THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Certiorari to York County
R. Keith Kelly, Circuit Court Judge

Case No. 2011-CP-46-0072
Appellate Case No, 2013-000505

RECEIVED
Apr 10 2024
S.C. SUPREME COURT

James Dejarnette Robertson,

Petitioner,

-vs-

State of South Carolina,

Respondent.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ARGUMENTS TO RESPONDENT'S ISSUES

I. RESPONDENT'S ISSUE I

A. RESPONDENT'S REASONING WOULD ELIMINATE ANY PATHWAY FOR PETITIONER TO PROVE PREJUDICE IN ACCORDANCE WITH THE REMAND ORDER.

The parties agree that under this Court's decision in *Robertson v. State,* 418 S.C. 505 (2016), the Remand Court needed to determine (1) whether counsel were statutorily qualified, and if not, (2) whether there was prejudice using the *Strickland* standard. *See* Ret. at 6. Yet Respondent argues that the Remand Court did not "abuse[ ] its discretion" when, having found counsel to be unqualified, it stated that it was jurisdictionally prohibited from considering whether the same, unqualified PCR counsel prejudiced Petitioner. The PCR Court's law clerk emailed as follows:

> The claims of deficient performance of PCR (sic) are dismissed as they are beyond the jurisdictional limitation of the remand. This court (sic) 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.

App. at 6378. The Remand Court misapprehended the thrust of the Order of Remand, which was to determine prejudice, using the *Strickland* standard, resulting from PCR counsel's overall deficient performance. As a result, the Remand Court's purported finding of no prejudice was "controlled by an error of law" and must be reversed. *See Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *see also Winkler v. State*, 418 S.C. 643, 651; 795 S.E. 2d 686, 691 (2016).

It is difficult to see how prejudice arising from a violation of S.C. Code Ann. § 17-27-160(B) (1976) could be analyzed *without* examining the actions of PCR

counsel, and Respondent fails to answer that question in concrete terms. Like the Remand Court, Respondent mistakes Petitioner's attempts to establish prejudice as attempts to establish further "deficiencies," which Petitioner did not need to do. *See* Ret. at 7 (stating Petitioner "argues that Judge Kelly should not have restricted him from presenting evidence on other perceived deficiencies in initial PCR counsel's representation."). But again, it is impossible to discuss whether counsel's lack of qualifications prejudiced the Petitioner without discussing counsel's errors.[1] Therein lies the prejudice.

Alternatively, presented with how the Remand Court interpreted *Robertson*, this Court might wish to reconsider the wording of its procedural Order and set a precedent that prejudice is not required. This Court ruled in the Order of Remand: "Applying the *Strickland* test, we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance *per se*," but went on to require *Strickland* prejudice from unqualified PCR counsel. *Robertson*, 418 S.C. at 521; 795 S.E.2d at 37. It is uncontroverted that neither PCR counsel were qualified and summary judgment was granted holding PCR counsel's performance was deficient. App. at 6401–6405. In a capital case, that should end the review—the failure to provide what is statutorily guaranteed in this context amounts to a structural error and prejudice

[1] Should this Court interpret and affirm the Remand Court's ruling of limited jurisdiction, the Record on Appeal contains the testimony of two expert witnesses who established the standards of care for capital defenders and identified numerous departures from those standards by PCR counsel, which caused their prejudicial performance. The expert witnesses are Robert John Burke (App. at 4751–4816; CV 5654–5653) and John Mitchell Bailey (App. at 4816–4910; CV 5664–5731).

should be presumed. *Nance v. Ozmint*, 367 S.C. 547, 551; 626 S.E.2d 878, 880 (2006). Appointment of unqualified counsel in a capital case should further concern this Court given the abandonment of *in favorem* review and the restrictions on federal habeas review for which competent appointed counsel was the bargain. *See Robertson*, 418 S.C. at 523–524 (Pleicones, C.J., dissenting); *see also id*. at 517–518 (discussing the bargain states made with Congress for "streamlined federal habeas procedures") (internal quotations and citation omitted). Nevertheless, the Remand Court's legal error in circumscribing its jurisdiction under the *Robertson* plurality merits reversal because its findings flow from that error.

B. BY ERRONEOUSLY CIRCUMSCRIBING ITS JURISDICTION ON REMAND, THE REMAND COURT IGNORED PETITIONER'S COMPELLING EVIDENCE ESTABLISHING PREJUDICE.

As described above, prejudice should not be required when there is a structural error in a death penalty case. *See Nance*, 367 S.C. at 551; 626 S.E.2d at 880. Appointment of unqualified counsel is such a structural error. *See generally Robertson*, 418 S.C. at 523–524 (Pleicones, C.J., dissenting). However, if prejudice is required, the question presented is, but for the deficient performance of PCR counsel, is there a reasonable probability the result reached by the PCR Court would have been different. The answer is overwhelmingly yes. The Remand Court failed to give any meaningful consideration to uncontroverted facts that overwhelmingly established prejudice resulting from PCR counsel's lack of Statutory qualifications under S.C. Code Ann. 17-27-160(B). The Remand Court's ruling is contrary to, and not supported by, substantial evidence and is an abuse of discretion. *State v.*

Robinson, 410 S.C. 519, 526; 765 S.E.,2d 564, 526 (2014). "[T]he question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188; 810 S.E.2d 836, 843 (2018) (internal quotations and citations omitted).

First and foremost, the initial PCR Court's statements on the record demonstrate that had PCR counsel investigated, developed, and presented[2] facts pertaining to trial counsel's performance, the PCR Court's order would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). The PCR Court had concerns about the integrity of the trial process and seemed to agree that the outcome could have been different if trial counsel had conformed to the standard of care by closely supervising Cascio's conduct, attending her interviews, and preventing her from soliciting inappropriate information. App. at 5344; 5297–5298; App. at 3633:1–3; 3636:24–3637:2). However, the PCR Court could not explore that or other issues because of PCR counsel's ineffective performance. The initial PCR Court's statements support the conclusion that its ruling would have been different:

> a. If PCR counsel had presented existing evidence showing that trial counsel did not make a "strategic decision" about whether to call Cascio as a witness after discovering the content of her

[2] *Wiggins v. Smith*, 539 U.S. 510 (2003) established the standard of care for capital defenders and reversed the lower Court in *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir; 2002) for failing to appreciate that: "We base our conclusion on the much more limited principle that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." 539 U.S. 510, 533 (internal quotations omitted). In the case under consideration PCR counsel did no investigation. The *Wiggins* majority opinion discussed the duty to investigate 20 times.

notes because they did not have her notes before deciding to call her. App. at 5302 para. 3 and 4; App. at 3458–3462; 5297–5305; 5340–5342; 5430; Trial Counsel Boyd 5302–5342.

b. If PCR counsel had presented mitigation evidence. As it was, the PCR Court stated it was precluded from performing the second prong of the *Strickland* analysis because PCR counsel presented no mitigation evidence against which the Court could measure trial counsel's performance. For this reason alone, the evidence establishes that the Petitioner did not receive a fair initial post-conviction hearing. App 3638.[3]

Current counsel produced expert mitigation testimony involving parricide in detail and, when measured against trial counsel's jury presentation, established both prejudice of trial and initial PCR counsel. App. at 5733–5745; 4932–5065. As a result of the deficient performance of PCR counsel, the PCR Court was precluded from performing the required *Strickland* analysis as to trial counsel. App. at 3638. Trial counsel's performance becomes relevant under the prejudice analysis enunciated in the Remand Order for this critical reason: had trial counsel's performance been constitutionally adequate PCR counsel's lack of qualification could not prejudice the client. In this context, requiring Petitioner to prove *Strickland* prejudice would necessitate such a layer cake-approach. The Remand Court refused to analyze how PCR counsel prejudiced Petitioner, stating that this Court's Order of Remand jurisdictionally precluded it from doing so. App. at 6378. On this point the Remand Court was operating under a fundamental misapprehension of this Court's intent as

[3] "You haven't put in any additional testimony, the records, and I will say that that is an insufficient basis, in my opinion, on which for me to conclude, under the second prong of Strickland, that the outcome of the trial could have been any different." App. at 3633:14–18.

expressed in its Order of Remand. The net result is that the required *Strickland* analysis regarding the mitigation case has not been performed by any court.

Buried in this case is a serious constitutional error meriting this Court's close review, which caused Petitioner to effectively testify against himself without ever taking the stand in violation of his Fifth Amendment right to remain silent. U.S. Const. amend. V. Ineffective trial counsel (1) hired one, brand-new expert witness and did not give her any instructions or attend the client interviews with her; (2) mixed their paralegal's notes with their *only* expert witness's notes; and (3) handed the mixed notes to the State without having read them. The State then read the notes of Dr. Cascio and the paralegal, gave those notes to their own witness, Dr. McKee, before he took the stand, and cross-examined Dr. Cascio with all the damning details contained therein. Without Petitioner ever waiving his right to remain silent under the Fifth Amendment of the United States Constitution, Petitioner's privileged communications to his attorney and inappropriate line of questioning by the expert witness all came pouring out to the jury. That bell could not be unrung, and it harmed Petitioner much more than any cold presentation of forensic evidence as suggested by the State. The State's cross-examination of Dr. Cascio derived its power from evidence obtained because of ineffective assistance of trial counsel and in violation of the Petitioner's Constitutional right to remain silent. *See* U.S. Const. amend. V. As cited *supra* Section I(B), the initial PCR Court would have granted relief based on this error alone had it been properly presented by PCR counsel.

II. RESPONDENT'S ISSUE II – PROCEDURAL ODDITIES SHOULD UNDERMINE ANY RELIANCE ON THE REMAND COURT'S PURPORTED FACTFINDING.

The Respondent acknowledges that the Remand Court did not announce its own findings of facts and conclusions of law before receiving the Respondent's proposed order; nor did the judge announce his own independent findings of facts or conclusions of law at any other time. Rather, it appears, his law clerk emailed the parties directing the Respondent to prepare an order denying relief on jurisdictional grounds. App. at 6378.

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. Emphasis added. Hall v. Catoe, 360 S.C. 353, 365; 601 S.E.2d 335, 340 (2004); See also Bryson v. State, 328 S.C. 236; 493 S.E.2d 500 (1997). "Death is qualitatively different."

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (emphasis added). It is of no help to the Respondent's argument that the Remand Court's law clerk later invited the Petitioner to also prepare a proposed order. Her directive was that Petitioner prepare a proposed order that: "reflects the Court's ruling" denying relief. App. at 6380. Of course, counsel declined to prepare an order against their client's interest, and the greater weight of the evidence. App. at 6381; App. at 5265–5290 Petitioner's Rule (59(e), SCRCP).

The Petitioner requested that the Remand Court make its own findings of fact and conclusions of law and specifically objected to casting that function upon the State without the Court making its own findings of fact and conclusions of law in the first instance. App. at 6386–6392.

In other orders presented to the Remand Court in this case, each page was initialed by the Court which is some evidence the page was at least seen by the Court. *See* Order Granting Partial Summary Judgment, App. at 6401–6405. Not so the final order denying relief in this complex capital case or in the order denying the Petitioner's Rule 59(e), SCRCP motion. App. at 5291–5292. Based on its interpretation of its jurisdiction and failure to follow ordinary procedure in capital cases, this Court cannot be assured that the Remand Court engaged in factfinding.

III. RESPONDENT'S ISSUE III – PETITIONER DID NOT WAIVE HIS PRESENCE WHEN HIS RESTRAINTS DISABLED HIM FROM WRITING AND CAUSED INJURY.

In its third issue the Respondent asks whether the Remand Court erred in "accepting Robertson's waiver of his presence" at the merits hearing. Ret. at 22. However, characterizing what happened as a "waiver" overlooks the reality. Counsel stated:

> All we're asking for is the hands component so that he can communicate with his lawyers, the rest of the things [restraints] I think we can accommodate.

App. at 4734. The Petitioner stood up so that the Remand Court could see the array of restraint devices and the injuries they were causing to the wrist. App. at 4736:11–4737:12. The photographs of the injuries appear on the thumb drive referenced in Petitioner's Merits Hearing Exhibit 40, App. at 4749. Having a hand to write notes, turn pages among the exhibits and to relieve the cutting pressure on his wrists in no way altered the efficacy of the restraints or the safety of those in the courtroom. It did coerce the Petitioner into leaving the courtroom during the hearing to reside in the cell without the wrist cuffs.

> The pain might be worth siting (sic) through if I could effectively help my attorneys, but I can't because I can't write.

App. at 4796; *see also Illinois v. Allen*, 397 U.S. 337 (1997). A detailed history of the proceeding pertaining to the wrist restraint issue is recounted with citations in the Petitioner's brief under Issue 9. When a court fails entirely to exercise its discretion regarding restraining a litigant while in the courtroom a Fifth Amendment Due Process error occurs. *See Deck v. Missouri*, 544 U.S. 622 (2005) (holding that the trial court must exercise its discretion regarding litigant restraints in the courtroom).

CONCLUSION

The Remand Court's order denying relief is contrary to the directions of this Court in the Order of Remand and not supported by the evidence. This Court should grant certiorari on all issues and order that the Petitioner receive a new sentencing trial.

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