

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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S.C. Supreme Court

SAMMIE LOUIS STOKES.....*Petitioner,*

v.

STATE OF SOUTH CAROLINA.....*Respondent.*

APPELLATE CASE NO. 2013-000635

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. AS A MATTER OF FIRST IMPRESSION IN SOUTH CAROLINA, WHETHER A LAWYER'S SUCCESSIVE PARTICIPATION, FIRST AS PROSECUTOR OF A DEFENDANT FOR A VIOLENT ASSAULT, AND LATER AS DEFENSE ATTORNEY FOR THAT SAME DEFENDANT IN A CAPITAL TRIAL AT WHICH THE VICTIM OF THE PRIOR ASSAULT TESTIFIES FOR THE PROSECUTION, VIOLATES THE SIXTH AMENDMENT GUARANTEE OF CONFLICT-FREE COUNSEL?
- II. WHETHER THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING A WAIVER OF THE RIGHT TO CONFLICT-FREE COUNSEL ON THE BASIS OF A TRIAL RECORD CONTAINING NO MENTION OF A CONFLICT OR WAIVER, AND A POST-CONVICTION RECORD THAT DOES NOT ADDRESS, LET ALONE SATISFY, MOST OF THE CONSTITUTIONALLY ESSENTIAL ELEMENTS OF A VALID WAIVER?
- III. WHETHER THE PCR COURT ERRED AS A MATTER OF LAW IN HOLDING THAT DIRECT APPEAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S FAILURE TO CONDUCT AN INDEPENDENT ASSESSMENT OF THE EVIDENCE TO DETERMINE WHICH STATUTORY MITIGATORS WERE SUPPORTED, OR TO INSTRUCT THE JURY ON A MITIGATOR FOR WHICH THERE WAS EVIDENTIARY SUPPORT?

STATEMENT OF THE CASE

Petitioner, Sammie Louis Stokes, seeks review of the denial of his application for post-conviction relief (PCR), in which he challenged the sentence of death imposed upon him by the Orangeburg County Court of General Sessions. As set forth in greater detail below, this case presents an important question of first impression. Stokes was represented at his capital trial by a former solicitor who had won a criminal jury verdict against him for a violent assault against his ex-wife. While that circumstance did not, by itself, give rise to a conflict of interest under this Court's existing jurisprudence, there was more. When the penalty phase of Stokes' capital trial got under way, his ex-wife – the victim of the earlier assault – was the first witness the prosecution called to the stand in support of a death sentence. During his brief, *pro forma* cross-examination, Stokes' prosecutor-turned-defense-counsel conspicuously pulled his punches, bypassing readily available opportunities for impeachment, and never letting on that he had previously persuaded a different jury to accept the very story, told by the very witness, he was now obligated to confront and discredit. In other states that have addressed the issue, these circumstances – commonly described as successive representation in *related* (as opposed to merely *unrelated*) matters – would constitute a violation of the right to conflict-free counsel, and require a grant of relief. As of now, this Court has never decided a case in this category.

In the PCR proceedings below, there was no dispute over whether the same lawyer had prosecuted then defended Stokes, over the featured roles Stokes' ex-wife had played in both trials, or over the substance or strength of the impeachment opportunities counsel failed to pursue. It was also undisputed that the trial judge had not been made aware of any of these facts, and that the trial record contains nothing resembling a waiver colloquy. The PCR hearing

evidence instead focused on whether defense counsel had nevertheless obtained a constitutionally valid off-the-record waiver of Stokes' right to conflict-free representation. On that question, defense counsel and his co-counsel (who had said literally nothing on the record at trial), testified that, some time prior to trial, they had reminded Stokes that the lawyer appointed to defend him had previously sent him to prison, asked Stokes whether he had a "problem" with that, then accepted his answer that he did not. Neither attorney, however, had any recollection of advising Stokes that his ex-wife would be a witness for the prosecution, or that cross-examining her would require his defense lawyer to become the adversary of a victim he had previously – and successfully – championed as a prosecutor. Likewise, no evidence indicated that counsel revisited the matter with Stokes once it became clear that the *possibility* of a confrontation with the victim from the earlier case had ripened into a *certainty*.

On the basis of this record, Stokes asserted both that counsel had labored under an actual conflict that adversely affected his performance, and that the information provided to Stokes, according to counsel's own account, was insufficient to support a constitutionally valid waiver as a matter of law. With regard to the existence of a conflict, Stokes provided the PCR court with detailed briefing explaining that although this Court had never addressed it, consensus among other courts places successive representation cases into two outcome-determinative categories: a larger category comprised of cases in which the successive proceedings are "unrelated," such that counsel's mere participation in both ordinarily creates no conflict; and a smaller category of cases, like this one, in which the successive proceedings are or become "related" through the appearance of common witnesses or the repetition of common issues, such that counsel's participation on both sides generates an actual conflict. As to the possibility of a waiver, Stokes'

briefing identified the settled constitutional standard for a knowing, voluntary and intentional relinquishment of a known right, and explained how the evidence in this case was incapable of meeting it.

The PCR court denied relief by signing an order prepared by counsel for respondent with no direction from the court. Adapted wholesale from respondent's own post-hearing briefing, the order denying relief assiduously ignored the body of law from other states differentiating between "related" and "unrelated" cases, and insisted instead that this case was governed by *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), a non-capital case which involved successive representation in *unrelated* proceedings. The order also included an alternative determination that Stokes' acquiescence to continued representation after being told his lawyer had previously prosecuted him amounted to a waiver of his right to conflict-free counsel. In making this determination, the PCR order treated trial counsel's account as conclusive proof of a waiver, and faulted Stokes for failing to take the stand to *refute* that testimony. Importantly, however, the order never acknowledged or applied the settled constitutional rules that actually govern the waiver of conflict-free counsel, under which trial counsel's testimony – even if taken as true – was insufficient in multiple respects.

After receiving the order denying relief, Stokes filed a timely motion to alter or amend the judgment. Among other contentions, that motion set forth objections to the PCR court's failure to make and articulate its own findings, and to the order's failure to acknowledge, let alone analyze, the legal principles critical to accurate resolution of the issues. After hearing argument on the motion and indicating that it would prepare its own order resolving the issues, *see* App. 2231-32, the PCR court ceded that critical task to respondent as well, *compare*, App.

2348-2370 *with* App. 2371-2395. The resulting order finally denying relief continued to ignore the legal rules omitted from the earlier order, and compounded both the factual misrepresentations that had appeared before, and the conclusions drawn from them.¹

I. Relevant procedural history.

Stokes was found guilty of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy, and sentenced to death by an Orangeburg County jury on October 31, 1999. This Court affirmed his convictions and sentence on May 29, 2001. *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001). On October 17, 2001, Stokes filed an application for post-conviction relief. On March 11, 2002, the PCR court appointed counsel to represent Stokes in connection with his post-conviction relief proceedings. Stokes, through counsel, amended his application for post-conviction relief on May 2, 2002, and again on August 6, 2004. After a delay in the proceedings to facilitate a determination of whether Stokes had mental retardation, the PCR court convened an evidentiary hearing on August 5, 2009. At that hearing, Stokes presented evidence relevant to the claims for relief discussed *infra*.

In early 2010, the parties filed post-hearing memoranda in support of their positions. On August 29, 2010, counsel for respondent submitted an unsolicited proposed order denying Stokes' application in all respects, which the PCR court signed without modification on October 21, 2010. Stokes thereafter filed a timely Motion to Alter or Amend, which was heard on December 8, 2011. After additional post-hearing briefing on January 27, 2012, the PCR court

¹As will be noted, *infra*, the orders written by counsel for the State and adopted by the PCR court contain a number patently disingenuous "findings" which badly distort the record, and falsely impugn the integrity of both Stokes' appointed PCR counsel and an attorney witness who testified to facts demonstrating that Sims had been put on notice of the potential for a serious conflict well before trial. These unseemly abuses of the order-drafting power were brought to the PCR court's attention, but it took no action to correct them.

announced its intention to deny relief, and counsel for respondent submitted a proposed order to that effect on March 28, 2012. On April 10, 2012, counsel for Stokes filed objections to the proposed order and, on the basis of remarks made by the PCR judge to counsel for the parties, moved for appointment of new counsel in light of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Nine days later, respondent submitted another proposed order denying Stokes' Motion to Alter or Amend and his request for new counsel. On February 13, 2013, the PCR court signed that document without modification.² Stokes received written notice of the entry of judgment on February 26, 2013, and filed a timely Notice of Appeal on March 27, 2013.³

II. Relevant facts.

A. Crimes, arrest, and appointment of counsel.

In early 1998, Stokes was finishing a ten year prison sentence for aggravated assault and battery when his cellmate, Roy Toothe, approached him about a plan to murder Toothe's girlfriend, Connie Snipes. App. 966-67. At the time, Snipes was living with Toothe's mother, Pattie Syphrette. App. 966. Syphrette wanted Snipes killed because of her belief that Snipes had been unfaithful to Toothe, and because she disapproved of Snipes' treatment of her children, who were Syphrette's grandchildren; DSS had already taken custody of one child, and its investigation was ongoing. App. 966-67. Stokes agreed to the plan. App. 967.

²Although the document signed by the PCR judge is dated "February 13, 2012," it was actually signed on that date in 2013. The version supplied by counsel for respondent included "2012" as part of the signature block, and the court did not correct it.

³The unusual delay since the filing of the Notice of Appeal is largely attributable to efforts to reconstruct the PCR record, made necessary by the Orangeburg County Clerk of Court's apparent loss of exhibits admitted into evidence at the PCR hearing, and pleadings submitted on behalf of Stokes in connection with the Circuit Court proceedings. *See* App. 2543-51.

Stokes was released from prison in early May, 1998. App. 784, 967. Shortly thereafter, DSS ordered Syphrette to evict Snipes from her home or risk losing another grandchild to removal by DSS. App. 971. Unwilling to have another grandchild taken, Syphrette contacted Stokes and set her plan in motion. App. 971. As a ploy to lure Snipes to a secluded area, Syphrette asked her to assist in the murder of one Doug Ferguson. Snipes agreed. App. 1661. Stokes and Syphrette then picked up Snipes and another man, Norris Martin, and drove to a wooded area, ostensibly for the purpose of killing Ferguson. App. 1661. After Stokes, Martin, and Snipes walked some distance into the woods, the true purpose of the venture was revealed to Snipes. App. 891, 973. She was then sexually assaulted and shot to death. App. 890-94, 1662.

Approximately five days later, a farmer happened upon Snipes' decomposing corpse and notified authorities. App. 812-15. At the crime scene investigators found items known to belong to Norris Martin, including a state-issued identification card. App. 821, 823-24. After interviewing Martin and obtaining other information linking Syphrette to the crime, the police made their way to her house. App. 842, 845. As it happened, Syphrette was then in the process of actually carrying out the Ferguson murder.⁴ Just before the police arrived, Syphrette and Stokes wrapped Ferguson with duct tape; the tape covered his mouth and nose, and he suffocated. App. 1209, 1310-12. Stokes and Syphrette were arrested a short time later.⁵

⁴Syphrette wanted Ferguson dead because he knew too much about the Snipes homicide. Syphrette had originally approached him about taking part in killing Snipes, but he had refused and Syphrette feared he would go to the police and implicate her. App. 1308, 1331.

⁵Stokes pled guilty to the Ferguson murder and was sentenced to life in prison without the possibility of parole.

Orangeburg County attorneys Thomas Sims and Virgin Johnson were appointed to defend Stokes. The trial court held a formal appointment hearing at which attorneys Sims and Johnson placed their qualifications on the record. App. 1505-07. Describing his criminal law experience, Sims emphasized his handling of “major criminal prosecutions” in the First Circuit Solicitor’s office from 1982 until 1993, but said nothing about any individual cases he took part in as a prosecutor. App. 1505-06. Satisfied with counsel’s qualifications, and unaware of any countervailing circumstances, the trial court designated Sims as lead counsel. App. 1507.

B. Sims’ 1991 prosecution of Stokes.

Just over seven years before his appointment as Stokes’ lead defense counsel for the Snipes capital murder trial, Sims, then an assistant solicitor, signed an indictment against Stokes for assault and battery with intent to kill. App. 1696-97. The victim was Stokes’ ex-wife, Audrey Smith. App. 1697. On March 12, 1991, Sims appeared at the trial on that indictment as the only representative for the State; he presented all of the evidence, which consisted primarily of testimony from Audrey Smith; he made all of the arguments to the judge and jury; and he secured a conviction for aggravated assault and battery. *See* App. 2396-2537. Stokes himself appeared in the courtroom only briefly, before the trial began. After the trial judge denied his request for time to locate and hire a private attorney, Stokes declined to be present for the actual trial proceedings, and therefore observed none of the prosecution’s case against him, and none of Sims’ activities as the prosecutor. App. 2408-09, 2428-29. Stokes also declined to be present for the reading of the verdict or for sentencing.⁶ App. 2533-34.

⁶It was during the resulting ten year prison term that Stokes became acquainted with Roy Toothe and Patty Syphrette.

The 1991 prosecution arose out of a December 1990 domestic violence incident. In testimony elicited by Sims, Audrey Smith claimed that she and Stokes had sex in a schoolyard, then walked to a nearby field where Stokes choked her until she lost consciousness. App. 2437-41. Some time later, Smith, still lying in the field, woke up, walked to a nearby house, and called 9-1-1. App. 2441. Smith also claimed that before they walked to the field, Stokes had her read a letter in which he expressed an intent to kill her, and that Stokes then told her he had changed his mind. App. 2439.

In a cross-examination spanning approximately twenty transcript pages, defense counsel raised doubts about Smith's claims by establishing a series of inconsistencies between the testimony she had given at a preliminary hearing and the story she told at trial. *See* App. 2443-2462. Additionally, defense counsel called two other witnesses who saw Stokes and Smith just before the alleged assault and described the couple as having appeared normal. App. 2492-94, 2498-2500. In response to this challenge to Audrey Smith's credibility, Sims devoted much of his closing argument to convincing the jury that Smith had been truthful, and that her version of events was accurate. App. 2519. As shown by the jury's guilty verdict, Sims' advocacy on behalf of Audrey Smith was successful.

C. Stokes knew little, and the 1999 trial judge knew even less.

It is undisputed that neither Sims nor anyone else ever informed the 1999 trial court that Sims had personally prosecuted Stokes in 1991, and the record of pre-trial and trial proceedings associated with the Snipes case contains no mention of the issue. With no knowledge of his own about the possibility that lead defense counsel was (or could be) burdened by a conflict of interest, the trial judge made no inquiry, conducted no colloquy, and secured no waiver.

Sims' casual approach to the issue was also reflected in the advice he gave to Stokes. According to Sims and his co-counsel Johnson, Sims did little more than remind Stokes in general terms that he had been a prosecutor, and that he had once prosecuted Stokes.⁷ While Sims and Johnson both recalled these communications to Stokes, neither had any recollection of informing Stokes of the ways in which Sims' work as the prosecutor at the Audrey Smith ABWIK trial could affect his representation if Smith were to appear as a State's witness at the Snipes capital murder trial. In fact, when questioned directly on that point, Sims insisted he had no memory of advising Stokes about the nature or consequences of a possible confrontation with Smith at the 1999 capital trial:

Q: And so you certainly wouldn't have discussed with [Stokes] the possibility of you cross-examining the witness that you didn't think was going to be able to testify, right; we're talking about Audrey Smith?

A: I don't know. I can't say that I did or did not.

Q: You don't have any recollection about talking to Mr. Stokes about Audrey Smith taking the witness stand and you cross-examining her?

A: No, I don't.

...

⁷See App. 1863 (Sims: "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him."); *id.* at 1864 (Sims, explaining his rationale for reminding Stokes of who he was: "For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes."); *id.* at 1892 (Sims' advice to Stokes about 1991 prosecution was limited to reminder that Sims had prosecuted Stokes, and that Stokes had gone to prison as a result); *id.* at 1896 (Sims: "Let me put it this way, [Stokes] knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that?"); *id.* at 1910 (Johnson: "Only thing I can remember is ... [Sims] said ... you know I put you in jail or I prosecuted you and [Stokes] said yes. And it went through the questions of do you have a problem with me representing you ... do you want somebody else and he said no.").

Q: But you wouldn't have told [Stokes] that Audrey Smith was going to testify and you were going to cross-examine her, because you did not think she was going to testify, right?

A: I have no recollection that I either did or did not.

App. 1903-04; *see also id.* at 1912.

For his own part, Stokes himself had no independent factual basis from which to surmise what a confrontation between Sims and Smith might look like. Because he had been absent from the 1991 trial, Stokes had not seen or heard the direct or cross-examinations of Smith, and he had not been able to watch or listen as Sims urged the jury to believe Smith during his closing argument. The PCR evidence further showed that Stokes was never afforded an opportunity to consult with a different lawyer who might have informed him of the brewing conflict and how it could be expected to manifest itself at trial. *See* App. 1892-93. In short, Stokes' only possible source of information concerning the relationship between the 1991 and 1999 trials, both of which featured Smith and Sims, was Sims himself. As Sims' own testimony makes clear, that information was never delivered.⁸

⁸Shortly after the evidentiary hearing below, Stokes moved to supplement the record with his own sworn affidavit corroborating Sims' and Johnson's testimony that they had done little more than remind Stokes that Sims had prosecuted him, and that they did not warn him that Smith would be permitted to testify or that Sims would be tasked with cross-examining her. *See* App. 1929-30. The motion also acknowledged the State's right to cross-examine Stokes about the content of his affidavit, and pledged cooperation in the event respondent elected to exercise that right. App. 1923. Three months later, respondent sent an email message opposing submission of Stokes' affidavit. From there, the issue lay dormant until the PCR court signed the State's proposed order, whose final page included a footnote declaring that the "record was closed" before the affidavit was submitted, and that the affidavit "contradict[s] the testimony of counsel Sims and Johnson." App. 2183. Later, in response to Stokes' explanations that neither of these grounds for exclusion were supported by the record, App. 2190-92, respondent wrote – and the PCR court signed – another order, this time accusing Stokes' counsel of engaging in "post-hearing gamesmanship" in a "blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process." App. 2393, 2385. Nowhere, however, did the order acknowledge or attempt to reconcile this *ad hominem* attack on Stokes' counsel with

D. Sims' misapprehension of basic capital punishment law, and resulting failure to appreciate the gravity of the issue.

Appreciation of the conflict danger in this case required knowledge of the rule that "information concerning prior criminal convictions shall be admissible ... during the sentencing ... phase of a capital trial," *State v. Plath*, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984), and recognition of the certainty that, pursuant to that rule, Audrey Smith would be permitted to testify as a penalty phase witness for the prosecution. As both his actions at trial and his testimony at the PCR hearing indicate, Sims did not know the *Plath* rule, and instead maintained an erroneous belief that evidence of a defendant's character or prior convictions – *i.e.*, the kind of evidence Smith would provide – is inadmissible at a capital sentencing trial.⁹

the offer to submit him to cross-examination that was set forth in the very document to which the affidavit was originally attached. Although the submission and adoption of such a finding was disingenuous and inappropriate, it does not impact the substance of the issues now before this Court. On the contrary, with or without Stokes' affidavit, the record establishes that Sims labored under an actual conflict that Stokes was never in any position to validly waive.

⁹Sims' failure to recognize or respond appropriately to the risk of conflict was corroborated by the PCR hearing testimony of attorney Jeff Bloom. Bloom gave a detailed account of a series of pre-trial conversations in which he urged Sims to acknowledge the conflict and bring it to the attention of the trial judge, while Sims maintained that there was nothing to worry about. *See* App. 1848-54. When asked about these conversations at the PCR hearing, Sims said he could not recall whether they had happened. *See* App. 1866, 1892. Despite the absence of any actual disagreement in the testimony, the State-written order denying relief declared the existence of a credibility contest between the two witnesses, and purported to resolve it in favor of Sims. *See* App. 2173. Through this partisan sleight of hand, the State avoided the impact of what was, on its face, credible and probative testimony favoring Stokes, and Attorney Bloom was, at least by implication, found to have lied under oath. The impropriety of these findings was brought to the PCR judge's attention, but he responded by allowing the State's counsel to compound the error in the preparation of another order. App. 2389.

At the time of Stokes' trial, Sims conducted extensive research and prepared written and oral arguments that the 1991 conviction was inadmissible under Rules 404(b), 608, and 609, SCRE. App. 1090-91, 1608, 1876-77. He filed a pretrial "Motion to Prevent Use of Prior Bad Act," in which he argued that evidence of a defendant's prior bad acts was admissible only to impeach a defendant who chose to testify, and that the "facts underlying such convictions, not to mention facts which have been alleged but never proven, have been excluded from evidence." App. 2541-42. At the hearing on his motion Sims further suggested that Stokes' prior conviction might not be admissible because it may not have met the felony requirement of Rule 609, SCRE. App. 1607-08.¹⁰ Sims also argued that even if Rule 609's requirements were met, Rule 404(b) and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), precluded admission of the 1991 conviction. App. 1608. Neither the trial judge nor the Solicitor were persuaded by these arguments. App. 1638.

Undeterred, Sims continued to make sweeping statements about the inadmissibility of prior convictions at the penalty phase. In fact, his misapprehension of the scope of a capital penalty phase remained apparent until just moments before Audrey Smith took the stand for the prosecution. Relying on two non-capital cases, *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998), and *State v. Brooks*, 335 S.C. 140, 515 S.E.2d 764 (Ct. App. 1999), Sims invoked the general rule that in order to admit evidence of prior crimes, there must be some connection to the charged crime. App. 1090-91. As Solicitor Bailey correctly pointed out, however, the rule Sims cited did not apply at the penalty phase of a capital trial, and the law had consistently allowed the admission of evidence of a defendant's character and propensity for violence in such a

¹⁰Rule 609, SCRE, entitled Impeachment by Evidence of Conviction of Crime, sets out the requirements which must be met before a witness may be confronted with a prior conviction.

proceeding. App. 1091-92.

Sims' PCR testimony continued to reflect his belief that there was a plausible legal basis for preventing Audrey Smith from testifying about the facts underlying Stokes' 1991 conviction. App. 1889.¹¹ In that testimony Sims admitted he had been confident during trial that the State could be precluded from introducing evidence of the prior conviction, App. 1889, and he agreed that he would have expressed this confidence to Stokes. App. 1903. Even at the PCR hearing nearly a decade later, Sims adhered to his belief that the prior conviction and the evidence supporting it were inadmissible. *See, e.g.*, App. 1900 (reiterating view that classification of prior conviction as felony is relevant to admissibility at penalty phase of a capital trial).

E. Audrey Smith's appearance at the capital sentencing trial.

As dictated by settled law, the trial judge rejected Sims' arguments against admission of the 1991 conviction and Audrey Smith's story supporting it. App. 1092. Moments later, the prosecution called Smith as its lead-off penalty phase witness. App. 1113. On the witness stand, Smith gave approximately sixteen pages of direct testimony detailing two assaults she claimed to have suffered at the hands of Stokes, one of which was the 1990 incident for which Sims had been the prosecutor. While Smith's story generally followed the version Sims had elicited from her at the 1991 trial, there were material differences in the details. For example:

◆ On cross-examination at the 1991 trial, Smith was forced to concede that

¹¹Elsewhere in his PCR testimony, Sims responded to questions from respondent by suggesting that he had anticipated that the trial court would admit the evidence of Stokes' prior conviction, and that Smith would be permitted to testify about the underlying facts of that conviction. App. 1868, 1906. These suggestions contradict other portions of his PCR testimony cited in the text, and cannot be squared with his consistent course of conduct prior to and during the trial itself. In any event, if Sims actually *did* expect Smith to appear and testify, then his failure to recognize and deal with the manifest conflict of interest that loomed ahead was even less defensible.

she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. App. 2460-62. This fact was not mentioned at the 1999 trial.

- ◆ At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. App. 2439, 2449. In her 1999 testimony, Smith made no mention of Stokes changing his mind. App. 1122-23.
- ◆ At the 1991 trial, Smith was confronted with an inconsistency between her preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. App. 2450-51. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 trial.
- ◆ At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." App. 2440. At the 1999 trial, Smith claimed Stokes had actually been looking for guns. App. 1125.
- ◆ At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." App. 2440-41. In 1999, Smith simply said that "he put it around my neck and I passed out." App. 1126.

In contrast to the twenty-page cross-examination of Smith conducted by Stokes' public defender at the 1991 trial, Sims' cross-examination at the capital trial covered a mere two pages of the transcript. *See* App. 1142-44. While Smith had provided Sims with multiple opportunities to challenge the details of her claims, and in so doing to raise significant doubts about her portrayal of what had transpired between her and Stokes, Sims made use of none of them. He did not expose Smith's own role in reinitiating contact with Stokes; he did not highlight the changes in her testimony (all of which favored the prosecution); and he did not confront her with the fact that she had been forced to deny the accuracy of a court transcript in an effort to defend testimony Sims himself had elicited from her at the 1991 trial. Instead, Sims merely asked Smith to confirm that she had not heard from Stokes since his release from prison in 1998, that it had

been some time since Stokes had written to her, and that Stokes had been jealous and possessive. App. 1142-44. Sims then sat down, putting a quick end to his unexpected and awkward confrontation with the woman whose story he had himself convinced a jury to believe eight years earlier.

REASONS THE WRIT SHOULD BE GRANTED

The PCR court's denial of relief on Stokes' claim that Sims labored under a conflict of interest rests upon two errors of law warranting this Court's review. First, the PCR order treated the question of the existence *vel non* of a conflict as governed by *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), which concerned successive representation in *unrelated* cases, and refused to acknowledge that this case involved successive representation in *related* cases, to which a different rule should apply. And second, the PCR order purported to find that Stokes had waived his right to conflict-free counsel, but did so without acknowledging either the constitutionally mandated elements of a valid waiver, or the absence of any record evidence capable of satisfying them. These errors are described in more detail below.

I. AS COURTS IN OTHER STATES HAVE DETERMINED, A LAWYER'S SUCCESSIVE PARTICIPATION, FIRST AS PROSECUTOR OF A DEFENDANT IN ONE CASE, AND LATER AS DEFENSE ATTORNEY FOR THAT SAME DEFENDANT IN A RELATED CASE, VIOLATES THE SIXTH AMENDMENT GUARANTEE OF CONFLICT-FREE COUNSEL.

A. The law governing conflicts of interest.

The Sixth Amendment guarantees that the accused in a criminal case be afforded counsel whose ability to act on his client's behalf is unimpaired by a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Wood v. Georgia*, 450 U.S. 261 (1981). Our justice system presumes that counsel will act as an accused's

advocate, and the Supreme Court has emphasized that “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); see also *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Nowhere is the fundamental safeguard of conflict-free counsel more essential to ensure the proper functioning of our adversarial system, and to maintain the public confidence through the appearance of impartiality, than in the trial of a capital case. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Conflicts of interest can take a variety of forms. As a general matter, “an actual conflict of interest occurs[] ‘... when a defense attorney places himself in a situation inherently conducive to divided loyalties’” *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)); see also, e.g., *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). To establish entitlement to relief, “a defendant need not demonstrate prejudice if there is an actual conflict of interest.” *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450; *Glasser v. United States*, 315 U.S. 60, 76 (1942) (where counsel’s representation is adversely affected by conflict of interest, there is no need “to indulge in nice calculations as to the amount of prejudice arising from [the] denial [of the right to conflict-free counsel]”); see also *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (a prisoner alleging a conflict of interest must ordinarily show an “actual conflict” “adversely affected his counsel’s performance”); *id.* at 172 n.5 (quoting *Holloway*, 435 U.S. at 482) (“[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from

adverse effect. An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.”); *Holloway*, 435 U.S. at 489 (“representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing”) (emphasis added); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).

Successive engagement as prosecutor and then defense lawyer carries inherent risks which, depending upon the circumstances, can ripen into actual conflict. While it is sometimes permissible for counsel who prosecuted an individual to later represent that same individual in a different, wholly unrelated proceeding, *see State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007),¹² counsel’s representation of an individual he previously prosecuted in the same matter or, as is the case here, in a different but related matter, is universally prohibited. *United States v. Ziegenhagen*, 890 F.2d 937, 940 (7th Cir. 1989) (“[G]overnment employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper.”); *People v. Martin*, 564 N.Y.S.2d 503, 506 (N.Y.App.Div. 1990) (“The fact that [counsel] had previously prosecuted defendant should have alone ... been sufficient to establish a conflict of interest”); *see also State v. Wareham*, 143 P.3d 302, 306-07 (Utah Ct. App. 2007) (“defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client”); *Worthen v. State*, 715 P.2d 81, 81 (Okla. Crim. App. 1986) (same); *People v. Hoskins*, 392 N.E.2d 405, 408 (Ill. App. Ct. 1979).¹³

¹²*See also, e.g., Hendricks v. State*, 128 P.3d 1017, 1021-22 (Mont. 2006); *State v. Cobbs*, 584 N.W.2d 709, 710 (Wis. Ct. App. 1998); *Smart v. Maass*, 939 P.2d 1184 (Or. Ct. App. 1997); *Maiden v. Bunnell*, 35 F.3d 477, 481-82 (9th Cir. 1994).

¹³*See also United States v. Sheppard*, 121 Fed. Appx. 508, 510 (4th Cir. 2005) (defendant’s appellate counsel initially appeared on behalf of the prosecution in the same matter); *Skelton v. State*, 672 P.2d 671 (Okla. 1983) (defendant’s trial counsel originally

The consensus among courts that have addressed these circumstances is that a conflict of interest exists – and a new trial is therefore required – where an attorney serving as defense counsel previously prosecuted his client in a different but related case, and counsel’s participation in the earlier prosecution was substantial and personal. Cases are considered “related” when the prior conviction is used in the subsequent case as evidence against the defendant. *Wareham*, 143 P.3d at 307 (attorney prosecuted defendant on matter used to enhance sentence in later proceeding at which same attorney served as defense counsel); *Ziegenhagen*, 890 F.2d at 940-41 (7th Cir. 1989) (attorney appeared for prosecution to recommend sentence length for two convictions used to enhance punishment for subsequent conviction rendered with same attorney then acting as defense counsel); *Worthen*, 715 P.2d at 81 (attorney prosecuted defendant twice and both resulting convictions were used to enhance punishment for later offense as to which same attorney served as defense counsel); *Hoskins*, 392 N.E.2d at 407-08 (attorney prosecuted defendant and secured probationary sentence, which was later revoked for conduct as to which same attorney represented defendant).

Counsel’s participation in a “related” prior prosecution is regarded as sufficiently personal and substantial to generate an impermissible conflict if he appeared on behalf of the government in the earlier proceeding, and would be required to challenge the outcome of the earlier proceeding in his new capacity as defense counsel.¹⁴ This is so because the close relationship between proceedings places counsel in the impossible position of having to attack

appeared on behalf of the state at arraignment and preliminary hearing in same matter); *People v. Kester*, 361 N.E.2d 569, 570 (Ill. 1977) (same).

¹⁴By contrast, there is no substantial or personal relationship between proceedings if counsel merely served as a prosecutor in the relevant government agency at the time that the defendant was prosecuted. *Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997).

his own work product and the credibility of a former client or complainant. *See Wareham*, 143 P.3d at 307 (“defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client”); *Ziegenhagen*, 890 F.2d at 940 (conflict arose where “defense attorney was required to make a choice of advancing his own interests to the detriment of his client’s interests”); *see also United States v. Sheppard*, 121 Fed. Appx. 508, 511 (4th Cir. 2005) (observing that court of appeals knew of no “instance where counsel were permitted to appear before a court as counsel of record, argue on the record, and then successfully argue that the words and arguments were not attributable to them”); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (conflict of interest can “exist between an attorney’s own personal interest and those of the client”); *United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991) (counsel’s circumstances must not cause him to “harbor substantial personal interests which conflict with the clear objective of his representation of the client”). Counsel in such circumstances also confront the choice of having to inappropriately rely upon or ignore confidences obtained while serving in their former capacity. *See, e.g., United States v. Nicholson*, 475 F.3d 241, 250-52 (4th Cir. 2007); *Pinkney v. United States*, 851 A.2d 479, 488 (D.C. 2004); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991).

Personal and substantial participation as prosecutor and then defense counsel in related cases is regarded as intolerable both because of the influence, tangible and intangible, that the successive roles have on the representation, and because of the unseemly shadow such representation casts across the integrity of a criminal proceeding. *See State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (2005) (even the possibility that counsel may be tempted “to

dampen the ardor of his defense” is sufficient to prove an actual conflict of interest requiring relief); *Kester*, 361 N.E.2d at 572 (under such conditions counsel is “subject to subtle influence which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner,” and this influence can be expected to generate a “subliminal reluctance” to attack prior work); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980) (“Both the fact and the appearance of total professional commitment are endangered by adverse representation in related cases.”). Impermissible successive representation is especially disturbing and erosive of public confidence when it occurs in a capital case. See, e.g., *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (“It ... is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”); *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (acknowledging “the notion, deeply rooted in the common law, that ‘justice must satisfy the appearance of justice’”); *Howerton v. State*, 640 P.2d 566, 568 (Okla.Crim.App. 1982) (“The public has a right to absolute confidence in the integrity and impartiality of the administration of justice.”).

B. Sims labored under a conflict of interest.

Sims’ successive engagement, first as the prosecutor at Stokes’ 1991 ABWIK trial at which Smith was the key witness, and later as defense counsel tasked with confronting Smith at Stokes’ 1999 capital trial, created a clear and manifestly impermissible conflict of interest. Sims’ participation in the 1991 prosecution was both personal and substantial; as described *supra*, he not only signed the indictment against Stokes, he also appeared as the sole representative of the prosecution at the jury trial, and fought hard for Smith’s credibility when it was attacked by Stokes’ public defender. It is equally clear that the two proceedings became related when the

prosecution made the 1991 judgment and the live testimony of Smith a featured component of its case for a death sentence at the 1999 trial. Under the decisions discussed above, these facts alone are sufficient to dictate a finding that Sims' representation violated the Sixth Amendment, and that a new trial must be ordered. *See, e.g., Gregory, supra; Ziegenhagen, supra; Wareham, supra; Worthen, supra.*

That Sims' role as prosecutor and advocate for Smith in 1991 was irreconcilable with his duty as lead defense counsel for Stokes in 1999 is confirmed by his handling of the issues relating to the 1991 case at the 1999 capital trial. While he managed to avoid alerting the trial judge to the full measure of his involvement in the 1991 case, Sims' ill-conceived arguments based on *Lyle, Cutro, Brooks* and the Rules of Evidence could not shield him from a confrontation with the conviction he secured at the 1991 trial, or with the live testimony of Smith herself. And when that confrontation occurred, Sims reacted in precisely the manner a conflicted lawyer would: by pulling his punches in the cross-examination of Smith.¹⁵ In so yielding to the impulse "to dampen the ardor of his defense," *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450, and by making the "choice of advancing his own interests to the detriment of his client's interests," *Ziegenhagen*, 890 F.2d at 940, Sims cemented the conflict he should have seen coming and taken steps to avoid months earlier.

Finally, it must be emphasized that this case differs from the other cases cited herein in an important respect. Whereas the conflicted attorneys in those cases compromised their

¹⁵Sims' failure to use what was available to him during the cross-examination, *see supra* at 14-15 (describing points of vulnerability in Smith's story), stands in sharp contrast to his handling of the Norris Martin cross-examination, where Sims appeared to regard no detail as too small or trivial to warrant inquiry. *See App. 905-31* (guilt phase); *App. 1170-86* (penalty phase). The source of the disparity in Sims' approaches is self-evident: he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination.

representation of defendants facing prison time, the conflict in this case manifested itself in the sentencing phase of a death penalty trial. This not only raised the stakes of Sims' gamble that he could avoid a run-in with Smith as high as they could go, it also meant that when his gamble failed – as it did – Sims was not only confronted with the *result* of his prior prosecution, but also with the very *witness* whose story he had embraced and vouched for as an officer of the court in 1991. The result was a clearer, more tangible manifestation of conflict than was necessary to support a grant of relief in any of the other cases, and a death sentence imposed under circumstances that defy the fundamental expectation that a man on trial for his life will be represented by loyal, conflict-free counsel.

C. The PCR court erred as a matter of law by treating this case as governed by *Childers*, and by refusing to acknowledge or give legal effect to the obvious relationship between the 1991 and 1999 proceedings.

The primary determination underlying the PCR court's denial of relief is that, pursuant to *Childers, supra*, *People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y. App. Div. 2002), and *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (Wis. Ct. App. 1998), the appointment as defense counsel of an attorney who previously prosecuted the defendant does not give rise to a *per se* conflict of interest. *See* App. 2173-2176. That is true, but it is also irrelevant. *Childers*, *Abar* and *Cobbs* all involved defendants represented by lawyers who had previously prosecuted them, but none of the prior prosecutions had any relationship to the subsequent cases in which the former prosecutors served as defense counsel. *See Childers*, 373 S.C. at 372, 645 S.E.2d at 235; *Abar*, 290 A.D.2d at 593, 736 N.Y.S.2d at 156-57; *Cobbs*, 221 Wis.2d at 107, 584 N.W.2d at 711. Because no such relationship existed in those cases, the defendants could only have prevailed under a *per se* rule categorically barring any lawyer from defending someone he or she

had previously prosecuted, regardless of whether the prior prosecution could have had any effect on the later defense.

This case occupies a different, smaller, and more troublesome category – one this Court has not addressed before. The issue here is not merely whether Sims’ status as a former prosecutor automatically generated a *per se* conflict of interest. Instead, it is whether Sims’ participation on *both sides* of the Audrey Smith ABWIK matter – as trial prosecutor in 1991 and as 1999 defense counsel tasked with confronting Smith and the evidence from the 1991 trial – gave rise to an actual conflict. Neither *Childers*, *Abar* nor *Cobbs* speak to that issue, but the decisions cited and discussed *supra* at 17-20 do, and they all make clear that this sort of successive participation in related cases is impermissible.

The PCR order also maintains that “there was no connection between the former offense and the instant case.” App. 2176. Rather, according to the order, “[t]he only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction.” *Id.* On their face, these two statements are irreconcilable. When the prosecution decided to feature both the “fact[s]” of the 1991 conviction and Smith’s testimony detailing the underlying offense as prominent pieces of its 1999 case for death, it necessarily established a “connection” between the two proceedings. And when Sims came face to face with Smith – who appeared at the 1999 trial to tell a version of the very story Sims himself had elicited and vouched for in 1991 – the relationship between the two cases became undeniable. The PCR order’s suggestions to the contrary are conclusory because they have to be; one cannot discuss the actual circumstances of Sims’ roles in the two proceedings without acknowledging the predicament in which he found

himself. Because this case presents an important question of first impression, this Court should grant certiorari, both to acknowledge the real and tangible connection that existed between the 1991 and 1999 proceedings, and to confirm, as courts in other jurisdictions have done, that such a connection gives rise to an actual conflict of interest.

II. THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING A WAIVER OF THE RIGHT TO CONFLICT-FREE COUNSEL ON THE BASIS OF A TRIAL RECORD CONTAINING NO MENTION OF A CONFLICT OR WAIVER, AND A POST-CONVICTION RECORD THAT DOES NOT ADDRESS, LET ALONE SATISFY, MOST OF THE CONSTITUTIONALLY ESSENTIAL ELEMENTS OF A VALID WAIVER.

A. Stokes did not waive, and could not possibly have waived, his right to conflict-free counsel.

While it is possible for a defendant to waive his right to conflict-free counsel, any such waiver “not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). “[W]hether such a relinquishment or abandonment has occurred depends ‘in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’” *Minnick v. Mississippi*, 498 U.S. 146, 159 (1990) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). When the existence of a waiver is disputed, it is “incumbent upon the State to prove ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Brewer v. Williams*, 430 U.S. 387, 404, (1977) (quoting *Zerbst*, 304 U.S. at 464). And in considering the proof offered by the state, a reviewing court must “indulge in every reasonable presumption against waiver.” *Brewer, supra* (citations omitted); *see also id.* (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 238-40 (1973); *United States v. Wade*, 388 U.S. 218, 237 (1967)) (“This strict standard

applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.”).

In the context of a potential (or in this case, actual) conflict of interest, any waiver purporting to be valid must be preceded by specific advice to the defendant regarding his right to effective representation, the details of his attorney’s possible conflict, the potential perils of the conflict, and an opportunity to discuss the matter with outside counsel. *See, e.g., Thomas v. State*, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (“To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.”); *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013) (relying on record of extensive hearings conducted by trial judge to review waiver of conflict of interest); *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992) (citations omitted); *Pinkney v. United States*, 851 A.2d 479, 488-89 (D.C. 2004); *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991). A valid waiver of a conflict also requires “at least some affirmative effort by the trial court to inform the defendant of the way the conflict might operate to impact deleteriously upon the reasoned and competent presentation of his or her defense.” *United States v. Casiano*, 929 F.2d 1046, 1053 (5th Cir. 1991); *see also Maiden v. Bunnell*, 35 F. 3d 477, 480 (9th Cir. 1994) (defendant’s acknowledgment during colloquy that defense counsel previously prosecuted him, and that defendant nevertheless desired that counsel remain on case, insufficient to constitute valid waiver). Additionally, because conflicts are inherently fluid, a waiver at the commencement of representation may not “serve to waive all conflicts of interest that arise throughout the course of that defendant’s criminal proceedings.” *Swartz*, 975 F.2d at 1048 (defendant’s waiver did not extend to the sentencing phase of trial when defense counsel

chose to pursue new strategy and argument); *see also Thomas, supra* (“Petitioner should have been given another opportunity to waive the conflict, if she so chose, when the solicitor offered to dismiss the charge against one spouse in exchange for the other spouse pleading guilty”).

In this case, none of the essential elements of a valid waiver are present. To begin with, it is undisputed that the trial record contains no mention of Sims’ 1991 prosecution of Stokes, let alone a discussion or colloquy with Stokes about the effects of Sims’ prior engagement on his representation in connection with the 1999 capital trial.¹⁶ *See* App. 1822 (counsel for respondent conceding the point at the outset of the PCR hearing: “I cannot find in the record that there was any reference specifically to Mr. Sims prosecuting Mr. Stokes previously.”).

Furthermore, Sims did not understand or appreciate the nature of his conflict, and therefore could not have provided Stokes with the advice necessary to make an informed waiver. As demonstrated by his statements at trial and his testimony at the PCR hearing, Sims steadfastly believed that Stokes’ 1991 conviction and the evidence supporting it were inadmissible at the penalty phase of the 1999 capital trial. Operating on this firmly held yet hopelessly misguided belief, it would have been impossible for Sims to have provided Stokes with an accurate or frank assessment of the nature and possible effects of his conflict.

Sims’ and Johnson’s PCR hearing testimony confirms that no such assessment was ever made available to Stokes. As described *supra* at 5, Sims and Johnson testified consistently that their advice to Stokes about Sims’ past consisted of nothing more than a reminder that he had been a prosecutor, and had once prosecuted Stokes, and an inquiry about whether Stokes had a

¹⁶Sims did disclose on the record that he personally signed Stokes’ 1991 indictment. App. 1637-38. However, this disclosure was made only in response to the introduction of the indictment as evidence, and Sims’ ensuing failure to reveal his additional role as the trial prosecutor in the 1991 case was misleading. *See Weik v. State*, 409 S.C. 214, 222, 716 S.E.2d 757, 761 (2014).

“problem” with that. App. 1896, 1910. Neither attorney had any recollection of specifically informing Stokes that the 1991 conviction was likely to be admitted, that Audrey Smith was likely to testify for the prosecution, or that Sims would face an obvious conflict if called upon to challenge Smith’s story on Stokes’ behalf. App. 1903-04 (reproduced *supra* at 9-10); *see also id.* at 1913. Having omitted these key facts, neither Sims nor Johnson were in any position elicit a waiver from Stokes, or to decide for themselves – and their client, and the trial court – that a valid waiver had been secured. *See Wheat v. United States*, 486 U.S. 153, 163 (1988) (“Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relationship to the care with which he conveys all the necessary information to them.”); *see also, e.g., Morris v. Beard*, 633 F.3d 185, 198 (3rd Cir. 2011) (“[W]e question whether an attorney who admittedly did not understand or appreciate the magnitude of his conflict could adequately convey the information necessary for his client to make an informed waiver.”).

The significance of these omissions by 1999 trial counsel was amplified by Stokes’ own ignorance of what had occurred at the 1991 trial, *e.g.*, how Audrey Smith had testified, how her story had been challenged by his public defender, or how then-Assistant Solicitor Sims had conducted himself at the 1991 proceeding. And like his attorneys, Stokes also had no knowledge that either the 1991 conviction or, more importantly, the testimony upon which it rested, would be admitted at the 1999 trial. In fact, even crediting Sims’ claims that he would have told his client that the “issue” of the 1991 conviction’s admissibility could have gone either way at trial, the information provided to Stokes was materially misleading. In truth, there was no “issue”; both the conviction and Smith’s testimony about the underlying incident were unquestionably

admissible under long-settled law. Absent that information – which Sims could not have provided since he did not know it himself – Stokes could not possibly have appreciated the perils of the confrontation that lay ahead, and was consequently ill-equipped to weigh the risks of proceeding with Sims against any benefits he may have perceived. In short, by counsel’s own account Stokes was not told of, and did not otherwise know of, most of the information that would have been essential to a valid waiver of Sims’ conflict of interest. Because he was not so informed, the record in this case cannot possibly support a finding of a “knowing, intelligent” waiver “done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady*, 397 U.S. at 748.

B. The PCR court erred as a matter of law in finding a valid waiver on the record presented here.

According to the order signed by the PCR judge, “there was a knowing waiver of a conflict of interest.” App. 2177. Yet nowhere does that order acknowledge either the legal standard for finding such a waiver, or the well-settled rules for applying that standard. In fact, the closest the order comes to suggesting a waiver standard is its reference to several sources discussing circumstances under which conflicts may or may *not* be waived. *See* App. 2177-78. On balance, however, those sources do the waiver finding contained in the order at least as much harm as good.

For example, the PCR order quotes the Comment to SCACR, Rule 407, Rule 1.7, as providing that, “when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” App. 2177. In this case, a disinterested lawyer *would* so conclude; indeed, Jeff Bloom did so more than once in his

pre-trial communications with Sims. By this authority Sims had no business even “ask[ing] for” Stokes’ consent to the representation.

The considerations the PCR order draws from *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1991), and A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), likewise undercut the proposition that a valid waiver occurred. For example, as described above, the record provides no basis for concluding that Stokes was “in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation.” *United Sewerage Agency* (quoted in PCR Order). App. 2177-78. The record similarly gives no indication of “appropriate client consent” to Sims’ “cross examination [of Audrey Smith as] an adverse witness” A.B.A. Formal Ethics Opinion (also quoted in the PCR Order). App. 2178. On the contrary, the most powerful message emanating from the record in this case is that neither Sims nor Johnson nor Stokes understood or appreciated the nature, extent or seriousness of the conflict at a time when a valid waiver could theoretically have been made.

The reason that the PCR order fails to acknowledge or articulate the settled standard for waiver of a guarantee like the Sixth Amendment right to conflict-free counsel becomes clear after a review of the reasoning actually set forth in support of the waiver finding. According to the order, Stokes waived his fundamental constitutional right – silently, and off-the-record – simply by failing to affirmatively request new counsel after being informed that Sims had been a prosecutor, and had once sent Stokes to prison. By implication, the order treats as irrelevant Stokes’ undisputed ignorance of (a) the fact that Audrey Smith would testify for the prosecution; (b) the fact that Sims would cross-examine Smith when she testified; (c) how Sims had conducted himself as the prosecution’s advocate for Smith and her story at the 1991 trial; (d)

whether Sims' successive roles would impair his advocacy, consciously or unconsciously; (e) what Stokes' own rights were under state and federal law; and so on. As authorities cited – but not heeded – in the order itself make clear, that is simply not how waiver law works. *See Cobbs*, 221 Wis.2d at 105, 584 N.W.2d at 711 App. 2101-02. (“The waiver [of a conflict] must be knowing and voluntary.”); *id.* (“The judge should ensure that the defendants *understand the potential conflicts and determine whether they want separate counsel*.... [T]his determination [to allow representation] *should not be made unless it is clear the defendants have made a voluntary and knowing waiver* of their right to separate counsel.”) (modifications by the court) (citation omitted) (emphasis added); *United States v. Perez*, 325 F.3d 115, 127 (2nd Cir. 2003) App. 2107-08. (“Although. [a waivable] conflict might require a defendant to abandon a particular defense or line of questioning, he can be *advised as to what he must forgo*; he “can then seek the *legal advice of independent counsel and make an informed judgment* that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel.”) (quoting *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir.1993)) (emphasis added).

Relatedly – and finally – the order also faults Stokes for failing to take the stand at the PCR hearing “to contradict the testimony of either Mr. Johnson or Mr. Sims,” which assertedly left him unable to “satisfy [his] burden of proof under these discrete circumstances.” App. 2163; *see also* App. 2392-93 (discussing and defending this finding). This criticism rests on a fundamental mistake of law. As discussed above, there was no imperative for Stokes to “contradict” Sims’ or Johnson’s testimony since, even when taken as true, it fell far short of a sufficient factual basis for a valid waiver of the right to conflict-free counsel. Once the PCR

court had heard from Sims and Johnson, and had been provided with the record of the 1991 trial demonstrating that Stokes had not been present to observe Smith's testimony or Sims' performance as the prosecutor, it had all it needed with which to apply the rules of waiver. Although the PCR order seems to imply otherwise, the requisite analysis does not begin with a presumption of waiver that must be rebutted by a prisoner. Instead, the inquiry proceeds from the opposite direction, and requires the reviewing court to determine whether the record reflects "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and to make that determination while "indulg[ing] every reasonable presumption against the waiver of fundamental rights," *Glasser v. United States*, 315 U.S. 60, 70 (1942) (refusing to find that defendant, himself an "experienced attorney," "tacitly acquiesced" to conflicted counsel's representation by failing to timely object); *see also Johnson*, 304 U.S. at 464. As demonstrated above, the record in this case simply does not satisfy the standard for a valid waiver. The PCR court's adoption of an order concluding otherwise cannot be sustained, and this Court should grant certiorari to correct it.

III. THE PCR COURT ERRED AS A MATTER OF LAW IN HOLDING THAT DIRECT APPEAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S FAILURE TO CONDUCT AN INDEPENDENT ASSESSMENT OF THE EVIDENCE TO DETERMINE WHICH STATUTORY MITIGATORS WERE SUPPORTED, OR TO INSTRUCT THE JURY ON A MITIGATOR FOR WHICH THERE WAS EVIDENTIARY SUPPORT.

To prevail upon a claim of ineffective assistance of counsel, a post-conviction relief applicant must establish that his attorney's representation "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 688, 694 (1984). The same standard applies to review of appellate counsel's performance.

Evitts v. Lucey, 469 U.S. 387 (1985).

Before the PCR court, Stokes contended that his direct appeal counsel provided constitutionally ineffective assistance by failing to challenge two related omissions by the trial court during the penalty phase of the 1999 capital trial. In denying relief on this ground, the PCR court held that appellate counsel's performance could not have been deficient since trial counsel had failed to lodge the objections necessary to preserve either issue for appeal. App. 2161-62. As set forth below, while it is ordinarily true under South Carolina law that a contemporaneous objection is an essential prerequisite to appellate review, that was not the case with respect to the issues overlooked by counsel here. Thus, the PCR court erred by rejecting Stokes' claim on the ground that appellate counsel's performance was not deficient.

A. Relevant facts.

Up until the moment she was killed, Connie Snipes, who believed she was accompanying Stokes and Syphrette to murder another man, willingly participated in the events preceding her death. There was evidence to support each of the following propositions:

- ◆ Snipes located Martin and asked him to go with her and Stokes. App. 880-81.
- ◆ Snipes voluntarily got in the car with Stokes, Martin, and Syphrette. App. 884.
- ◆ When they arrived at the designated location, Snipes voluntarily accompanied Martin and Stokes into the woods. App. 890-91, 922.
- ◆ Snipes voluntarily had sex with Martin and Stokes once in the woods. App. 924, 973-74, 1172.

In fact, even the Solicitor conceded that there was evidence from which the jury could infer that Snipes had accompanied Stokes and Martin voluntarily, and that she had sex with them

voluntarily. App. 991-92.

These facts formed the basis of the defense theory that Snipes voluntarily participated in at least some of Stokes's conduct, and thus, there was evidence to support the statutory mitigator relating to a victim's participation. *See* S.C. Code § 16-3-20(C)(b)(3) ("The victim was a participant in the defendant's conduct or consented to the act."). Just before the penalty phase began, Sims, in response to the court's question, indicated that the defense intended to establish that Snipes' conduct satisfied the victim participation statutory mitigator. App. 1084-85. While the court indicated some skepticism about the evidentiary support for this mitigator, App. 1086-87, it never revisited the issue. Additionally, there is no evidence that the court ever conducted the statutorily required assessment of the evidence at the conclusion of the penalty phase. As a result of this omission, trial counsel was afforded no occasion to object to the trial court's evaluation of the evidence. Ultimately, the court did not include the victim participation factor in its instructions to the jury. App. 1482-83.

Stokes' direct appeal counsel, Joseph Savitz, did not challenge either the trial court's failure to conduct the statutorily-required evidentiary review or its failure to instruct the jury on a mitigating factor that was supported by the evidence. When questioned about these omissions at the PCR hearing, Savitz was unable to recall a strategic reason for not raising the issues. App. 1832-33. To the contrary, Savitz testified that before and after the Stokes appeal he had pressed these very issues because he believed they had merit. *Id.*

B. The trial court failed in its obligation to conduct an independent assessment of the mitigation evidence.

The Eighth Amendment requires that a jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Any impediment to a juror’s consideration of relevant mitigating factor is unconstitutional. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury’s consideration of penalty phase evidence); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation).

To these ends, South Carolina’s capital sentencing statute obligates a trial court to conduct its own independent review of the penalty phase evidence in order to determine which statutory mitigating factors are supported. Indeed, absent a waiver from the defense the court is required to submit to the jury any mitigating circumstance with evidentiary support. S.C. Code § 16-3-20(C). To ensure compliance with this statutory requirement, this Court set out a specific procedure for trial courts.

Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

State v. Victor, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989).

In the years following *Victor* this Court consistently approved this approach, and never suggested a deviation from the statutory requirement. *See State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Rogers*, 338 S.C. 435, 438, 527 S.E.2d 101, 103 (2000); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996). Thus, for at least ten years prior to Stokes’s trial

the law was settled that the trial court had an obligation to assess the penalty phase evidence to determine which statutory mitigators were supported by the evidence.

Such an evaluation never occurred at Stokes's trial. The trial court simply did not conduct the required analysis and never engaged in the procedure set out in *Victor*. To be sure, subsequent cases have clarified defense counsel's duty to object to the trial court's initial determination at the "*Victor* conference." See, e.g., *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996). But these cases are grounded in the assumption that a *Victor* conference actually occurs. Here, the trial court never engaged in its own review of the evidence and, therefore, contrary to the cases cited *supra*, the defense was never presented with an opportunity to object to the trial court's determination. Given the trial court's failure to undertake the statutorily required evaluation of evidence, appellate counsel's failure to raise this issue on direct appeal represented ineffective assistance of counsel.

C. The trial court also failed in its obligation to instruct the jury on all mitigators supported by the evidence.

As discussed *supra*, ample evidence presented at both phases of Stokes's trial established that Snipes participated in the events that preceded the homicide. See *State v. Stokes*, 345 S.C. 368, 374, 548 S.E.2d 202, 205 (2001) (noting evidence that Snipes voluntarily accompanied Stokes into the woods). Based on the evidence that had already been presented, trial counsel alerted the court to their reliance on this statutory mitigating factor at the outset of the penalty phase. App. 1084-85. The trial court ultimately did not charge the jury on this or any other statutory mitigating circumstance. This failure was error.

Pursuant to S.C. Code § 16-3-20(C), the trial judge was obligated to instruct the jury on any mitigating factor that was supported by the evidence. *State v. Pierce*, 289 S.C. 430, 435, 346

S.E.2d 707, 711 (1986), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Bowman*, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005) (acknowledging duty of trial court to instruct on mitigating factor supported by evidence), *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006); *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (trial court was required to instruct the jury on a statutory mitigator raised by evidence of intoxication); *State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991) (same). When assessing mitigating evidence, a trial court should not narrowly construe what is relevant and what is not. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation); *Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury's consideration of penalty phase evidence). In fact, the trial court must instruct on every mitigating factor for which there is any evidence without regard to the weight of the evidence. *Pierce*, 289 S.C. at 435, 346 S.E.2d at 711.

The trial court's premature refusal to charge the jury on an instruction both supported by the evidence and requested by trial counsel seems to have rested on the court's guilt phase assessment of this evidence. "The victim having participated in the act situation, if that goes back to what was not allowed [in the guilt phase] because of the way the letter came in and all, you're not going to be able to do it. . ." App. 1086 (trial court's response to request to charge victim participation mitigator). The court may well have been correct in its assessment that evidence of Snipes's conduct was irrelevant to the defendant's guilt and was, therefore, inadmissible at the guilt phase of the trial. But this guilt phase evidentiary ruling should not have governed the

evidentiary analysis at the penalty phase given the very different issues to be decided by the jury at that point in the trial.

Appellate counsel failed to include this claim on direct appeal and had no strategic reason for this failure. App. 1832-33. While it is true that subsequent legal developments would establish that the error was not adequately preserved for appellate review, that requirement was not clearly established at the time counsel handled this case. *See* App. 1840-41. As a result, there exists a reasonable probability that the issue would have been considered if it had been raised, and that the result of Stokes' direct appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Because the PCR court erred in holding otherwise, this Court should grant certiorari.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

November 12, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County
L. Casey Manning, Circuit Court Judge

SAMMIE LOUIS STOKES,

PETITIONER,

V.

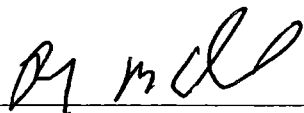
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000635

CERTIFICATE OF SERVICE

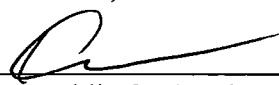
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Donald J. Zelenka, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of November, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.