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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Deadra L. Jefferson, Circuit Court Judge

LESLIE DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000587

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the PCR court erred by holding that trial counsel could not have known about the potential for bifurcation of Petitioner's trial simply because the trial occurred prior to this Court's decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019)?

ARGUMENT IN REPLY

By *Cross*'s own terms, it did not announce a new rule of law or procedure, and therefore, trial counsel was ineffective for failing to be aware of the potential for bifurcation.

In *State v. Cross*, four members of this Court held that the "avenue of bifurcation" was not "adoption or sponsorship of a new rule of procedure;" rather, it stemmed from this Court's "reliance upon Rule 611(a) [SCRE]," and "simply a plain reading of the English language." 427 S.C. at 479-80, 832 S.E.2d at 289. The state, however, asserts that *Cross* "was not the law at the time of Petitioner's trial," that "bifurcation as applied to a non-capital case sexual assault case was a novel question," and thus "[Trial] Counsel could not have known" that she should move to bifurcate Petitioner's trial." Return at 6. The state's position cannot be squared with the *Cross* Court's words.

"It is apparent the drafters of Rule 611(a)(1) recognized an inherently procedural component of the mode and order of presenting evidence. It is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. *We are simply recognizing what has been there all along*." *Cross*, 427 S.C. at 480, 832 S.E.2d at 289 (emphasis added). The relevant inquiry is whether trial counsel's performance was deficient under the prevailing professional norms at the time of Petitioner's trial. *Pantovich v. State*, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019). An attorney is never required to be "clairvoyant" to provide competent representation. *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

Respectfully, there is a significant difference between an attorney being "clairvoyant" and an attorney's ability to undertake "a plain reading of the English language." *Cross*, 427 S.C.

at 479-80, 832 S.E.2d at 289. While an attorney need not "foresee successful appellate challenges to novel questions of law," *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016), it is well within prevailing professional norms for an attorney to "recogniz[e] what has been there all along." *Cross*, 427 S.C. at 480, 832 S.E.2d at 289. The state's position, that *Cross* created a brand new, never before seen rule of law, is wholly inconsistent with what *Cross* itself said about its holding.

Even without considering what the *Cross* Court said, however, bifurcation is not a novel issue of law. The United States Supreme Court described bifurcating criminal cases as "common." *Erlinger v. United States*, 602 U.S. 821, 847 (2024) (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 521 n.10 (2000) (Thomas, J., concurring)). In *Cross*, this Court recognized two other jurisdictions that had employed similar bifurcation practices for decades. *See* 427 S.C. at 480-81, 832 S.E.2d at 289-90 (*citing People v. Calderon*, 9 Cal.4th 69, 885 P.2d 83 (1994), and *State v. Wareham*, 772 P.2d 960 (Utah 1989)). And the practice of bifurcation in the civil context predates the founding of the United States of America. Derek Shoemake, *Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation*, 59 S.C. L. REV. 433, 443 & n.107 (2008) (*citing, inter alia*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 164).

For these reasons, trial counsel should have known that bifurcation was an option that was available. She was ineffective for failing to move for the same.

Further, Petitioner can establish prejudice. As the state recognizes, Petitioner's case "depended solely on the credibility of witnesses." Return at 8. In a case such as this, where the only evidence a jury has to rely on is the word of one witness, it is entirely possible that the jury's knowledge of Petitioner's prior rape conviction was the main factor in its decision to

convict rather than acquit. The state argues Petitioner relies "purely on speculation" by making this point. Return at 8. A reasonable reading of the record is not speculation. Furthermore, Petitioner presented evidence to the PCR court to support prejudice. Trial counsel testified at the PCR hearing that "the expression" on "the juror's faces" dropped when Petitioner's prior conviction was entered into evidence. App. 503. She felt she was fighting "an uphill battle" after that moment. App. 503. This evidence is far beyond "pure speculation;" it is the first-hand account of trial counsel's contemporaneous observations of the jury. Accordingly, Petitioner has established both deficiency and prejudice, and this Court should reverse.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari, this Court should grant Certiorari and reverse the denial of post-conviction relief.

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This 9th day of January, 2026.