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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Georgetown County
The Honorable W. Jeffrey Young, Circuit Court Judge

STEPHEN C. STANKO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2017-000211

MOTION TO FILE SUPPLEMENTAL APPENDIX

Respondent, by and through the undersigned attorneys, hereby makes a Motion to File a Supplemental Appendix in this capital post-conviction relief (PCR) appeal to include the entire record below. Respondent has attached a Proposed Supplemental Appendix with this Motion. Respondent makes this motion for the following reasons:

This appeal is the consolidation of Petitioner's original appeal from the denial of PCR by the Honorable W. Jeffrey Young [the initial PCR court] and Petitioner's appeal from the denial of relief by the Honorable D. Craig Brown after conducting a *Robertson*[1] hearing pursuant to this Court's remand Order. See *Stanko v. State*, App. Case No. 2017-000211, S.C. Sup. Ct. Order

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[1] *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

dated Dec. 14, 2017, App. 2738-39, p. 1 ("Any notice of appeal filed following the ruling on remand will be consolidated with the notice of appeal currently pending").

Petitioner Stephen C. Stanko's Appendix, filed with his Petition for Writ of Certiorari in this Court, fails to include the entire record of this case. See Rule 243(f), SCACR.[2] It fails to include the record of the initial PCR action before the Honorable W. Jeffrey Young, and only includes the record of the limited remand proceedings for a *Robertson v. State*, hearing before the Honorable D. Craig Brown, to determine whether Stanko was prejudiced by his 1st PCR counsels' *per se* deficient performance. (See Appendix, Volumes I through IX). See *Stanko v. State*, App. Case No. 2017-000211, S.C. Sup. Ct. Order dated Dec. 14, 2017. Stanko has never filed the record of the initial PCR proceedings.[3] In fact, Stanko's Appendix does not even contain the name of the initial PCR court on its title page. (See Appendix).

In this Court's Remand Order, this Court ordered a hearing before Circuit Judge D. Craig Brown "to determine if petitioner was prejudiced by [his initial post-conviction relief counsel] attorneys' lack of qualifications" pursuant to S.C. Code Ann. § 17-27-160(B) (2014) and *Robertson v. State*. The prejudice hearing was predicated upon Judge Brown's earlier finding that Stanko's initial PCR counsel were not qualified under the relevant statute. That hearing and formal order occurred in accord with the timeline established by this Court in its December 17, 2014 directive. Order (Pursuant to Remand from Ap. C/A 2017-000211), C/A No. 2008-CP-22-01446 (Jan. 16, 2018).

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[2] (f) **Contents of Appendix**. The Appendix shall contain:
(1) The entire lower court record.
(2) A copy of the final order entered after the post-conviction proceeding.
Rule 243(f), SCACR.

[3] Respondent previously checked with the Clerk of the South Carolina Supreme Court and the record of the initial PCR proceedings were never filed with this Court even before the remand.

The standard appropriate for the prejudice hearing was whether Stanko could demonstrate a reasonable probability of a different result at the initial PCR hearing had he been represented by statutorily qualified counsel. *Robertson*, 418 S.C. at 521-22, 795 S.E.2d at 37-38. Yet Stanko has failed to include any of the proceedings before the initial PCR Court in his Appendix, including the grounds raised, the testimony presented before the initial PCR Court, the Court's Order Denying relief, post-trial motions, and orders ruling on the same. Following this Court's remand Order and *Robertson*, Judge Brown considered not only the testimony presented at the *Robertson* prejudice hearing but the record of the initial PCR proceeding to determine if Stanko was prejudiced by initial PCR counsel's representation. (Appendix 4058-4147, Order Denying Relief). This was appropriate given the holding in *Robertson* and this Court's remand Order.

Robertson unambiguously addressed the narrow issue before Judge Brown. That case expressly set the remedy for when a capital PCR applicant suffers from a lack of qualified counsel at initial PCR proceeding. *Id.* It held that "[i]f prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*,[4] Petitioner was prejudiced." *Id.* at 522, 795 S.E.2d at 38. In order to succeed on the prejudice prong of *Strickland* in any PCR action, an applicant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 520 n.14, 795 S.E.2d at 37 n.14 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2052). Yet, Stanko would have Judge Brown and this Court not be allowed to consider the prior proceeding before the initial PCR Court and what was presented there. (See Appendix, Volumes 1-9). This would be an absurd restriction in light of this Court's remand Order and *Robertson*, especially where, as Judge Brown found below in his Order Denying Relief, Stanko's new PCR

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[4] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

counsel raised many of the same ineffective assistance of counsel claims at the *Robertson* prejudice hearing as were raised by initial PCR counsel at the initial PCR hearing and denied by that Court. (See App. 4058-4147, Order Denying Relief). And, Judge Brown found some of the same or similar evidence was offered at the *Robertson* prejudice hearing in support of some of the grounds as was offered before the initial PCR Court and denied. (Ibid). Of note, this Court rejected the kind of truncated review Stanko relies upon. *Robertson, supra.*

The *Robertson* Court's intent to incorporate the *Strickland* prejudice standard is apparent not only from its express adoption of that standard in the context of the proceeding before Judge Brown, but also in its rejection of the *Martinez* standard. 418 S.C. at 515-22, 795 S.E.2d at 34-38 (Beatty, J. with Kittredge and Hearn, JJ. concurring) (Pleicones, C.J. and Toal, J. concurring in rejection of *Martinez, infra*). Regarding this latter assertion, *Robertson* also held "that *Martinez*[5] does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel" and reaffirmed its prior holding from *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013), in the context of a capital PCR. Ultimately, the *Robertson* Court has declared that to succeed on the issue now before this Court, "a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification." *Id.* at 521 and nn.14-15, 795 S.E.2d at 37 and nn.14-15. Again, he must show there is a reasonable probability he would have prevailed at the initial PCR hearing before Judge Young. He cannot do this when he presents many of the same grounds asserted at the initial PCR hearing and presents much of the same or similar evidence in support of the same grounds. (App. 4058-4147, Order of the Honorable D. Craig Brown Denying Relief). To be able to evaluate the ruling on prejudice, this Court needs the entirety of the record. Ibid; *Rule 243(f), SCACR.*

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5 *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012).

It is also important to this Motion to examine what standard *Robertson* did not adopt. 418 S.C. at 522-24, 795 S.E.2d at 38-39 (Pleicones, C.J. dissenting in part). The majority did not choose to implement a holding that, absent representation by statutorily qualified counsel at the initial PCR proceeding, a capital PCR applicant is entitled to "a new PCR proceeding in which he is represented by [qualified] counsel." *Id.* at 524, 795 S.E.2d at 38-39. Chief Justice Pleicones in *Robertson* maintained that the *Strickland* standard applied in PCR actions "is a poor substitute for *in favorem* review" abolished in *State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991). *Id.* at 524, 795 S.E.2d at 38. Pleicones postured that in order to honor the procedural safeguards afforded capital defendants, a prejudice analysis is not appropriate "where the undisputed facts do not demonstrate a conscious waiver or strategic decision to forego one of the special protections mandated by the capital statutes" such as the that prescribed by § 17-27-160(B). *Id.* It follows from the majority's rejection of the automatic right to a full successive PCR hearing that Stanko was not entitled to a brand new PCR hearing. (*Robertson, supra*; Remand Order).

In sum, the standard adopted in *Robertson* is whether Stanko can demonstrate a reasonable probability of a different result at the initial PCR hearing had he been represented by statutorily qualified counsel. *Robertson*, 418 S.C. at 521-22, 795 S.E.2d at 37-38. Despite this standard, Stanko has failed to include the entire record of what occurred below in the Appendix. Rule 243(f), SCACR; *Stanko v. State*, App. Case No. 2017-000211, S.C. Sup. Ct. Order dated Dec. 14, 2017, Remand Order, p. 1 ("Any notice of appeal filed following the ruling on remand will be consolidated with the notice of appeal currently pending"); *Robertson, supra.*

Respondent has consulted with opposing counsel, Lindsey S. Vann, Esquire, regarding this Motion, and Stanko opposes the Court granting Respondent's Motion to file the Supplemental Appendix including the record of the entire PCR proceedings below.[6]

WHEREFORE, for the above stated reasons, Respondent requests this Court grant its Motion to File a Supplemental Appendix.

RESPONDENT SO MOVES.

Respectfully submitted,

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[6] Respondent would note that one of Stanko's grounds raised in his Petition for Writ of Certiorari is that Judge Brown allegedly erred in considering what was raised and presented at the initial PCR hearing. (See Petition for Writ of Certiorari).