

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Georgetown County

Honorable D. Craig Brown, Circuit Court Judges

Appellate Case No. 2017-000211

STEPHEN C. STANKO #6022,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO FILE
SUPPLEMENTAL APPENDIX

Petitioner, Stephen C. Stanko, through undersigned counsel, for the reasons stated below, opposes Respondent's Motion to File Supplemental Appendix. Respondent asserts that supplementation of the appendix with the initial post-conviction relief ("PCR") proceedings is required by this Court's remand order in this case and this Court's opinion in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). Neither ruling establishes such a requirement in this case. Because the lower court found initial PCR counsel failed to meet the statutory qualification requirements, establishing deficient performance per se, and because Petitioner does not rely on

any evidence or claims presented in the initial PCR proceedings, the initial PCR proceedings are irrelevant to the questions before this Court. Petitioner, therefore, opposes Respondent's request to supplement the appendix.

I. Following a finding that initial PCR counsel were not qualified, the initial PCR proceedings are irrelevant to questions of deficient performance.

On remand, Judge Brown found that initial PCR counsel failed to meet the qualification requirements of South Carolina Code section 17-27-160, and therefore, initial PCR counsel's performance was deemed per se deficient. *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). As *Robertson* held, "non-compliance with section 17-27-160(B) constitutes deficient performance per se." 418 S.C. at 521, 795 S.E.2d at 37. This Court reasoned that "[t]o rule otherwise . . . would render meaningless the Legislature's intent to have *qualified* counsel appointed to capital PCR applicants." *Id.* (emphasis in original).

By narrowing the question of deficient performance to only initial PCR counsel's qualifications, this Court removed from consideration the questions otherwise relevant to deficient performance, such as initial PCR counsel's investigation and strategic decision making. *See Strickland*, 466 U.S. at 690–91. Thus, there is no need to review the initial PCR proceedings for the investigation, decisions, or evidentiary presentation made by initial PCR counsel—no matter what they did in the initial PCR proceedings, counsel provided deficient performance as a matter of law due to their failure to meet the statutory qualification requirements.

Robertson, of course, requires the applicant whose initial PCR counsel were not qualified to also prove that he was prejudiced under *Strickland*. 418 S.C. at 522, 795 S.E.2d at 38. The *Strickland* prejudice inquiry looks at the outcome of the proceeding, asking if "there is a reasonable probability that, but for counsel's unprofessional errors [i.e. lack of qualification], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. To determine if the result

would have been different, the courts must determine whether claims raised by qualified successor PCR counsel are meritorious. If they are, the outcome of the initial PCR proceeding would have been different had the applicant been represented by qualified counsel, proving prejudice. In this context, therefore, a determination of prejudice pursuant to *Strickland* does not require a comparison between the evidence presented by initial unqualified and qualified PCR counsel.¹

II. Petitioner’s prejudice presentation and claims presented to this Court do not implicate the initial PCR proceedings, making them irrelevant.

After Judge Brown found initial PCR counsel were not qualified, and therefore provided per se deficient performance, he appointed two attorneys qualified under the PCR statute to prepare for a hearing on prejudice. *See* S.C. Code § 17-27-160. The parties then engaged in discovery, and Petitioner’s qualified counsel conducted investigation. Following their investigation, qualified counsel filed an amended PCR application, raising claims identified during their investigation. At a two-day evidentiary hearing on prejudice, Petitioner’s qualified PCR counsel presented evidence on each claim raised in the amended PCR application through witness testimony and records related to Applicant’s life history. Petitioner’s qualified counsel did not submit any portion of the initial PCR proceedings in support of their claims at the prejudice hearing.

Following Judge Brown’s ruling that Petitioner failed to show prejudice, Petitioner filed a notice of appeal and a petition for writ of certiorari raising questions related solely to the claims presented on remand and Judge Brown’s prejudice determination based on those claims. None of the questions presented to this Court allege that Judge Young was incorrect in his denial of the

¹ Respondent thus appears to request inclusion of the initial PCR proceedings in an attempt to relitigate initial PCR counsel’s performance by “considering the prior proceedings before the initial PCR Court and what was presented there.” Such review is inappropriate based on *Robertson*’s holding that a lack of qualification constitutes per se deficient performance.

claims raised in the initial PCR proceedings. The initial PCR proceedings are, therefore, irrelevant to the petition for writ of certiorari pending before this Court.²

Contrary to Respondent's argument, this Court's order does not (explicitly or implicitly) require inclusion of the initial PCR proceedings—presented by unqualified counsel—in the appendix on the appeal following remand. Nothing in this Court's remand order required qualified counsel to rely on initial PCR counsel's evidentiary presentation or raise claims on appeal related to the initial PCR proceedings—to do so would be senseless because it would require qualified counsel to litigate claims raised by unqualified counsel who provided per se deficient performance. Because Petitioner's qualified PCR counsel did not rely on any portion of the initial PCR proceedings at the prejudice hearing or in this appeal, the initial PCR proceedings are irrelevant and do not warrant inclusion in the Appendix.

CONCLUSION

For the reasons stated above and in Section II of Petitioner's Petition for Writ of Certiorari, the initial PCR proceedings are irrelevant to the claims before this Court, and supplementation of the Appendix is inappropriate.

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² One could envision a case where portions of initial PCR counsel's evidentiary presentation are submitted in support of qualified PCR counsel's claims raised at a prejudice hearing. For instance, where a witness who testified at the initial PCR hearing is no longer available for the prejudice hearing, qualified counsel might seek to rely on initial PCR counsel's presentation of that witness. Or there could be a case where initial PCR counsel sufficiently raised a claim for appellate review despite their lack of qualifications, leading qualified counsel to raise that claim on appeal. In either of those cases, initial PCR counsel's presentation would be relevant to this Court's review. But that is not the case here where qualified counsel submitted full evidentiary support for their claims at a prejudice hearing and did not raise any claims raised by initial PCR counsel on appeal.

Respectfully submitted,

s/Lindsey S. Vann

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