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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

REPLY TO OPPOSITION TO FILE SUPPLEMENTAL APPENDIX

Respondent, by and through the undersigned attorneys, hereby makes a Reply to Petitioner's Response in Opposition to Respondent's Motion to File a Supplemental Appendix. Petitioner's Opposition to the Motion to File a Supplemental Appendix is without merit for the following reasons:

(1) Per this Court's remand Order, this appeal is the consolidation of Petitioner's original appeal from the denial of PCR by Circuit Court Judge W. Jeffrey Young [the initial PCR court] and Petitioner's appeal from the denial of relief by Circuit Court Judge 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 dated Dec. 14, 2017, App. 2738-39, p. 1 ("Any notice

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

of appeal filed following the ruling on remand will be consolidated with the notice of appeal currently pending”).

(2) Petitioner’s Appendix, filed with his Petition for Writ Certiorari, 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 Judge Young, and only includes the record of the limited remand proceedings for a *Robertson v. State*, hearing before Judge Brown, to determine whether Stanko was prejudiced by his 1st PCR counsels’ *per se* deficient performance. (See Appendix, Volumes I - IX). See *Stanko v. State*, App. Case No. 2017-000211, S.C. Sup. Ct. Order dated Dec. 14, 2017. ³

(3) In this Court’s Remand Order, this Court ordered a hearing before Judge 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*.⁴ 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

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 Stanko has never filed the record of the initial PCR proceedings and his Appendix does not even contain the name of the initial PCR court on its cover page. This Court remanded the case for a *Robertson* hearing before the original PCR appellate counsel could file a Petition for Certiorari or the Appendix.

⁴ The prejudice hearing was based 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).

raised, the testimony presented before the initial PCR Court, the Court's Order Denying Relief, post-trial motions, and Orders ruling on the same.

(4) 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, i.e. whether the result of the original PCR hearing would have been different. (Appendix 4058-4147, Order Denying Relief). This was appropriate given the holding in *Robertson* and this Court's remand Order. Stanko's position places an impossible task before this Court. He asks this Court to review Judge Brown's decision without having all of the materials Judge Brown had before him and reviewed in accordance with *Robertson* and this Court's remand Order. Petitioner's Opposition to the Supplemental Appendix is illogical.

(5) *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 "[i]f prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*,⁵ 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. Yet, Stanko would have Judge Brown and this Court barred from considering 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

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

found in his Order Denying Relief, Stanko's new PCR 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). Stanko would have this Court take his appellate counsel's word they are not raising some of the same or similar claims raised by 1st PCR counsel without having that record before this Court, in contravention Judge Brown's Order indicating they did raise some of the same or similar claims. 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). Further, the Order of the 1st PCR Court, Judge Young, is already before this Court. (See Original Notice of Appeal with Judge Young's Order attached). Of note, this Court rejected the kind of truncated review Stanko relies upon. *Robertson, supra*.

(6) *Robertson* expressly incorporated the *Strickland* prejudice standard in the context of the proceeding before Judge Brown.⁶ In his Response, Petitioner spends much of his time arguing deficient performance, but Respondent is not asking to file the Supplemental Appendix on the issue of deficient performance of initial PCR counsel, but on prejudice. Ultimately, the *Robertson* Court 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, Stanko must show there is a reasonable probability he would have prevailed *at the initial PCR hearing* before Judge

⁶ It also rejected the *Martinez v. Ryan, 566 U.S. 1 (2012)* 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*). *Robertson* also held "*Martinez* 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.

Young. The State will submit 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 some of those grounds. (App. 4058-4147, Order of the Honorable D. Craig Brown Denying Relief). Petitioner's assertion in his Response in Opposition to Respondent's Motion to File Supplemental Appendix that he does not raise the same grounds as raised at the 1st PCR is incorrect and not supported by the record, as this Court will see when it is able to review the record of the initial PCR proceedings.⁷ (See Original Notice of Appeal with attached Order of Judge Young; and also App. 4058-4147, Order of Judge Brown). To be able to evaluate the ruling **on prejudice by Judge Brown, which *Strickland* and *Robertson* require**, this Court needs the entirety of the record. *Ibid*; *Rule 243(f), SCACR*.

(7) Petitioner's Opposition to the Motion to File a Supplemental Appendix is an attempt to by-pass what this Court specifically held in *Robertson* and what this Court 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

⁷ As will be set out in the Return to the Petition for Certiorari, not yet filed, Petitioner's assertion he is not raising the same grounds on appeal as raised by 1st PCR counsel at the 1st PCR, is incorrect. Petitioner is raising 4 of the same grounds *raised* by initial PCR counsel and denied by Judge Young, and 1 additional ground [a 5th] that is an extension of an IAC ground raised at the 1st PCR but with new facts, i.e. IAC for failure to present mental health/brain damage evidence. At the 1st PCR, Petitioner presented evidence in support of some of these same claims and little or no evidence in support of others. The 1st PCR Court addressed each claim on the merits, including finding no prejudice given this record including the overwhelming evidence in aggravation. These 5 IAC claims are raised within 2 appellate issues, Issues III. and IV. of the Petition for Certiorari. Judge Brown combined 2 of these IAC claims under 1 ground in his Order. As to the 5th IAC claim, without arguing the merits, the trial record will show why 1st PCR counsel [3 attorneys] did not raise this claim. But again, some reference must be made to the 1st PCR Court record. It cannot be completely ignored.

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. He posited 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 ignoring what occurred at the 1st PCR hearing. *Robertson, supra*; Remand Order. By keeping this Court from having the entire record of the 1st PCR proceedings, Stanko is attempting to gain exactly that, a full successive PCR hearing, which this court did not adopt.

(8) Finally, Respondent needs the Supplemental Appendix to be accepted in order to properly cite to the Record in its Return to the Petition for Certiorari in this case. Respondent is filing a motion to temporarily stay the due date of the Return, until this Court rules on Respondent’s Motion to File a Supplemental Appendix for this very reason.

(9) Lastly, Stanko is free to make whatever arguments he wishes to make, even when the full lower court record is presented to the Court as required under the rules. By opposing the Motion to File a Supplemental Appendix, he has not conceded Issue II. of his Petition for Writ of Certiorari.⁸

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,

⁸ In Issue II. of his Petition, Stanko argues Judge Brown should not have considered the 1st PCR Court record at all despite *Robertson* and the Remand Order.

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 stands ready to supplement the incomplete Appendix with permission of this Court.

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

RESPONDENT SO MOVES.

Respectfully submitted,

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