
NO. 18-6344

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON EUGENE LACY,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF IN OPPOSITION FOR RESPONDENT
STATE OF ARKANSAS

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QUESTIONS PRESENTED

On August 29, 2007, Brandon Lacy and a separately tried co-defendant, Brody Laswell, murdered Randy Walker in Walker's home. Using a fire place poker, Lacy hit Walker over the head and stabbed him in the chest. Lacy then stabbed and slit Walker's throat with a knife to make sure Walker was dead. Lacy and Laswell then lit Walker's house on fire.

Lacy was charged with capital murder and aggravated robbery and was represented by four lawyers at trial. Believing that Lacy may have suffered from amnesia and memory confabulation, Lacy's trial counsel contacted three mental-health experts prior to trial: two forensic psychiatrists and a forensic psychologist. All three of them agreed that Lacy had no apparent neurological issues, and Lacy's counsel was advised that further neuropsychological testing was unnecessary. Lacy was convicted and sentenced to death. Lacy's conviction and death sentence were affirmed on direct appeal in 2010. *Lacy v. State*, 377 S.W.3d 227 (Ark. 2010).

In postconviction proceedings, Lacy argued that his trial counsel was ineffective in handling his mental-health issues. After weighing competing expert testimony opining on Lacy's mental state, among other issues, the trial court held that Lacy's counsel was not ineffective. Lacy appealed, and the Arkansas Supreme Court affirmed.

The questions presented are:

1. Should certiorari be granted to review the Arkansas Supreme Court's routine application of *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts of Lacy's case?
2. Should certiorari be granted to resolve purported conflicts between circuits and between states as to whether counsel's deficiencies under *Strickland* should be assessed individually or cumulatively for the purpose of determining prejudice when the Arkansas Supreme Court held that Lacy's counsel was not deficient?

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JURISDICTION

The judgment of the Arkansas Supreme Court was entered on May 17, 2018. On August 16, Justice Gorsuch extended the time to file a petition for a writ of certiorari to October 14, 2018. Petitioner filed his petition on October 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On August 29, 2007, Brandon Lacy and a separately tried co-defendant, Brody Laswell, murdered Randy Walker in Walker's home. Lacy was questioned by police and admitted that he had participated in the murder of Walker. Lacy admitted that he hit Walker over the head with a fire place poker and then forced Walker to open the safe in his bedroom, where Lacy hoped to find money. Record, CR-09-1340 at 3524. According to Lacy, Laswell hit Walker over the head with a weight bar. *Id.* at 3524, 3559. In a later interview with police, Lacy admitted stabbing Walker in the chest with a fire place poker and slitting his throat with a knife. Lacy told police that he thought Walker was "pretty much done," *id.*, after Laswell hit him over the head with the weight bar, but he stabbed him, *id.* at 3617, and slit his throat to make sure. *Id.* The duo then lit Walker's house on fire with gas from a can found in Walker's garage. *Id.* at 3524, 3600, 3617.

Dr. Frank Peretti testified at trial that Walker died from blunt force trauma to his head, cutting wounds, and from stabbing wounds. *Id.* at 2537. The direction of the wounds indicted that Walker struggled with his assailant. *Id.* at 2542. Walker suffered six blows to his head which caused "massive fracturing of the entire skull." *Id.* at 2569. Walker was alive at the time he was stabbed and at the time his throat was slit by Lacy. *Id.* at 2566.

In a criminal information filed October 8, 2007, Lacy was charged in Benton County, Arkansas with the capital murder of Randy Walker and with aggravated robbery. After a multi-

day trial, wherein Lacy was represented by four lawyers, including Jay Saxon and Steven Harper, Lacy was convicted and sentenced to death. A judgment and commitment order, Record, CR-09-1340 at 392, and an amended judgment and commitment order were filed on May 13, 2009. *Id.* Lacy appealed, and the Arkansas Supreme Court affirmed his conviction and sentence. *Lacy v. State*, 377 S.W.3d 227 (2010 Ark.) (No. CR-09-1340).

Lacy then timely sought postconviction relief pursuant to Ark. R. Crim. Pro. 37 in a petition filed in the trial court on September 6, 2011. Record CR-12-142 at 84. Lacy's Rule 37 petition contained only three claims for relief: that his trial lawyers were ineffective "when they failed to investigate and present the affirmative defense of mental disease or defect," his trial lawyers were ineffective because they put forth insufficient mitigating evidence in the penalty phase of trial and, lastly, Lacy asserted that cumulative error required reversal in his case. *Id.* In an order filed October 19, 2011, Lacy's Rule 37 petition was denied without a hearing. *Id.* at 108.

Lacy appealed the denial of Rule 37 relief to the Arkansas Supreme Court. Finding that the record did not conclusively establish that Lacy's allegations were meritless, the Arkansas Supreme Court reversed and remanded the case to the Benton County Circuit Court for a hearing on Lacy's Rule 37 allegations. *Lacy v. State*, 425 S.W.3d 746 (2013 Ark.) (No. CR-12-142). A multiple-day hearing was held after which the trial court denied relief as to the guilt phase of Lacy's trial but granted Rule 37 relief as to Lacy's death sentence. Record CR-15-171 at 573. On January 2, 2015, the State timely filed its notice of appeal. *Id.* at 580. Lacy cross-appealed. In an opinion issued on February 4, 2016, the Arkansas Supreme Court affirmed the denial of postconviction relief as to the guilt phase of Lacy's trial. Because the trial court had used a subjective standard rather than the objective standard required by *Strickland v. Washington*, 466

U.S. 668 (1984), and Arkansas caselaw, it reversed the circuit court’s ruling that Lacy received ineffective assistance of counsel in the penalty phase of trial and remanded the case with directions that the court assess counsel’s sentencing phase performance using an objective standard. Lacy sought certiorari from the Arkansas Supreme Court’s ruling affirming the finding that counsel was not ineffective under *Strickland* for foregoing an affirmative defense of mental disease or defect, contending that this Court should decide whether “consistent defenses [are] required to be pursued” by counsel under the Constitution or whether “counsel [can] neglect them akin to a contradictory defense.” This Court denied certiorari on October 3, 2016. *Lacy v. Arkansas*, 137 S. Ct. 105 (2016).

In the meanwhile, as directed, the trial court applied the correct objective standard to Lacy’s claims of sentencing ineffective assistance of counsel and issued an order on January 25, 2017, denying Rule 37 relief. The Arkansas Supreme Court subsequently affirmed. *Lacy v. State*, 545 S.W.3d 746 (2018 Ark.) (No. CR-17-404).

Lacy now seeks certiorari from the Arkansas Supreme Court’s decision that his sentencing counsel was not ineffective under *Strickland* for failing to consult or utilize a neurologist at sentencing, and from the court’s decision refusing to recognize cumulative *Strickland* error. The Arkansas Supreme Court’s routine application of *Strickland* to the facts of Lacy’s case is not particularly novel or worthy of certiorari review. And, because the Arkansas Supreme Court specifically found no deficient performance under *Strickland*, there are no errors in Lacy’s case to cumulate. Thus, a decision on the appropriateness of cumulating error under *Strickland* could have no effect on the outcome of Lacy’s case.

REASONS FOR DENYING THE WRIT

I. **The Arkansas Supreme Court's routine application of *Strickland* to the facts of Lacy's case does not warrant certiorari review.**

Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), Lacy must show that his sentencing counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Lacy must additionally show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Lacy's assertion of ineffective assistance of sentencing counsel fluctuates, even in his own petition. Sometimes he asserts that sentencing counsel was ineffective for failing to consult with a neuropsychological expert; at other times he asserts counsel was ineffective for failing to have Lacy examined by a neuropsychologist. At still other times he asserts that sentencing counsel performed deficiently by not presenting the testimony of a neuropsychologist at sentencing. In the end however, he asserts that the Arkansas Supreme Court's error was a simple "misappl[ication] of *Strickland*" and that the Arkansas Supreme Court erred by "by focusing on the number rather than then type of expert involved, given what counsel knew about the client's mental difficulties." Pet. at 9-10.

1. Expert Neuropsychologist: It is undisputed that prior to trial, counsel believed that Lacy suffered from amnesia and potential memory confabulation and, thus, had Lacy examined by several mental health professionals.¹ Specifically, counsel moved to have Lacy examined and

¹ Dr. Curtis Grundy described memory confabulation as "not having memory of an event and then taking either cues or information from others and then recreating a false memory."

the court ordered that he be examined by Dr. Robin Ross of the Ozark Guidance Center. Dr. Ross is a forensic psychiatrist. Dr. Ross submitted a written report dated February 15, 2008. He concluded that Lacy did not have a mental disease or defect and that he was competent both at the time of the crime and at the time of trial. Pet. App. at 4; Supp. Add., CR-17-404 at 89-94. He diagnosed Lacy with alcohol dependence, depressive disorder, NOS, a history of cannabis and methamphetamine dependence, both of which were in remission, and a history of hallucinogen abuse. Supp. Add., CR-17-404 at 89.

Lacy was then evaluated by Dr. Curtis Grundy, a forensic psychologist hired by his trial counsel. Pet. App. at 4. Sentencing counsel had worked with Grundy prior to the Lacy trial and found him to be “good,” “honest” and “very thorough.” Abstract, CR-15-171 at 322, 405. Dr. Grundy concluded Lacy suffered from depressive disorder and substance abuse. Pet. App. at 4. He found Lacy did not have a mental disease or defect, *id.*, and was competent to stand trial and to assist in his defense. Supp. Add. CR-17-404 at 102. Although Lacy professed an alcoholic “blackout” regarding the murder, Dr. Grundy noted in his report that Lacy “was able to provide some information surrounding his recollection of events.” *Id.* at 103.

Based upon Dr. Grundy’s recommendation, counsel contacted Dr. Robert Forrest, a forensic psychiatrist, and sought from him an oral opinion on whether Lacy had any brain dysfunction or organicity in his brain.² Pet. App. at 4. They provided Dr. Forrest with copious

Abstract, CR-17-404 at 334. Counsel testified that he had a “strong belief” that Lacy had no memories of the night of the murder but rather had adopted a story of what happened the night of the murder that had been fed to him by his co-defendant, Brody Laswell. *Id.* at 193, 194.

² Lacy has long alleged that counsel were ineffective because they failed to contact Dr. Harold Hall, a purported memory expert located in Hawaii. That allegation makes an appearance

records, including records from a car wreck Lacy had been in, Walmart pharmacy records, in patient records from Decision Point, and records from a hospital regarding Lacy's prior suicide attempts. Abstract, CR-17-404 at 189-190, Add. CR-17-404 at 55. On August 7, 2008, Dr. Forrest reported orally to counsel that he had reviewed Lacy's records and spoken with Dr. Grundy. Abstract, CR-17-404 at 337. It was Dr. Forrest's opinion that neuropsychological testing was not necessary and that it would not yield anything significant. Dr. Forrest noted that Lacy functioned well when he was sober, performed well on memory testing administered by Dr. Grundy, and that alcohol amnesia would not prevent some memories from returning. Add. CR-17-404 at 55-56.

Finally, prior to trial, counsel moved the court for an order to send Lacy back to the State Hospital for a determination of whether it was possible to retrieve some of his alleged missing memories of the crime. Abstract, CR-17-404 at 205. A hearing was held wherein counsel presented testimony from Dr. Grundy that Lacy experienced amnesia or memory lapses regarding the commission of the crime. Dr. Grundy described amnesia as a blockage of memory. After the trial court questioned Dr. Grundy and learned that Lacy had some memory of the crime, it denied the motion. *Id.* at 1-18. As the Arkansas Supreme Court noted, when Dr. Grundy suggested to counsel that a neuropsychological consult might be needed, counsel consulted with Dr. Forrest. Dr. Forrest specifically was to opine on whether a brain scan or testing for "brain dysfunction" was needed. Add. CR-17-404 at 55-56. Dr. Forrest reported to counsel that he did not believe neuropsychological testing would be beneficial.

in the petition before this Court. Pet. at 12. Lacy never has, in any court, however, presented an affidavit or testimony from Dr. Hall, nor has he even established that Hall was available on the date of his trial.

The pretrial opinion of Dr. Forrest was confirmed on state postconviction review. In conjunction with the Rule 37 evidentiary hearing, Lacy was examined by Dr. Jeff Gould. Gould wrote a report dated September 4, 2014 in which he concluded that, consistent with the diagnoses at trial, Lacy suffered from depressive disorder, NOS, and alcohol and cannabis dependence. Add. CR-17-404 at 148. Also in conjunction with the Rule 37 hearing, Lacy was examined by a neuropsychologist, Dr. Barry Crown. Dr. Crown examined Lacy over two years after conclusion of trial and testified at the Rule 37 hearing that his postconviction examination was “status oriented,” so it was “as of the date [he] saw him.” Abstract, CR-15-171 at 365. Although Dr. Crown testified that he was testifying more as a “mitigation person” as opposed to a mental health expert, Abstract, CR-15-171 at 391, he nonetheless issued a report wherein he formally diagnosed Lacy with cognitive disorder intellect, NOS. *Id.* at 369, Add. CR-15-171 at 153-157. According to Dr. Crown, Lacy had, at the time of the examination, functional impairments in the areas of delayed memory, and problems with reasoning. Abstract CR-15-171 at 369. A significant portion of this damage likely occurred from Lacy’s early substance abuse. Abstract, CR15-17 at 369. He also found Lacy “amnesic” about various life experiences-- mostly during the time he was intoxicated. Abstract CR-15-171 at 370-371.

Dr. Jack Randall Price, a neuropsychologist, also testified at the Rule 37 hearing for the State. He reviewed a plethora of documents, including medical records, school records, police reports, statements from Lacy’s family members, Lacy’s statement to police, trial transcripts, employment records, and copies of previous evaluations by psychologists and psychiatrists-- including Dr. Crown’s. *Id.* at 471-472. Dr. Price disagreed with Dr. Crown’s findings, *id.* at 511, and concluded that the data he reviewed did not support the opinion that Lacy had brain damage. *Id.* at 491, 504. In addition, Dr. Price did not believe that the available data supported

an opinion that Lacy suffered from any form of alcoholic amnesia. *Id.* at 506. Dr. Price testified that Lacy had some very specific memories of the crime. *Id.* He did not prepare a written report but did prepare a chart which identified for the court where he disagreed with Dr. Crown. Add. 17-404, at 158. Given all of this testimony it is hardly surprising that the Arkansas Supreme Court found that counsel did not perform ineffectively in regards to a neuropsychological expert:

Far from ignoring the issue of neuropsychological testing, counsel explored it and was told by an independent expert that it was not needed. This conclusion was repeated during the Rule 37 proceeding by Dr. Price, who testified that he saw no indication of brain damage and was highly critical of the conclusions reached by Dr. Crown. Given the information that counsel had at the time of trial, as well as the other evidence in the record, we affirm the denial of relief on the claim that counsel failed to adequately investigate Lacy’s alleged neuropsychological issues.

Pet. App. at 7. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690–691. Counsel’s investigation was reasonable. They contacted three experts prior to trial—Drs. Ross, Grundy, and Forrest. Two of these doctors evaluated Lacy before trial. According to counsel, all three of them agreed that Lacy had no apparent neurological issues. Abstract, CR-17-404 at 298. Counsel also had access to a psychiatric evaluation completed on Lacy two years before the Walker murder. This evaluation did not contain any information that Lacy suffered from any sort of neurological condition. Add. CR-15-171 at 97-101. The Arkansas Supreme Court’s routine application of the *Strickland* standard to the facts of Lacy’s neurological expert claim merits no certiorari review.

2. Other Penalty Phase Ineffective Assistance of Counsel Issues: In the Arkansas Supreme Court, Lacy asserted that his sentencing phase counsel was ineffective in the manner in which he presented family member testimony at sentencing, and during his sentencing phase closing argument. The Arkansas Supreme Court applied *Strickland* to both of these claims and

held that counsel's performance in both instances was not deficient. *Lacy*, 545 S.W.3d at 751-752. Lacy does not challenge the Arkansas Supreme Court's application of *Strickland* to these specific claims in his petition before this Court and, thus, they do not warrant a grant of certiorari.

II. Resolution of the purported conflict regarding "cumulative error" would not affect the outcome of Lacy's case because the Arkansas Supreme Court held Lacy's counsel was not ineffective.

Lacy asserts that certiorari should be granted to resolve conflicts between circuits and between states as to whether counsel's deficiencies under *Strickland* should be assessed individually or cumulatively. This Court should deny certiorari on this issue because resolution of the purported conflict would not affect the outcome of the case. To begin with, the Arkansas Supreme Court expressly declined to apply cumulative error to Lacy's assertions of ineffective counsel because "Lacy has not demonstrated that his counsel committed any errors during the penalty phase, much less that an accumulation of error should result in his receiving a new sentencing hearing." *Lacy*, 545 S.W.3d at 752. Thus, even if this Court were to decide the issue in the manner that Lacy seeks, it would have no bearing on his case because there is no error to cumulate. Courts should think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will "have no effect on the outcome of the case." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011). *See also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (refusing to resolve a split among the Courts of Appeals regarding discovery accrual rules because, *inter alia*, it would not affect the outcome of the case). Accordingly, the petition should be denied.

Lacy may assert that he somehow is entitled to cumulate his allegations of ineffective assistance of counsel for failing to obtain a neuropsychologist, for improperly handling family

member mitigation evidence, and for giving a bad penalty phase closing argument. But, Lacy does not challenge the Arkansas Supreme Court's rejection of the latter two instances of alleged ineffective assistance of counsel in this petition. Thus, resolution of those issues stand. *Baxter v. Clutchette*, 425 U.S. 308, 332 n.6 (1976) (noting that when holdings of a court are not challenged they "are no longer at issue"). Under Supreme Court Rule 14.1(a), moreover, only questions set forth in the petition, or fairly included therein, will be considered by the Court. Except for the allegation that counsel was ineffective for failing to obtain a neuropsychologist, Lacy simply has not fairly incorporated any challenge to the performance of his penalty phase attorney in this petition. The "fact that [Lacy] discussed these issues in the text of his petition for certiorari does not bring them before [the Court]. Rule 14.1(a) requires that a subsidiary question be fairly included in the question *presented* for [the Court's] review." *Wood v. Allen*, 558 U.S. 290, 304 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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