No. 21A61

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; and
MICHAEL STEPHAN, Warden,
Broad River Correctional Institution.....Applicants.

v.

SAMMIE LOUIS STOKES.....Respondent,

CAPITAL CASE

REPLY TO RESPONSE IN OPPOSITION TO APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING THE WARDEN'S FILING OF A PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONSE IN OPPOSITION

Stokes' Response Regarding the Defaulted Claim and the Fourth Circuit's Flawed Prejudice Analysis

Stokes embraces the majority's error to argue that the prejudice analysis is not wrongly limited, but a reflection of the jury's findings of fact. He is equally wrong. There is simply no necessary and reported finding that limits the jury's consideration during the selection process of any properly admitted evidence. None. The properly admitted evidence of the second murder, and the brutal circumstances of the first, constituted admissible and relevant evidence before the jury. Consequently, this evidence must be considered in any proper *Strickland*[1] prejudice analysis. The majority did not do so, and therein lies the clear error.

Of note, to support his conclusion that sentencing relief was properly granted, Stokes initially skips directly to what the new evidence submitted in the habeas action through his defaulted claim could show. (Response, p. 1). But federal habeas is not simply a process for presentation of a new theory; a petitioner must show cause to excuse the default. This is a step not so easily brushed aside. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770 (2011) ("exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding"). When Stokes finally addresses the default, his reference to the federal appellate court's first-in-time finding of excuse for the default again depends mostly on his belief that the underlying claim is strong, along with a carefully excised portion of collateral

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

counsel's federal habeas testimony. (Response, pp. 10-11). With this limited presentation, he claims the matter "fact-bound." (Response, p. 11). Stokes has failed to address the legal question noted in the Application: whether the federal appellate court majority committed legal error in disregarding the credibility rulings made by the district court. The procedural bar doctrine is greatly valued in maintaining respect between the sovereigns, *id*, it should not be so lightly treated.

In addition to overlooking crucial habeas appeal missteps, Stokes' response regrettably misleads or misapprehends the Fourth Circuit disposition on the Warden's petition for rehearing. Apparently attempting to gain momentum for a perception of acceptance, Stokes asserts "[n]ot a single judge on the Fourth Circuit voted to grant Applicants' petition for rehearing en banc." (Response, p. 1). But no vote was requested. (Application Attachment B, citing Fed. R.App. P. 35).[2] Further, the habeas relief stems from a split panel decision. The dissent is powerful, detailed, and, the Warden submits, correct. There is clear evidence of dissent, not an agreement in the result. Stokes' suggestion to the contrary fails.

Turning from procedure to substance, the Warden submits the very fact that Stokes forwards as correct an argument that the jury's findings regarding eligibility somehow constrains consideration of properly admitted evidence in the selection process underscores the necessity of further review. This shows an express reliance on the Fourth Circuit's clear error. The majority committed an error of law that

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[2] Rule 35(f), Fed.R.App.P. provides: "A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote." The Order notes "[n]o judge requested a poll...." (Application Attachment B).

diminishes the sentencing phase evidence and fatally alters the *Strickland* prejudice analysis.[3] This is irreconcilable with state and federal law.

South Carolina, when asked to consider *Strickland* prejudice in capital cases, and much like the dissent in the Fourth Circuit opinion here, makes the evaluation in light of "the totality of the evidence before the jury." *Jones v. State*, 504 S.E.2d 822, 824 (S.C. 1998). In *Jones*, the state court expressly noted such weighing was consistent with *Strickland* and state capital sentencing structure: "The 'weighing' that is permissible is the *considering* of any mitigating and aggravating circumstances." *Id.*, at 824 n. 1. This is because we are not a "weighing" state, *i.e.*, jurors "are not instructed to 'weigh' circumstances of aggravation against circumstances of mitigation." *Id.* (citing *State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984)). Thus, the collateral review prejudice analysis is not limited by any "finding" of certain statutory aggravating or mitigating factors. This is a clear reflection that, like Georgia, South Carolina assigns a "limited purpose served by the finding of a statutory aggravating circumstance...." *Zant v. Stephens*, 462 U.S. 862, 873, 103 S. Ct. 2733 (1983).[4] As this Court has resolved, where the "aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty" and the circumstance is rejected or otherwise found insufficient, "[t]he underlying evidence" if not otherwise

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[3] It is particularly difficult to understand the majority's conclusion to remove the second murder from consideration when the jury also had Stokes' own writing "*admitting to much of the detail about his role in the murders of Connie and Doug Ferguson. ...*" (Slip Op. 56) (Quattlebaum, J., dissenting) (emphasis added).

[4] *State v. Shaw*, 255 S.E.2d 799, 802 (1979) (South Carolina's statute "patterned after the death penalty statutes of our sister state Georgia).

unconstitutional, "is nevertheless fully admissible at the sentencing phase." *Id.*, at 875 and 886. The panel majority and Stokes are wrong.

As asserted in the application, the Fourth Circuit previously acknowledged South Carolina's capital case structure, but has now twice refused to apply it for a *Strickland* prejudice analysis in federal habeas review, here and in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019). (Application, p. 14). The danger of allowing this error to remain unaddressed is evident where the error may be applied in other South Carolina capital cases. As of this writing, these South Carolina death sentenced inmates have federal habeas action appeals identified as currently pending in the Fourth Circuit and raising *Strickland* claims:

- *John Richard Wood*, USCA4 Appeal: 20-11 (set for argument Oct. 29, 2021);
- *Mikal Mahdi*, USCA4 Appeal: 19-3 (argued March 9, 2021)(Mahdi's counsel submitted *Stokes* as additional authority by letter of August 20, 2021);
- *Abdiyyah Ben Alkebulanyahh (f/k/a Tyree Alphonso Roberts)*, USCA4 Appeal: 15-3 (currently stayed);

Another, *Steven Bixby*, USCA4 Appeal: 21-5, is still in the process of informal briefing, and may very well have ineffective assistance claims. Further, seven other South Carolina capital cases are pending habeas proceedings or disposition in the District Court of South Carolina:

- *William Dickerson*, 9:21-mc-00618-SAL-MHC;
- *Steven Stanko*, 1:19-3257-RMG-SVH;

- *Bayan Aleksey*, 5:14-3016-JMC-KDW;
- *Stephen Corey Bryant*, 9:16-cv-1423-DCN-MHC;
- *James D. Robertson*, 2:11-63-TMC-MGB;
- *Bobby Wayne Stone*, 2:17-cv-01221-MGL-MG;
- *Anthony Woods*, 5:18-00144-DCN-KDW.

All of these cases are potential victims of overreaching and erroneous federal habeas review. Consequently, Stokes' attempt to cast this matter as fact-bound and case-specific should hold little sway. What constitutes a proper *Strickland* prejudice analysis in reviewing South Carolina capital cases is a question that directly affects most every capital case in federal habeas review (which, as shown above, does not make a short list). This Court has considered the importance of a matter to a state's capital cases as reason to grant certiorari review. *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020) ("[b]ecause of the importance of the case to capital sentencing in Arizona, we granted certiorari"). Because the majority opinion allows the federal courts to discard evidence that the state fact-finder could (and should)[5] consider in selection, this issue is undoubtedly important to South Carolina capital case review.[6] Further, without some stay in place, the precedent still carries weight with all these cases potentially lined up for error.

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[5] The trial judge instructed the sentencing jury: "In considering the appropriate punishment, you may consider in addition to the aggravating circumstances and mitigating circumstances the character of the defendant and the circumstances of the crime." (J.A. 1396).

[6] As set out in the application, adding even more error, the majority also refused to consider the hefty negatives that came along with the habeas presentation of new evidence. (See Application, p. 21). That is plainly contrary to *Wong v. Belmontes*, 558 U.S. 15 (2009).

In light of the unbroken line of South Carolina precedent that allows for consideration of *all* admitted evidence after the finding of statutory aggravating circumstances, *i.e.,* after a determination of *eligibility*, even in conducting a *Strickland* prejudice analysis, Stokes' argument and the Fourth Circuit panel majority's position is hopelessly untethered to any actual support.[7]

Stokes' related assertion that there is not a circuit split on this issue, (see Response, p. 17-18), is similarly based on his own misapprehension of the mechanics of the statute and the limited purpose of statutory aggravating circumstances in non-weighing states.

Additionally, Stokes' assertion that his fact-case is a strong one, (*see generally* Response, pp. 7-11), is of no moment. Whether he can show a different and better strategy bears no importance at all to determining the correct legal structure in which to view his proposed evidence, either for excuse of the procedural default or for *Strickland* prejudice.

Stokes' Assertion a Section 2254(e) Argument is Not Available

Stokes' attempt to find some bar to the Warden's reliance on 28 U.S.C. § 2254(e) again reflects a misapprehension of law. He asserts such an argument is lost because the Warden did not cross-appeal. (Response, p. 19-20). In the Fourth Circuit, it is not only not required, it is actually disfavored for the Warden as a prevailing party to cross-appeal. *Young v. Catoe*, 205 F.3d 750, 762 n. 12 (4th Cir.

[7] Further, if one, for the sake of argument, overlooks the solid line of authority against Stokes' argument, and considers the statutory aggravating circumstances a "finding of fact" for selection and not simply eligibility, he fares no better. There is no finding that the second murder did not occur. The only finding is the second murder did not occur during one scheme or course of conduct – a far cry from it never occurred at all. The Snipes murder was a murder for hire, while the Ferguson murder, several days later, was, at least in great part, to prevent Ferguson from talking about the first murder. (*See* Slip. Op. 6).

2000) (noting that "respondents" asserted an argument in the alternative "via the unnecessary vehicle of cross-appeal"). Nor do the federal rules require a State to request and obtain a certificate of appealability for jurisdiction to attach. Rule 22 (b)(3), Fed. R. App. P. Notably, Stokes does not contend the Warden failed to assert reliance on the bar in the district court, nor could he. The record shows the Warden consistently preserved the issue.

Stokes' Assertion of No Harm

Stokes' assertion there is no need to recall and stay the remittitur because South Carolina does not have to begin resentencing for one-year, (Response, pp. 5-6), merits little needed response either in theory or practicality.

Stokes forgets that "[f]ederal habeas review of state convictions 'entails significant costs,' all on its own. *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (citing *Engle v. Isaac,* 456 U.S. 107, 126 (1982)). South Carolina *has to prepare the case again* and to *begin jury proceedings* within a year. How much more exacting is that cost when the State is wrongly forced to prepare this case again. That wrong is more than monetary costs and diversion of limited resources, it inflicts injury to state sovereignty, comity, and unsettles the victim's family's reliance on the prior sentence. Further, that wrong "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders" –in the capital cases, punishment for offenders of the most egregious crimes – and, in addition, "intrudes on state sovereignty to a degree matched by few exercises of

federal judicial authority." *Richter,* 562 U.S. at 103 (quoting *Harris v. Reed,* 489 U.S. 255, 282, 109 S.Ct. 1038 (1989) (Kennedy, J., dissenting)). There is definite harm.

Further, rather than support Stokes' assertion to the contrary, the most recent actions in this matter *enhance* the need for the stay. With the Fourth Circuit issuing the mandate while this application was pending, and the district court obligated to act, the lower courts are currently advancing on a capital resentencing path. The drive for resentencing, however, is based on only the erroneous decision. The additional action brings into sharp focus the division of limited state resources – forcing the State to begin reconstruction of this case in preparation for new proceedings while also simultaneously devoting resources to pursue appellate litigation. It has also left the prosecutors and family members of the victims uncertain as to which direction the case will ultimately take. The more prudent course remains a limited to stay.

CONCLUSION

For these reasons, and those set out in the application, the Court should recall and stay the mandate pending the filing of a petition in this Court on or before December 22, 2021, and through disposition of proceedings in this Court.

Respectfully submitted,

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October 21, 2021
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