

STATE OF SOUTH CAROLINA
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 TO RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

DAVID ALEXANDER
Appellate Defender

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR PETITIONER

RECEIVED

Sep 03 2020

S.C. SUPREME COURT

INDEX

INDEX..... i

ARGUMENT IN REPLY 1

CONCLUSION 8

ARGUMENT IN REPLY

Reply to Issue 1

The Attorney General's silence concedes petitioner's two key factual points: (1) the Amended Order differs in no material respect whatsoever from the original Order that caused the 2014 remand; and (2) the Order denying petitioner's Rule 59(e) Motion differs in no material respect whatsoever from the Attorney General's Proposed Order. The Return contains no argument that was not made or could not have been made before this Court remanded the case in 2014.

Once again, the Attorney General relies on the passage of time to argue that the PCR judge adequately reviewed the Orders. If this argument were dispositive, there would have been no reason for this Court to vacate the first Order in 2014. The Attorney General argues that the lack of *ex parte* contacts, hearings, and opportunity to submit briefs complied with Due Process. But this argument did nothing to prevent this Court's remand in 2014.

The Attorney General belittles the errors catalogued by petitioner. Ret. Pet. Cert. n.3 and p.10. Failure to take the amount of errors seriously disregards this Court's remand Order as this Court stated its "concern with the frequency and severity of the drafting errors in the Order of Dismissal." Supp. App. II. at 1. The state says the question before this Court "is not whether relief is due based on unmatched brackets, an additional space in the text, or the lack of subject-verb agreement." Ret. Pet. Cert. at 10. Petitioner wholeheartedly agrees—it is the inescapable inference that the PCR Court failed to read the first Order, the embarrassment to Bench and Bar, and the dire Due Process implications that follow which are the questions for this Court.

The Attorney General's argument is essentially that this Court took the extraordinary step of remanding a capital PCR case to correct typographical errors that were insignificant. The

Attorney General does not—and could not—dispute that the Amended Order after this Court’s remand contains no real difference from the Original Order. The Attorney General does not dispute that it provided the PCR court with a list of the errors *compiled by petitioner* and that the Amended Order primarily only corrects those errors. The wholesale adoption of the Attorney General’s proposed order after the Rule 59(e) hearing is also not disputed.

Instead of heeding this Court’s instructions in the 2014 remand Order, the state took steps to exacerbate the problem by further encouraging the PCR judge to rely on proposed orders. This indicates that the state also fails to take seriously this Court’s statements in Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004) and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) that PCR judges should draft their own orders in death penalty cases. In Hall, this Court stated, “[W]e strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases. . . .” Hall at 365, 601 S.E.2d at 341 (emphasis added). The Attorney General takes “strong encouragement” from this Court to mean only that the Court did “not ban the proposed order process.” Ret. Pet. Cert. at 13. The more reasonable interpretation of Hall is that this Court means what it says.

The Attorney General writes at length about the general fairness of the proposed order system in all PCR cases. Ret. Pet. Cert. at 13-16. Petitioner is not asking this Court to overhaul the PCR system. Petitioner is asking for relief because this case is an outlier that fails to follow this Court’s dictate in Hall about what should happen in death penalty cases. The Eighth Amendment and Due Process require heightened reliability where the state seeks to execute a citizen. 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.”). See also 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). This Court’s 2014 remand was not an exercise in proofreading, but an opportunity to the PCR court to comply with constitutional requirements—an opportunity it flatly rejected.

The state improvidently cites Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) as supporting its position. First, Fishburne was not a death penalty case. Second, Fishburne is the result of a long history of errors in PCR orders, some of which are catalogued in the opinion. Fishburne at 512-15, 832 S.E.2d at 587-89. The Court did not place blame on either side for the continued problems in PCR orders. Id. However, the state prevails in the overwhelming majority of PCR cases and therefore drafts almost all proposed PCR orders. PCR counsel also must accept blame for failing to catch errors in proposed orders, but in this case, it is the state who bears the blame for continuing to lead the PCR court down a path heavily criticized by this Court.

The central point of Fishburne—that problems in PCR orders continue despite multiple admonishments from this Court—is likely the reason this Court long ago strongly encouraged PCR judges to draft their own orders in death penalty PCR cases. The Due Process concerns with proposed orders are amplified by the Eighth Amendment’s requirements. Sixteen years after Hall, the Attorney General still fails to heed the “strong encouragement” from this Court and continues to suggest the opposite to PCR judges. If the 2014 remand from this Court did not make this point, then all that is left is to grant petitioner a new PCR hearing if a new sentencing hearing is not granted on the other grounds raised.

Reply to Issue 2

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. This argument ignores the many key differences between what was presented at trial compared to the PCR hearing which are detailed in the petition for certiorari. The differences between the trial testimony and the PCR testimony of the members of petitioner's family, which are detailed in the petition, 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. Ret. Pet. Cert. at 30-31. At trial, the state's most damning allegation was that appellant was malingering. On the answering machine tape, the jury could 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 the same day showing Lindsey 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.

The state argues that evidence from the paramedic that petitioner wanted to die was cumulative because the jury knew petitioner shot himself. Ret. Pet. Cert. at 31. Solicitor Gowdy belittled the 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 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. The paramedic, a neutral witness, would have testified that petitioner said he wanted to die, which could have blunted the solicitor’s argument disparaging petitioner’s suicide attempt.

The state dismisses the wealth of evidence presented through Jan Vogelsang as cumulative. Vogelsang’s evidence tied together the mental illness and violence in petitioner’s family presented in depth during the PCR hearing. See Pet. Cert. at 46. The state also improperly argues that much of Vogelsang’s evidence would have been inadmissible, which ignores that the rules of evidence, especially hearsay rules, are interpreted in favor of allowing mitigation evidence in capital sentencing proceedings. See Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that reliable hearsay evidence that is relevant to a capital defendant’s defense should not be excluded by rote application of a state hearsay rule).

The state 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 2.5 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 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.

Reply to Issue 3

The state argues that trial counsel's failure to present any testimony that petitioner could be managed in prison was not prejudicial. Ret. Pet. Cert. at 47-48. The Attorney General's current argument is contradicted by the way the solicitors tried their case in aggravation. The state called James Sligh from the Department of Corrections to answer questions about how petitioner would be managed if the jury gave him a life sentence. App. 1908, l. 5 – 24.

The solicitor's questions were consistently about whether petitioner would have access to other people, which implied to the jury that petitioner would be dangerous unless put to death. App. 1909, l. 5 – 1912, l. 14. The solicitor asked whether petitioner would have cell mates. App. 1909, l. 5 – 8. He asked whether petitioner would "have opportunities to have contact with other individuals" on the yard and how many. App. 1909, l. 16 – 1910, l. 3. Sligh responded "as many as 300" and "quite a number." App. 1909, l. 20 – 1910, l. 3. On re-direct, the solicitor confirmed that petitioner could be housed with inmates with sentences less than life imprisonment. App. 1915, l. 12 – 1916, l. 8.

The solicitor asked whether work and school would be "solitary" or "with other people." App. 1910, l. 13 – 21. Sligh testified petitioner would be fed along with other inmates in a cafeteria. App. 1910, l. 22 – 25. When the solicitor asked about visitation, Sligh told the jury the visitation rooms hold as many as 500 people "including visitors usually on the weekends."

App. 1911, l. 13 – 17. The solicitor asked if this was “contact visitation” and had Sligh explain that meant there were no “barriers between the inmate and the visitors.” App. 1912, l. 4 – 11. The solicitor even thought it necessary to ask whether petitioner would have “contact with other guards or employees.” App. 1911, l. 18 – 20.

These questions show that the solicitors trying the case thought it important to tell the jury, through Sligh, that petitioner would have multiple future opportunities for violence unless he was executed. The trial tactics of the solicitor show that the state is now trying to have it both ways. Aiken’s testimony would have explained that inmates like petitioner are successfully managed without violence and that petitioner posed no more threat than any other inmate convicted of a violent crime. The state’s own strategy shows the prejudicial impact of trial counsel’s failure to call a prison adaptability expert—prejudice sufficient to cause reversal in State v. Burkhart, 371 S.C. 482, 487-88, 540 S.E.2d 450, 453 (2007). In a close case that only technically satisfied the single aggravator designed for mass shootings and bombings, this testimony could have persuaded any one of the jurors to choose life. See State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing the PCR court and granting petitioner a new sentencing hearing. In the alternative, this Court should grant petitioner a new PCR hearing before a different judge.

Respectfully submitted,

s/Robert M. Dudek
Chief Appellate Defender

David Alexander
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

This 3rd day of September, 2020.