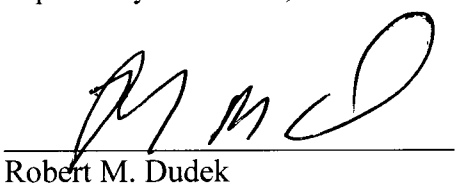
important and necessary evidence to a reasonable juror. The fact that James Aiken did not personally meet petitioner was meaningless. The important factor was that Aiken thoroughly reviewed petitioner's records, he was aware of his past violent acts, and yet he unwaveringly -- as a consummate correctional expert -- concluded petitioner could be managed well if given a life sentence, and he was therefore adaptable to prison life.

The post-conviction court should be reversed, and petitioner granted a new sentencing phase trial.

CONCLUSION

Based on the foregoing arguments and the arguments raised in the brief of petitioner, by reason of arguments two and three, petitioner's death sentence should be vacated, and his case should be remanded to the Spartanburg Court of General Sessions for a new sentencing trial. Alternatively, by reason of argument one, petitioner's case should be remanded to the Spartanburg County Court of Common Pleas for a new post-conviction relief hearing before a different PCR judge.

Respectfully submitted,



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This 28th day of April, 2023.

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Appeal from Spartanburg County

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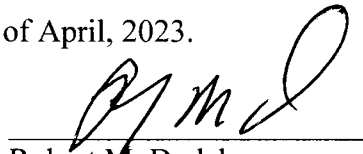
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the reply brief of petitioner in the above referenced case has been served upon Donald J. Zelenka, Esquire, Melody J. Brown, Esquire, and Michael D. Ross, Esquire, all of the South Carolina Attorney General's Office, at their primary e-mail addresses listed in the Attorney Information System (AIS), this 28th day of April, 2023.



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