NO. 20-6166

In The Supreme Court of the United States

BRAD KEITH SIGMON,
Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. THE DISTRICT COURT DID NOT ADDRESS THE SECOND PRONG OF *MARTINEZ* AND IT CANNOT SERVE AS A BASIS FOR RESOLUTION OF THIS CASE.

The Respondent spends much of its Brief in Opposition arguing Sigmon's petition is doomed to failure because he has not argued whether state post-conviction relief (PCR) counsel was ineffective. The Respondent raises this argument for the first time here. This argument misstates the district court's order and misunderstands the law related to *Martinez* claims.

The order granting summary judgment on the habeas proceedings specifically recognized the Petitioner adequately argued PCR counsel was ineffective for failing to preserve the claims raised under *Martinez*. DE 234, p.32-33. There is no mention of the perceived failure the State argues—because it did not exist.

The district court's denial of habeas relief was solely based on whether the issue raised by Sigmon was "substantial." This is consistent with the same district court's opinions in similar cases, finding that "the prejudice analysis for PCR counsel dovetails with the *Strickland* analysis for trial counsel." *Mangal v. Warden*, *Perry Corr. Inst.*, 2019 U.S. Dist. LEXIS 59710, *31 (D.S.C. April 8, 2019). This is also in accord with the Ninth Circuit's holding that if an ineffective assistance claim against trial counsel would have been successful, then PCR counsel's failure to raise it was surely ineffective. *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016).

Throughout the district court and on appeal, Sigmon has focused on the actions of his trial counsel. There is no claim of ineffectiveness against post-conviction

counsel that does not require a focus on trial counsel's effectiveness. A habeas petitioner can only raise the ineffectiveness of post-conviction counsel to the extent that counsel failed to raise a valid issue of ineffectiveness of trial counsel.[1]

The district court correctly found no deficiency on Sigmon's argument regarding the ineffectiveness of PCR counsel. There is no reason to find fault with it now. Sigmon's PCR counsel failed to raise a meritorious claim of trial counsel's ineffectiveness. Sigmon has been unable to locate a case where there was a valid strategic reason for failing to raise a meritorious issue in collateral proceedings, because there can be *no* valid reason for failing to raise a meritorious issue in state collateral proceedings. That failure will always constitute ineffective assistance of counsel. The district court was correct in taking the position that the effectiveness of collateral counsel in an ineffective assistance case is subsumed into the analysis of the effectiveness of the underlying trial counsel.

As a practical matter, both the Respondent and the Fourth Circuit made the same mistake. The district court did not address the effectiveness of PCR counsel in the ruling below. The issue was first raised at oral argument in the Fourth Circuit and the subsequent Circuit opinion. It forms no part of the district court opinion. Because the district court did not consider or rule on this ground, the issue cannot govern the outcome of the case. The issue was never raised as an argument by the Respondent. It was only brought up by the Fourth Circuit. This petition is the first

[1] There is little appellate authority on this issue. However, district courts have analyzed this issue. *Moore v. Stirling*, 2017 U.S. Dist. LEXIS 219559, *68 n.19 (D.S.C. Dec. 28, 2017); *Elders v. Stevenson*, 2016 U.S. Dist. LEXIS 40145, *11 (D.S.C. Mar. 28, 2016); *Mangal v. Warden, Perry Corr. Inst.*, 2019 U.S. Dist. 59710, *29-31 (D.S.C. April 8, 2019).

time the Respondent has raised this issue. Under Circuit precedent, the Fourth Circuit does not consider arguments that were not raised in the briefs. *United States v. Pena*, 952 F.3d 503, 511 (4th Cir. 2020).

The Respondent's claim that this renders Sigmon's appeal no more than an "academic" question is backwards. Forcing Sigmon to argue an issue the district court never used to rule against him would be at odds with the basic premise of appellate practice—to correct legal errors. There was no error in the district court's analysis, so this issue has no place in this appeal.[2]

2. THE DISCOVERY OF NON-CUMULATIVE EVIDENCE THAT CHANGES THE NATURE OF A MITIGATION CASE SUPPORTS A SUBSTANTIAL CLAIM UNDER *MARTINEZ*.

In declaring Sigmon's argument on the ineffectiveness of trial counsel (and by extension PCR counsel) "as troubling as it is unfounded," the Respondent mischaracterizes Sigmon's argument. Sigmon is not arguing that any time new evidence is located in a habeas investigation, that new evidence will result in a substantial claim of ineffective assistance of counsel. He is arguing new evidence that changes the nature of the case presented supports a substantial claim under *Martinez*.

Sigmon's claims in this Court turn on whether trial counsel was constitutionally ineffective in failing to present mitigation evidence and whether that

[2] While it is recognized in the Fourth Circuit the appellate court can affirm on any ground appearing in the record, *Strawser v. Atkins*, 290 F.3d 720, 728 n.4 (4th Cir. 2002), even that theory would not apply here. The Respondent's argument was never addressed by the district court. In fact, the Respondent did not raise this issue in its Return in the district court. It conceded in that return Sigmon was making a claim of ineffective assistance of PCR counsel. DE 208, p.5; 78. The Respondent similarly never made this argument in its briefing before the Fourth Circuit.

new mitigation evidence would have resulted in at least one juror voting for life instead of death. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Respondent dismisses this argument with the claim that "just because other evidence existed," counsel may not have been ineffective because "too many variables exist." The Respondent does not explain this point further.

Sigmon is not arguing the existence of additional evidence is all he must show. In fact, he has drawn a clear line between evidence that is merely cumulative and evidence that covers the same ground as the evidence presented in the sentencing phase but serves to undermine confidence in the sentence.

Contrary to the Respondent's argument, Sigmon recognizes it is not enough to simply present more evidence. Rather, the evidence must result in a stronger, and effective, mitigation case. The evidence at issue here accomplishes exactly that, capturing Judge King's attention and resulting in a lengthy and powerful dissent in the court below where the Judge "emphatic[ally]" argued in favor of an evidentiary hearing. *Sigmon v. Stirling*, 956 F.3d 183, 212 (4th Cir. 2020)(King, J., dissenting).

The Respondent's argument would result in the foreclosure of ineffective assistance of counsel arguments related to mitigation evidence, which is often the most important part of capital cases. No court to consider Sigmon's claims has engaged in the "careful evaluation" claimed by the Respondent. Each court to deny his habeas claims related to mitigation evidence has simply found the evidence similar to what was presented and deemed it cumulative with little analysis.

Cumulative evidence would, by definition, simply repeat what earlier evidence showed, adding nothing to the sentencing case.

As Judge King pointed out in his dissent, Sigmon's "new evidence is markedly more compelling, detailed, and favorable to Sigmon than that presented at trial." *Id.* at 211. He is correct and even a cursory review of the new mitigation evidence described in this case reveals it is not cumulative.

3. THIS COURT'S GUIDANCE IS NEEDED FOR THE LOWER COURTS TO FAITHFULLY APPLY *MARTINEZ.*

The Respondent incorrectly argues Sigmon is creating a circuit split where none exists, claiming the examples cited in the petition are merely instances of the lower courts faithfully applying the *Martinez* test.

As Judge King noted in his dissent, the evidence Sigmon presented at the habeas stage was not cumulative. It was the kind of evidence that paints a more detailed picture, supporting the themes that would have convinced a juror to vote for life. Contrary to the Respondent's position, Sigmon is not arguing new evidence would always warrant an evidentiary hearing.

The cases cited in the petition were decided under a similarly incorrect standard as the one used by the Fourth Circuit in this case. In many cases, mitigation evidence found after trial that resembles evidence presented at trial is automatically deemed "cumulative" and the claim is found to be insubstantial. This Court has never taken that position. The Circuit opinions Sigmon referenced involved varying levels of review in the lower courts.

Some courts have found similar evidence cumulative as a matter of law and refused to allow further development of that evidence. Other courts have properly found the subject matter of the evidence may be similar, but its detail and effect can make similar evidence far more than cumulative.

This is the standard Sigmon asks this Court to clarify. Similar evidence is not automatically cumulative. Cumulative evidence tends to merely prove the same point. Evidence regarding a similar theme that does not prove the same point, but proves a different more powerful point, cannot be deemed cumulative.

The district court and the Fourth Circuit refused to consider more compelling evidence because it was similar, despite the fact it would have created an entirely different mitigation case—one which realistically could have convinced a single juror to vote for life. This Court should clarify that evidence is only cumulative if it proves nothing additional. If it tends to change the overall picture of a case, it cannot be cumulative.

CONCLUSION

The Court should grant the petition in this matter and remand the case for a proper consideration of the additional mitigation evidence uncovered during habeas proceedings.

Respectfully submitted,

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