STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
L. Casey Manning, PCR Circuit Court Judge

SAMMIE LOUIS STOKES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2013-000635

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

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II. WHETHER THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING 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?

ARGUMENTS WHY CERTIORARI SHOULD BE DENIED

I. Certiorari is not warranted where the fact that appointed counsel Thomas Sims had previously prosecuted the Petitioner in 1991 was known by Stokes who after discussion with counsel waived his right to have different counsel appointed. The PCR Court reasonably concluded that there was no actual conflict of interest in his present representation of Petitioner and that alternately there was a waiver of any conflict of interest.

In his first two arguments, Stokes contends that that counsel Thomas Sims had an actual conflict of interest in representing Stokes in 1999 as court appointed counsel because he had personally prosecuted Stokes in 1991. The 1991 prosecution involved on Indictment 91-GS-38-0190 concerned the December 2, 1990 assault on Audrey Smith. It resulted in a 1991 conviction for assault and battery of a high and aggravated nature and sentence of 10 years after a jury trial before Judge John H. Smith. The record also reveals that Sims signed the indictment for assault and battery with intent to kill and personally handled the trial. Further, the evidence of the 1991 conviction and sentence was introduced by the State in the penalty phase in State Exhibit One in the chart [App.p. 1012-13, ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith, who counsel Sims cross-examined. The record also reveals that there is no indication on the record before the jury that Sims had prosecuted Stokes.

Petitioner contends that the PCR court erred in concluding that there was no actual conflict of interest because it viewed the potential conflict from a standard of an unrelated case as opposed to a related case. Further, the Petitioner contends that the PCR court's finding that there was a waiver of a conflict of interests was deficient because it did not acknowledge the constitutionally valid elements of a knowing waiver and a failure on the part of the initial order to specifically cite federal constitutional cases concerning knowing and voluntary waivers, such

as Boykin v. Alabama, 395 U.S. 238 (1969), Glasser v. U.S., 315 U.S. 60 (1942) and Johnson v. Zerbst, 304 U.S. 458 (1938).

Judge Manning in his order denying the motion to alter concluded that Stokes ignored its conclusions that implicitly acknowledges this constitutional waiver standard in the following findings and conclusions:

> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that **Stokes knowing[ly] and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial.** Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

App.p. 2163, Order, p. 25. (emphasis added).

> This Court concludes as a matter of law that Thomas Sims's prior prosecution of Stokes does not create an actual conflict of interest and/or require a new trial. First, this Court finds as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and **Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter. Further, this Court finds credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter**.

App.p. 2168-69, Order, p. 30-31. (emphasis added). "This Court alternately finds that there was a knowing waiver of a conflict of interest." App.p. 2177. Order, p. 39.

The PCR judge further relied upon SCACR Rule 407, Rule 1.7 (b). The hearing court specifically found: "[H]ere, Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware - based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. This Court finds that the Petitioner waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." App.p. 2183, Order, p. 45. See Order Denying Rule 59 Motion, App.p. 2377-2379.

Respondent respectfully submits that certiorari is not warranted were the PCR court reasonably concluded under the particular facts that there was no conflict of interest in Sims representation and that Stokes waived any conflict or right to different counsel. There is probative evidence to support the findings and conclusions.

Standard of Review

Upon appellate review, this court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR [court's] findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). "This [c]ourt will uphold the findings of the PCR court when there is any evidence of probative value to support them, and [it] will reverse the decision of the PCR court when it is controlled by an error of law." Id.

In a PCR proceeding, the applicant bears the burden of demonstrating that he is entitled to relief. Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). " 'The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.' " Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (quoting State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005)). Indeed, " 'until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.' " Id. at 102, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)).

How The Counsel Issue Was Presented At Trial

Judge Shuler appointed Thomas Sims after initially appointing Virgin Johnson. A pretrial hearing was held on January 19, 1999 in Stokes presence by Judge Shuler. During the qualification, Sims noted that he was in the Solicitors Office from 1982 -1993. App.p. 1505-06, ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record at that time about Sims's prior prosecution of Stokes in the earlier matter involving Audrey Smith. A review of the trial record reveals no further on the record inquiry concerning the prior representation. In the penalty phase of the trial, the Solicitor indicates that he is presenting the chart, State Exhibit One, rather than the indictments to remove any potential prejudice. App.p. 1087, ROA 1085.

Audrey Smith's Testimony in the 1999 Penalty Phase

In the State's case in aggravation in 1999, Solicitor Bailey put in record the following criminal record concerning Stokes:

March 9, 1998	Assault and Battery of A High and Aggravated Nature - 8 years and 5 years probation.
August 31, 1990 -	Paroled from conviction.
March 13, 1991 -	Assault and Battery of a High and Aggravated Nature. 10 year sentence.
April 3, 1991 -	Parole from first sentence revoked.
February 11, 1993	Assault and Battery of a High and Aggravated Nature 3 years consecutive.

App.p. 1112-13, ROA 1110-1111.

The State also presented the testimony of Audrey Smith, the Petitioner's ex-wife who testified about incidents where Stokes assaulted her. App.p. 1113-1145, The incidents included a November 1987 incident when Stokes held a knife to her throat which resulted in a tussle and her hands getting cut when she tried to grab the knife and held her hostage and threatened to kill her children and brother if she made a sound. App.p. 1117-1119, ROA 1115-1117. She later attempted to call for her brother after he placed her in a ditch and Stokes stabbed her three times in the back and then he fled. App.p. 1120-21, ROA 1118-1119. She then stated she went to the hospital. App.p. 1121, ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. App.p. 1121, ROA 1119. Stokes had gotten out on an early release program. Smith was staying at her mother's home. Stokes came by and they went for a walk up the hill implicitly to get something that a lady was making for him. However, he forced her to have intercourse with him and then went to the high school and gave her a letter that stated he was going to kill her that night. App.p. 1122-23, ROA 1120-21. She said they walked away and that Stokes declared that he was looking for guns that he left in a field. Unable to find the guns, Stokes pulled out an extension cord with knots on it and put the cord around her neck and she passed out. When she awoke, she was bleeding and fled to the emergency room. App.p. 1127, ROA 1125. She stated that she was in the hospital for 3 to 4 weeks. App.p. 1127, ROA 1125. She stated that this included being in the regular part of the hospital for 8 days and then being placed in the Rose Center, a place for people with mental and emotional problems for 11 to 12 days to deal with returning to Branchville. App.p. 1128, ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received aa ten year sentence. Id.

Smith testified that while being locked up he wrote her a series of threatening letters towards her or anyone who may attempt to aid her. State Exhibit 2, 3, 4, 5, 6, 7, 8. App.p. 1129-1141, ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. App.p. 1141, ROA 1138.

On cross-examination, defense counsel Simms had her confirm that Stokes had no direct contact with her after he got out of prison and had not come around or called her in 1998. She stated that it had been a couple of years since Stokes had written her. App.p. 1142-43, ROA 1139-1140. She asserted that Stokes had told her when they were having problems that he was on drugs and jealous, and possessive of her. App.p. 1143-44, ROA 1140 - 41. She confirmed that in a number of the letters Stokes wrote that he was asking to be able to talk and write him and that he was trying to get his head straight. Id.

On re-direct examination, she stated that she had to go to Branchville Police Department and the Parole Department to get the letters stopped. App.p. 1144, ROA 1141.[1]

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[1] The State also put into evidence various prison violations. In particular, the state presented a chart [State Exhibit 9] which included the following:

July 1, 1998 - fighting without a weapon

January 4, 1992 - refusing or failing to obey promptly or properly a direct order.

January 22, 1992 - out of place, lying to employees.

January 26, 1992 - out of place.

February 26, 1992 - exciting or creating a disturbance, refusing or failing to obey promptly and properly a direct order.

April 11,1992 - out of place.

July 12, 1992 - possession of a weapon.

July 29, 1992 - fighting without a weapon.

December 3, 1993 - gambling.

The Stokes-Audrey Smith 1991 Trial

The PCR Court had before it the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. Plaintiff Exhibit 1. The 1991 record reveals that Sims personally prosecuted the case and signed the indictment against Stokes. The victim, Audrey Smith, the ex-

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July 28, 1993 - lying to employees.

App.p. 1145-46, ROA 1142-43.

The state called Roy Stevens, a former criminal investigator at the South Carolina Department of Corrections who testified about the incident with Jackie Williams which resulted in the February 11, 1993 conviction for assault and battery of a high and aggravated nature. App.p. 1147, ROA 1144. He stated that Stokes and Jackie Williams were inmates at Allendale Correctional Institution. He described and presented photographic evidence of Jackie Williams slashed face from a box cutter used by Stokes in a restroom fight. App.p. 1148-49, ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. App.p. 1150-52, ROA 1147-49. There were 10 sutures. App. 1152-53, ROA 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. App.p. 1154, ROA 1151.

The state also presented testimony concerning the Orangeburg- Calhoun Regional Detention Center. Evidence was presented from Keith Simmons, a former correctional officer that on July 27, 1999, after 5 PM, a fight broke out between Stokes and another inmate Shawn Windburn, a houseman with small privileges. When food was being delivered to Stokes, they had words and Stokes started hitting on Windburn. App.p. 1281-82, ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. App.p. 1282, ROA 1279. It required Windburn being sent to the hospital. App.p. 1282, ROA 1279. He said that Stokes was locked down as a result.

On cross-examination, he described that fights in the jail are not uncommon. However, Simmons stated that he personally placed Stokes in the cell, but that Stokes did not try to hit him nor be aggressive. He stated that the only thing that happened to Stokes was an incident report and that his canteen privileges and no visitations were allowed for five days. App.p. 1287, ROA 1283, l. 17-25. He stated there was nothing unusual about the punishment. App.p. 1286-87, ROA 1283-84.

On re-direct, this incident was described as a major infraction. App.p. 1287, ROA 1284.

wife of Stokes was the primary witness. The crime involved a December 2, 1990 incident between them. At the trial, Stokes was represented by Reddick Bowman. However, Stokes chose to waive his presence in court during the trial. App.p. 2400-2409, 1991 Tr.p. 4-14. Audrey Smith testified in the 1991 trial that Stokes had gone on a walk with her to a schoolyard and then took her clothes off and forced her to have sex with him after she refused. App.p. 2438, 1991 Tr.p. 43. She stated that he had a letter that stated he was going to kill her that night and he told her that he had changed his mind. App.p. 2439, 1991 Tr.p. 44. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. App.p. 2441, 1991 Tr.p. 46. She later woke up in the field and called 911 from a nearby house. App.p. 2441-42, 1991 Tr.p. 46-47.

During cross-examination by Mr. Bowman, Smith stated that when she woke up she reached for her shoes and hid when she saw some automobiles because she thought that Stokes was returning. App.p. 2443-44, 1991 Tr.p. 48-49. She admitted that Stokes did not own an automobile, but had friends who did. She said he was supposed to arrive at 6 the evening before , but did not get there until 7 PM at Turnkey Apartments in Branchville. App.p. 2445, 1991 Tr.p. 50. She stated that they traveled across the open field. She stated that they went up there at the schoolyard swinging and two of his friends came by. App.p. 2447-48, 1991 Tr.p. 52-53. A little while after the friends left, she stated that they had sex. App.p. 2448, 1991 Tr.p. 53. She stated sometime after that he put the cord around her neck but she could not be definite about the time. App.p. 2449, 1991 Tr.p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. App.p. 2451, 1991 Tr.p. 56. Smith stated that she thought she did say to the police that Stokes took the letter back from her because he feared that she would take it to the police.

App.p. 2454, 1991 Tr.p. 59. She admitted that she was afraid of Stokes who did not let her talk to his friends, however, she did not scream in fear that date nor have any conversation with his friends. App.p. 2455-56, 1991 Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. App.p. 2457, 1991 Tr.p. 62.

After Smith testified, Stokes remained outside of court due to his dissatisfaction with appointed counsel and the court's refusal to delay the matter to allow him to attempt to retain counsel. App.p. 2462-63, 1991 Tr.p. 67-68.

Solicitor Sims next asked Smith on re-direct examination concerning why she did not request help from the two men at the schoolyard when they came up. She stated that she had not seen the threatening letter yet and that they were just sitting and talking then. App.p. 2467-68, 1991 Tr.p. 71-72.

ANALYSIS

The PCR court reasonably concluded as a matter of law that Thomas Sims's prior prosecution of Stokes in 1991 did not create an actual conflict of interest and/or require a new trial. App.p. 2163, 2173. First, there is probative evidence to support the findings that counsel Sims and counsel Johnson had discussions with the Petitioner about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter. Further, there is credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter to support a waiver of any conflict. Finally, counsel Sims was not part of the prosecution team in any manner concerning the charges related to the death of Connie Snipes or Doug Ferguson. Certiorari is not warranted.

Testimony of Counsel

A. Thomas Sims Testimony

Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. App.p. 1859, PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. App.p. 1860, PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. App.p. 1860, PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. App.p. 1861-62, PCR 53-54. Sims stated that he was appointed by Judge Shuler . He stated that during the qualification hearing, his prosecution trial experience was presented, but he did not specifically state that he had previously prosecuted Stokes at that time. He stated that the question was never asked. App.p. 1863, PCR 55.

Importantly, Sims stated that he discussed his prior prosecution with Stokes:

> . . .after going through the information we did discuss with Mr. Stokes , my role, who I was, and what my role had been in the previous matter with him. We discussed , me and Attorney Johnson. We did discuss it . He never expressed any desire not to have me as his attorney.

App.p. 1863, PCR 55. As to whether he could have another lawyer represent him, Sims stated that we talked about it, but could not state under oath that he said to Stokes: "if you want another lawyer you can get one." App.p. 1863, PCR 55. However, he testified that the discussion was that he was told that Sims had prosecuted him and sent him to jail and "do you still want me as your lawyer , and he says yes." App.p. 1864, 3-8.

Sims opined that it was clear from his discussions that Sammie could have said he didn't want you as his layer and he said he wanted him to continue. App.p. 1864, PCR 56. In support of this understanding, Sims noted that after the trial and sentencing, after the Smith testimony and death sentence, that Stokes contacted him and told him that his appellate lawyer thought that they

were going to win the case and that Stokes stated that he wanted Sims as his lawyer again "because you're top flight...I want you back." App.p. 1865, PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. App.p. 1865, PCR 57.[2]

Sims was firm in his recollection that Stokes never indicated any desire to have him removed as his layer in the case. App.p. 1866, PCR 58.

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. App.p. 1866-67, PCR 58-59.He stated that he was aware that they planned to use letters that he had written his girlfriend and Stokes prior convictions. App.p. 1867, PCR 59. Sims stated that they talked about the matters in depth. Sims stated that he would look at the issue from both sides and try to develop a defense. . He stated that he anticipated that both the conviction and that Audrey Smith would testify in the penalty phase. App.p. 1867-68, PCR 59-60. He stated that he reviewed these matters with Stokes. App.p. 1868, PCR 60. As to the Smith incident, Sims stated that he knew it was coming in and that he needed to address it with a showing of remorse. App.p. 1868, PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. App.p. 1868, PCR 60. He denied that the fact that he had previously prosecuted Stokes for the same incident affected the manner that he handled the testimony. He stated that if he thought that he could not have represented Stokes to the best of his ability that he would not have been in the case. App.p. 1869, PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. App.p. 1869, PCR 61.

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[2] Counsel Sims recollection of Mr. Jeffrey Bloom's role and advice was different that Mr. Bloom's. Particularly, he recalled contacting Mr. Bloom to assist , but that he was involved in a major trial in Aiken and would not be able to assist. App.p. 1865, PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. App.p. 1866, PCR 58.

Counsel did not recall whether they made any formal motion about the earlier prosecution in the 1999 trial, but thinks it was more fully developed in the record in the second case after the death penalty verdict where Sims continued to represent Stokes at his request. Sims asserted that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. App.p. 1869, PCR 61.

On cross-examination, Sims stated that he research the admissibility of prior convictions prior to trial. App.p. 1876-77, PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. App.p. 1879, PCR 71. He noted that he looked at *State v. Lyle* and Rules 404(b), 608 and 609. App.p. 1880, PCR 72. Counsel Sims stated that he attempted to present an argument in an attempt to keep out the prior convictions in the penalty phase, trying to rely upon these rules. App.p. 1882-1888, PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. App.p. 1888, PCR 80.

Counsel Sims stated that he made sure that Stokes knew that he was the person who prosecuted him and had sent him to jail previously. App.p. 1891, PCR 83. He stated that they talked about the indictment that he had signed also. App.p. 1891, PCR 83. However, he stated that he could not state that he asked him if he still wanted him on the case. App.p. 1891-92, PCR 83-84.

Counsel Sims again confirmed that he had no recollection of any discussion with Jeff Bloom concerning a conflict of interest. App.p. 1892, PCR 84. However, counsel Sims thought that there was a discussion with a judge at some time concerning the prior prosecution. App.p. 1893, PCR 85.

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. App.p. 1895, PCR 87. Sims further confirmed that this concern was raised

with the trial court at the October 14 hearing because Sims's name appeared on the indictment. App.p. 1637, 1895, PCR 87, ROA 1636.[3] It was agreed his name would be removed from any document being presented to the jury. App.p. 1895, PCR 87. See also, App.p. 1087, ROA 1085. Counsel Sims stated that he wanted to be sure that there were no slips ups in trial court concerning his name on the indictment. App.p. 1896, PCR 88.

Counsel Sims clarified that Stokes knew that he had been the one to prosecute him and his practice was to state that did he have any problems with that . Further, he recalled that after the trial Stokes wanted Sims to represent him again. Sims felt that Stokes knew that if he had any problem, he only had to speak up and let them know. App.p. 1897-99, PCR 88-90. He stated that Mr. Johnson was present during the discussions. App.p. 1897, PCR 89. Sims stated he knew that the state intended to introduce prior bad act evidence, that this information was included in his evidence in aggravation and that the state would try to introduce it. App.p. 1897-98, PCR Tr.p. 89-90. Counsel stated that he expected the material to be introduced. App.p. 1897-98, 1906, PCR 93-94, 98. He re-confirmed that he anticipated the 1991 conviction evidence to be introduced prior to its introduction. App.p. 1906, PCR 98.

B. Virgin Johnson's Testimony

Co-counsel Virgin Johnson testified concerning his representation of Stokes in 1999. He stated that he was initially first chair, but when Mr. Sims was appointed, he became second chair. App.p. 1909, PCR 101. Johnson stated that at some point during the preparation he learned that Sims had prosecuted Stokes previously. Johnson stated that recalled Sims discussing the prior prosecution with Sammie at the beginning of his representation. He recalled Sims telling Stokes that he put him in jail and that Sammie recalled that Sims had been the prosecutor. App.p. 1910,

[3]It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

PCR 102. Johnson stated that they went through questions of do you have a problem with me representing you, do you think - - you know do you want somebody else and he [Stokes] said no. App.p. 1910, PCR 102, l. 8-13. Johnson confirmed that Stokes never requested other counsel be appointed throughout the trial. To the contrary, he asserted that their relationship was good throughout both trials. He also recalled after the conviction while the matter was on appeal, Stokes expressed a desire to have Sims represent him. App.p. 1910, PCR 102.

Johnson recalled Audrey Smith testifying at the trial concerning the prior assaults. Johnson recalled the fact that Stokes was told prior to the trial that the evidence of the prior conviction could possibly be presented. App.p. 1911, PCR 103. Johnson stated that Stokes did not request that Sims be removed. Further, Johnson never saw Sims hesitate to act on Stokes behalf at any time. App.p. 1912, PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. App.p. 1913, PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. App.p. 1913, PCR 105. [4]

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[4] In the PCR hearing, the Petitioner called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. App.p. 1851, PCR 41-43. However, unlike Sims testimony, Mr. Bloom suggested that he recalled a discussion about a potential conflict of interest which Bloom was concerned about based upon the prior prosecution. App.p. 1851, PCR 43. Bloom stated that he tried to emphasize this to Mr. Sims who Bloom contended did not fully understand why it would be a problem. Bloom contended that he told Sims that a t a minimum he must request a hearing before a judge on the issue in an ex parte setting and allow Stokes to express his desires to the court. App.p. 1852, PCR 44. Bloom stated that in his next telephone contact with Sims that he learned that Sims had not followed through with Bloom's suggestions. App.p. 1854, PCR 46. He stated that because of this he had to sever his professional relationship with him. App.p. 1854, PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. The PCR Court determined that Mr. Sims testimony was credible which was also addressed in the Order Denying the Rule 59 Motion to Alter. App.p. 2173, 2385-2390.

In his Petition, Petitioner complains about the fact-finding of Sims credibility concerning the discussion. Petition, p. 11, n. 9. As Judge Manning concluded in his order after a hearing on the motion, "[T]his Court had a basis in the record to support the credibility

C. *Sammie Stokes Belated Affidavit After the Close of the Hearing.*

Stokes complains within his argument as he did in his motion to alter that his post-hearing personal affidavit was not included in consideration. Petition, p. 10, n. 8. The affidavit by Sammie Stokes was submitted on August 18, 2009 after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Petitioner was present throughout the hearing. However, the Petitioner's counsel failed to call the Petitioner in support of his claims either during the Petitioner's case or in reply after state witnesses testified. App.p. 1857, PCR Tr.p. 49, l. 5-7. At the close of the state's case, the Petitioner's counsel advised the court that there would be no further witnesses. App.p. 1915, PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Petitioner was present at the entire hearing, heard the evidence presented and could have testified and been subjected to cross-examination. The only matters remaining were the briefing and the decision of the PCR Court.

The Petitioner acknowledges that the affidavit was submitted two weeks after the hearing concluded along with a Memorandum Clarifying Ground 9(d). The Petitioner attempts in his petition to take the State to task during the intervening months prior to the entry of the October 21, 2010 order for failing to seek procedures to cross-examine the Petitioner concerning the averments made in the belated affidavit. Petition, p. 10-11, n. 8. The Petitioner admits that the State voiced objections to the affidavit in a November 12, 2009 email and in the February 16, 2010 Post-Hearing Memorandum, p. 44. In his August 18, 2009 Memorandum Clarifying Ground 9(d), the Petitioner stated that the submission was made because "immediately after the

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determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue." App.p. 2390.

hearing, respondent's counsel Don Zelenka, remarked that he was surprised Stokes had not been called to testify. Undersigned counsel interpret Mr. Zelenka's remark as an indication that respondent's arguments from this point forward - most immediately the arguments likely to appear in its post-hearing briefing - will feature the absence of testimony from Stokes as a basis for denying post-conviction relief . . . " Petitioner's Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent's counsel confirmed in an earlier pleading that the Petitioner correctly stated that Respondent's counsel's response when asked what he thought the Judge was going to do, and pointed out that they had not contradicted any of the testimony of either Mr. Sims or Mr. Johnson by Petitioner's failure to testify at the hearing. The PCR Court had found that it was evident at that time that the Petitioner had not presented any evidence to contradict the representations made by either counsel or in the original trial record concerning the discussions and desire to have Mr. Sims represent him in this trial, as well as the subsequent trials. The burden of proof in the collateral proceeding was upon the Petitioner. The PCR Court rejected the submission as untimely under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11 and the Order denying the Rule 59 motion. App.p. 2183, n.11, pp. 2379-2385. Importantly, the Petitioner was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Petitioner's case in chief, counsel Lominack stated: "that concludes our testimony portion of the case." App.p. 1857, Tr.p. 49, l. 5-6. After Mr. Sims and Mr. Johnson had testified in the Respondent's case in chief and the Respondent had rested its case, what is most important, this Court offered the opportunity to have the Petitioner called at that hearing when he asked counsel if they wanted "anything further" and the response by the counsel was "nothing further." App.p. 1915, PCR Tr.p. 107, l. 18-22. At that point, the Court inquired about making arguments then, in addition to a proffer for a submission

of proposed orders. Plainly, it was strategic decision by the Petitioner to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.[5]

The PCR Court found that this one-sided and limited affidavit presentation did more than Stokes has suggested - it prevented the State from cross-examining Stokes in an already closed record about the discussions that both trial counsel had with him - matters that were uncontradicted at the time of the hearing, including whether his prior convictions could be used against him at trial and his knowledge about whom the prosecutor was at his initial trial. The Petitioner asserts that they offered to allow the State to cross-examine the Petitioner after they had submitted the belated affidavit. However, the PCR Court found the belated affidavit presentation also did not include any information about the fact that after the trial Stokes sought and did have Sims continue to represent him in his subsequent potential capital trial after he was aware of the prior prosecution and the cross-examination by Sims of Audrey Smith - evidence that again wholly contradicts the affidavit of Stokes. Further, counsel Sims testified that he and Stokes talked about evidence of the Audrey Smith incident and that Sims knew it would come in. App.p. 1868, PCR Tr.p. 60, l. 2-18. Also, App.p. 1895, PCR Tr.p. 87, l. 9-17; App.p. 1896 – 1897, Tr.p. 88, l. 15- p. 89, l. 2; App.p. 1906, PCR Tr.p. 98, l. 1-17. Contrary to the Stokes

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[5] The Petitioner suggests that the affidavit does not present new information and merely corroborates the testimony of Mr. Sims and Mr. Johnson. However, that is not an accurate characterization of the affidavit. In the affidavit at paragraph six, Stokes states: "[I]f I had known that Mr. Sims handled my whole trial for the prosecution in 1991, that the 1991 conviction would be used against me at the 1999 trial, and that Audrey Smith would testify and be cross-examined by Mr. Sims, I would have asked to have a different lawyer." Affidavit, Sammie Stokes, p. 2, ¶ 6 (August 17, 2009). App.p. 1929-30.

To the contrary, the broadly worded affidavit does attempt to contradict the testimony of Virgin Johnson and Thomas Sims concerning the substance of the discussions and his decision and Stokes' desire to be continually represented by Mr. Sims, even after the entire trial. At the PCR hearing, former counsel Sims stated that they had discussed with Stokes his role, who he was, "and what my role had been in the previous matter with him." App.p. 1863, PCR Tr.p. 55, l. 15-19. In complete contradiction of Stokes belated affidavit, counsel Sims testified at the hearing that after the trial, after all the information had come out, that Stokes called him and wanted him to continue to be his lawyer in the second case. App.p. 1864-65, PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony repudiates the substance of Stokes' later averments.

affidavit, counsel Johnson also testified about the fact that after the trial, Stokes continued to be desirous of having Thomas Sims represent him the second capital trial and he asked if the trial was overturned and we had to try it again that he wanted Thomas Sims to represent him again. App.p. 1910, Tr.p. 102, l. 1-24. ("I know he wanted Thomas back."). Counsel Johnson also testified that they had discussions that the evidence of the prior conviction could be presented at the trial and that Stokes did not request then for Sims to be removed. App.p. 1911, PCR Tr.p. 103, l. 15-24.

In asserting in the belated affidavit that he was not aware that Sims had prosecuted him previously, it also varies from the testimony of Sims and Johnson. It does not corroborate their testimony or confirm it - it disputes it. Further, while the affidavit does state that "he was not in the courtroom during the trial," the record of the March 12, 1991 trial reveals that although the Petitioner refused to come into the courtroom during the testimony, he did enter the courtroom at the outset of the trial proceedings and was present when then Solicitor Sims provided the judge with the indictment while Stokes made a personal plea for a continuance. App.p. 2399-2409, March 12, 1991 Tr.p. 6-14.

The PCR Court concluded that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Petitioner to the adversarial process. The PCR Court had made available the hearing process by securing a reasonable length of time for the evidentiary hearing and provided the opportunity for each side to fully present their case at the hearing.

The PCR Court concluded that the credibility of the Petitioner, as well as the completeness of his affidavit to the claims before the court, were plainly at issue. In the State's post-hearing memorandum, the State urged the Court to strike the affidavit from consideration as

it was not newly discovered evidence, but was evidence sought to be shielded from the adversarial process where the Petitioner would have opened himself up to impeachment and further testimony concerning the issues. App.p. 2060, *Respondent's Post-Hearing Memorandum,* p. 44, n. 11. The PCR Court agreed with that assessment. App.p. 2183, n. 11; *Order of Dismissal*, p. 45, n. 11.

The Petitioner questions in his Petition the criticism by the PCR Court in noting that the Petitioner failed to testify at the PCR hearing. Petition, p. 30. What he fails to recognize is that he had the burden of proof in the collateral proceeding. The testimony of Sims and Johnson supported the existence of providing Stokes with information about Sims prior employment and Petitioner's right to have other counsel if he had a problem with it. Simply put, absent contradiction and a determination of credibility, the PCR Court was recognizing a filure of the burden of proof.

The record was closed after the Petitioner was given the opportunity to testify in their case in chief and on reply. Contrary to the assertions and characterization of collateral counsel, the Stokes did seek to contradict the combined testimony of Mr. Sims and Mr. Johnson about their discussions with Stokes, the knowledge of Stokes concerning Sims prior prosecution and Stokes's desire with the knowledge of the prior involvement to have Sims continue as defense counsel.

1. No Per Se Conflict of Interest Due to The Prior Prosecution..

The PCR Court reasonably found, independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution of Petitioner involving a different crime. In *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233, 235 (S.C. 2007), the Supreme Court of South Carolina affirmed the state's lower appellate court on the conflict issue

concluding that defense counsel prior prosecution of the defendant did not require removal as a conflict of interest. The Court held:

> Childers asked the trial judge to relieve defense counsel based on defense counsel's prior prosecution of him and his perceived lack of defense counsel's trial preparation. Defense counsel told the trial judge he was ready and prepared to go to trial and he had no independent recollection of prosecuting Childers. Childers failed to show his counsel had any divided loyalties or an actual conflict of interest. *See Gregory*, 364 S.C. [150] at 152, 612 S.E.2d [449] at 450 [2005] ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's."); *See also People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y.App.Div. 2002)(finding there was no conflict of interest where defendant's public defender had previously prosecuted him on unrelated charges when she was employed as an assistant district attorney); *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (1998)(concluding there was no actual or serious potential conflict where defendant's counsel had previously prosecuted defendant while working in the district attorney's office). The Court of Appeals correctly found the trial judge did not abuse his discretion by denying Childers' request to relieve counsel.

State v. Childers, 645 S.E.2d 233, 235 (S.C. 2007).

Given there was no evidence of conflict, or even serious potential conflict under the particular facts of this case, there could be no Sixth or Fourteenth Amendment error. *See Mickens v. Taylor*, 535 U.S. 162, 171(2002) ("we think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*-as opposed to a mere theoretical division of loyalties") (emphasis in original).The record clearly shows counsel did not claim an actual conflict, or move to be relieved based on his perception of a conflict. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978)(trial counsel advised the court of an actual conflict of interest and requested different counsel be appointed for co-defendants). Moreover, the record shows Petitioner relied upon counsel, and expressed no complaint of counsel, prior to the trial. In short, neither case law nor facts support Petitioner's position.

The PCR Court distinguished any reliance upon *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), which provides that Petitioner was not required to show prejudice where his

right to choice of counsel was violated because an actual conflict of interest is a structural error. . The PCR Court did not disagree with that reading of the case; however, this is not a choice of counsel matter, and *Gonzalez-Lopez* is neither relevant or dispositive to the issue here. Stokes was represented by an appointed counsel and Stokes did not request the services of another whom he could retain or who would waive compensation. The particular right of counsel of choice evaluated in *Gonzalez-Lopez* was not invoked in the instant case involving court appointment. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 126 S.Ct. at 2561. Clearly, the resolution of the issue in *Gonzalez-Lopez* is not applicable to the present case with its differing factual underpinning. In fact, in regard to the factual basis posed by Petitioner, the Court finds that two of Petitioner's critical factual assertions lack support in the record.

The record is void of any attempt by the Petitioner to have counsel Sims removed with the uncontradicted record that Stokes was aware of the prior prosecution by Sims. The record does not show Petitioner was "vehemently" opposed to counsel's representation because of Sims' former role as a prosecutor, nor does the record show an actual conflict of interest. The state supreme court in Childers adopted the logic of other jurisdictions that hold such a situation does not show "competing interests" or "divided loyalties" that could form a basis for finding an actual conflict in representation. *Childers*, 645 S.E.2d at 235. In support of its decision, the state court cited with favor *People v. Abar*, 290 A.D.2d 592 (N.Y. App. Div. 2002), *affirmed* 786 N.E.2d 1255 (N.Y. 2003), and *State v. Cobbs*, 584 N.W.2d 709 (Wis.App.1998), *review denied* 222 589 N.W.2d 629 (Wis. 1998), both of which fully support the state court's findings. The court in *Abar* noted that "[a]lthough the transfer of a defense attorney to a District Attorney's office might well create a conflict of interest constituting a disqualification of the District

Attorney's staff from prosecuting the defendant previously represented by the former defense attorney" the converse situation does not provide the same opportunity for "abuse of confidence" or the appearance of conflict. 290 A.D.2d at 593. Similarly, in *Cobbs*, a former prosecutor had also been appointed defense counsel. While a prosecutor, counsel had represented the state against Cobbs. The court found that the former representation had absolutely nothing to do with the present representation, and that counsel had broken ties with the office more than five years before the instant charge. The court concluded there was no conflict of interest. Such sound logic is persuasive in evaluating when confidences are placed in counsel, and when abuse may occur. See e.g. U.S. v. Fields, 483 F.3d 313, 351–52 (5th Cir.2007) (rejecting a conflict of interest claim where counsel was employed as a prosecutor fifteen years earlier; counsel had summarily signed off on a request to initiate delinquency proceedings against defendant); U.S. v. Villarreal, 324 F.3d 319, 327 (5th Cir.2003) (defense counsel's employment in the district attorney's office at time of defendant's prior conviction did not constitute a conflict of interest); Hernandez v. Johnson, 108 F.3d 554, 558–61 (5th Cir.1997) (rejecting the argument that counsel suffered a conflict of interest because he previously served as the district attorney when some of the defendant's prior convictions were obtained; counsel had also filed a motion requesting psychiatric evaluation of defendant, signed a motion to dismiss a related indictment after defendant pled guilty, and approved of defendant's plea bargain).

In this case, with at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant prosecution concerning the death of Connie Snipes. The 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. There is

no showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith) - a person whom Sims never represented. There were no divided loyalties in the matter.

The simple fact of the former prosecution did not provide proof of a conflict of interest. Given the lack of an actual conflict, the Petitioner otherwise must show adverse effect to be entitled to relief. *Id.* This precisely follows the United States Supreme Court's well-defined precedent:

> ...the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). See also, *State v. Wareham*, 143 P. 3d 302 (Utah App. 2006) (attorney's prosecution of individual present no general bar to attorney's subsequent representation in a criminal defense capacity); *Hendricks v. State*, 128 P.3d 1017 (Mont. 2006) (per se ineffective assistance of counsel as a conflict of interest does not result when appointed counsel previously prosecuted defendant on another matter).

During the Rule 59 motion hearing, counsel for Stokes additionally argued that the fact that counsel Sims had researched an argument to exclude the admission of evidence of the prior bad acts, including the conviction involving the Audrey Smith incident supported their showing that Sims did not appreciate and therefore did not fully discuss with Stokes the possibility that the Smith matter would be introduced by the State at the trial. The PCR Court rejected this claim. App.p. 2390-92. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. App.p. 1868, PCR Tr.p. 60, l. 18. Further, the record did reflect that counsel conducted research on the admissibility of prior bad acts in the penalty phase of the trial. App.p. 1877-78, PCR Tr.p. 69 -70. [The trial transcript of the October 25, 1999 trial shows

counsel Sims argued at the outset of the penalty phase that the evidence of the prior acts should be excluded in the penalty phase pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and S.C.R.E. Rule 404(b). The Solicitor correctly argued that the very recent decision in State v. Hughes (Mar-Reece), 336 S.C. 585, 521 S.E.2d 500 (Oct. 4, 1999), which rejected a similar theory, defeated Sims's argument and the trial court agreed. App.p. 1090-92, ROA Tr.p. 1088-1090]. Sims's argument at trial was essentially whether crimes over 10 years old were too remote to be considered, whether the prior crimes were felonies versus misdemeanors which was crafted from Evidence Rule 609 concerning impeachment use of convictions. App.p. 1885-86, PCR Tr.p. 77-78. Although this argument was inadequate under Hughes, supra., its lack of a sound basis in the law at the time of the trial had no effect on the conflict issue because Sims' actual expectation was that the evidence would be admitted, albeit over his objection.

At the PCR hearing, counsel Sims testified that he was aware of the state's intent to use the Audrey Smith indictment and conviction in the penalty phase. App.p. 1897-98, PCR Tr.p. 89-90. He stated that he had researched the matter and felt that they could probably try to keep it out, mainly because it was beyond the 10 year limit. However, he stated that he did not think that the evidence would be kept out, but he wanted it kept out. App.p. 1901, PCR Tr.p. 93, l. 4-9. Mr. Sims denied that he would have told Stokes that the evidence would not be admitted. To the contrary, he said he probably would have told him that most judges would not make the call to keep it out. App.p. 1901-02, PCR Tr.p. 93-94. To clarify, Sims stated that he fought to keep the evidence out, but agreed that he anticipated that the judge would let the evidence in. App.p. 1906, PCR Tr.p. 98, l. 3-12.

The Applicant's present argument suggests that counsel Sims did not perceive a potential conflict of interest because he believed that the evidence of the Audrey Smith incident and

conviction could never be admitted. This is a misreading of the record. Counsel Sims clarified that he thought he had a viable argument to keep the evidence out, but that he expected the judge to still admit the evidence. Further, Sims was cognizant at least two weeks before the trial that his own name was on the prior indictments and wanted to have his name removed before the indictments would be introduced. Contrary to the claim suggested by Applicant, Sims was not ignoring the potential admissibility of the evidence or the potential of Audrey Smith testifying about the incident and the letters that Stokes had sent to her in his assessment of his ability to represent Stokes. He had notice and anticipated the introduction of the evidence.

2. There was a Knowing Waiver of the Conflict of Interest.

The PCR Court alternately found that there was a knowing waiver of a conflict of interest. App.p. 2177. SCACR, Rule 407, Rule 1.7(b)(1-2), wherein it essentially states that a lawyer should not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless:

1.) the lawyer reasonably believes the representation will not be adversely affected; and

2.) the client consents after consultation.

However, the comments to Rule 1.7 recognize that a client may consent to representation notwithstanding the conflict. However, it notes: "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." Further, the comments noted that "there may be circumstances where it is impossible to make the disclosure necessary to obtain consent."

The Court in its order concluded that:

> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial. Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

App.p. 2163, Order of Dismissal, p. 25. The Court further found "as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter." App.p. 30-31.

There is evidence at the PCR hearing to support this finding. App.p. 1863-65, 1897-98, 1909-1911, PCR Tr.p. 55-57, 88-90, 101-103. Counsel Virgin Johnson recalled that Stokes was told prior to trial that evidence of the prior conviction that Sims had prosecuted could possibly be presented. App.p. 1910, PCR Tr.p. 102. In its order, the Court found the evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter and never requested to have Sims removed was credible. App.p. 2169, Order of Dismissal, p. 31. Evidence supported this conclusion See also State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011) (defense attorney's previous employment as a prosecutor where he handled citations against the defendant did not create a conflict of interest where he no involvement in the homicide case).

It is well established that the Sixth Amendment right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." Wood

v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. See generally ABA, Model Rules Prof. Conduct, Rule 1.7 and Commentary (1983). Conflicts may occur in various factual settings. For example, conflicts may arise in circumstances in which one attorney represents more than one defendant in the same proceeding. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 481–91, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

A defendant may waive his Sixth Amendment right to an attorney who is "free from conflicts of interest," Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), so long as his waiver is " 'knowing, intelligent, and voluntary.' " U.S. v. Brown, 202 F.3d 691 at 697 (4th Cir. 2000) (quoting United States v. Gilliam, 975 F.2d 1050, 1053 (4th Cir.1992)); see also Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). A waiver is only knowing and intelligent if made with "sufficient awareness of the relevant circumstances and likely consequences," Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and as such, a defendant must know the basis for, and potential consequences of, his chosen counsel's alleged conflict in order to make an "intelligent choice" whether to waive the conflict. United States v. Duklewski, 567 F.2d 255, 257 (4th Cir.1977); see also Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir.1990) ("A defendant cannot knowingly and intelligently waive what he does not know."). In practical terms, this means that a defendant's conflict of interest waiver is valid if he "waives the conflict with knowledge of the crux of the conflict and an understanding of its implications ... even if [he] does not know each detail concerning the conflict." Brown, 202 F.3d at 698 (emphasis omitted).

Whether there is a proper waiver is to be determined by the trial court and any such waiver should appear on the record. Johnson v. Zerbst, 304 U.S. 458, 464–65, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Resolution of the issue of waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.; see also Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Courts will, however, "indulge every reasonable presumption against the waiver of fundamental rights." Glasser v. United States, 315 U.S. 60, 70 (1942). Cf. United States v. Akinseye, 802 F.2d 740, 745–46 (4th Cir.1986) (concluding that a pre-trial waiver of a potential conflict of interest waives the actual conflict of interest that ripens, as the defendant was warned, from that potential during trial).

The Court has not specified the circumstances in which a court must override a defendant's otherwise valid conflict of interest waiver. The Second Circuit, for example, holds that an actual conflict of interest "so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation" cannot be waived. United States v. Lussier, 71 F.3d 456, 461 (2d Cir.1995); see also United States v. Martinez, 143 F.3d 1266, 1270 (9th Cir.1998) (citing Lussier with approval). Similarly, the Fifth Circuit frames the issue in terms of a conflict that is "so severe as to render a trial inherently unfair." United States v. Vaquero, 997 F.2d 78, 90 (5th Cir.1993). Respondent submit that the Court need not settle on a precise formulation of the controlling principle for the purposes of this case; the facts alleged by Petitioner fail to demonstrate the existence of a conflict approaching either of these standards by the continued representation of counsel Sims with Stokes blessing in this and a subsequent trial.

In the instant case, Sims's earlier prosecution arose from an independent action and was unrelated to the present prosecution of Stokes. It was already a matter of record concerning the

earlier conviction for the Audrey Smith incident. This case is similar distinguishable from cases where conflicts have been determined when a lawyer jointly represents a witness where an immunity agreement had been made to testify against his client. See Hoffman v. Leeke, supra. In Perillo v Johnson, 79 F3d 441 (5th Cir .1996), an attorney's concurrent representation of capital murder defendant and witness who had been granted transactional immunity in murder of which defendant had been convicted necessitated an evidentiary hearing to determine if conflict of interest entitled defendant to habeas corpus relief. But see, Cowell v Duckworth , 512 F. Supp. 371 (ND Ind. 1981) where in action brought by state prisoner seeking writ of habeas corpus, writ would be granted on ground of ineffectiveness of counsel retained by prisoner's wife to represent him where record established that defense counsel had actual conflict of interest between representation of defendant and two prosecution witnesses.

This case is distinguishable from Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013). In Jordan, the Court found that the only evidence in the record was that the defendant and his co-defendant concerning a potential conflict of interest was that they were not informed of the precise nature of the conflict of interest from their joint representation. Here, Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware - based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. The PCR Court found that the Petitioner waived his right to have counsel other than Thomas Sims represent him.

Respondent submits that certiorari is not warranted on the issue of conflict of interest. The PCR Court reasonably denied relief on this claim where evidence supports that the Petitioner knowingly waived his right to other counsel after being made aware of the fact that Sims had prosecuted him in 1991 and that he could have other counsel if he desired.

ISSUE THREE - INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

III. Certiorari should be denied where the PCR Court reasonably applied the mandates of Strickland v. Washington, 466 U.S. 668 (1984) and Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990) concluded that appellate counsel was not ineffective in failing to argue on appeal that the trial court erred in failing to instruct the jury on the statutory mitigating circumstance "the victim was a participant in the defendant's conduct or consented to the act" and allegedly failed to hold a penalty phase charge conference where no request or objection was made at the penalty phase for the instruction to preserve the issue for appeal. (Order, p. 2154-2162).

In his third argument on certiorari[6] the Petitioner contends that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was constitutionally deficient in failing to present two separate grounds in the direct appeal - the alleged failure to hold a charge conference on the record and the particular failure to instruct on the statutory mitigating circumstance 16-3-20(C)(b)(3) that "the victim was a participant in the defendant's conduct or consented to the act." The PCR Court rejected this claim finding that appellate counsel cannot be found deficient because neither issue was preserved for review by objection or ruling by the trial court. App.p. 2154-61. Respondent submits that the conclusion was supported by probative evidence and was a reasonable application of Strickland, Petitioner failed in his burden of proof on the initial prong under Strickland v. Washington, 466 U.S. 668(1984). Certiorari is not warranted to reconsider this issue.

STANDARD OF REVIEW

On certiorari in PCR cases, the Court applies an "any evidence" standard of review. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). "This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them," and it "will reverse the PCR judge's

[6] In the amended application, Petitioner raised the following grounds: 9(b) - Ineffective Assistance of Counsel on Appeal - Failure to Hold a Charge Conference on Mitigating Circumstances.
9(c) - Ineffective Assistance of Counsel on Appeal - Failure to Brief Failure to Instruct on Statutory Mitigating Circumstance (b)(3) - the victim was a participant in the defendant's conduct or consented to the act.

decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). This Court gives great deference to the PCR judge's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).

Standard of Review for Ineffective Appellate Counsel Claims

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Tisdale v. State, 357 S.C. 474, 475, 594 S.E.2d 166, 167 (2004); Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. Id. at 285 (applying Strickland).

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "For judges to

second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, 463 U.S. at 754, 103 S.Ct. 3308. "Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. Holladay v. State, 629 So.2d 673 (Ala.Cr.App.1992), McCoy v. Lynaugh, 874 F.2d 954, 965-66 (5th Cir.1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)." Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App.1998).

> "'[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.'

Jones v. Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). [7]

In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal ..., reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, " '[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far

[7]The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ' Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by this Court. See, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

WHAT THE RECORD SHOWED

The record reveals that at the outset of the penalty phase, Judge Burch made inquiry of the State and defense of the aggravating and mitigating factors it intended to pursue. Counsel Sims advised Judge Burch at that time that:

> ....under section B(3), ***the victim was a participant in the defendant's conduct or consented to the act, we think there is ample evidence in the record that the victim participated up to a point by being involved in the actions of the defendant at the time and we would think that it would be a mitigating***

> ***circumstance***. Your honor, we also intend to – what we consider to be mitigating, his adaptability to prison and there would be a third matter (which concerned the medical condition of Stokes).

App.p. 1085, ROA 1083, ll. 1-22. (Emphasis added).

Judge Burch stated that he had no problem with adaptability to prison life evidence. App.p. 1086, l. 14-15. However, he stated that "the victim having participated in the act situation, if that goes back to what was not allowed in because of the way the letter came in and all, you're not going to be able to do it if you develop that . . .if you develop something else in regards to that, that will be fine . .." App.p. 1086, l. 14-25.

In counsel Sims's penalty phase opening statement, he discussed their intent to present adaptability to prison evidence, but did not make any statement concerning the victim's involvement or consent factor. App.p. 1111, ROA 1109.

In his petition, the Petition claims that there was evidence in the record that Connie Sue Snipes, the victim, located Norris Martin and asked him to go with her and Stokes, App.p. 880-81, had accompanied Stokes, Pattie Syphrette and Norris Martin voluntarily, and had sexual intercourse with Stokes and Martin, citing App.pp. 991-992, 1172. He further maintains that the evidence in the record from the testimony of Nolan Martin indicated that Snipes had located Martin, that Pattie Syphrette and Stokes came up to them at an apartment in a red convertible. App.p. 881-883.

However, the testimony from Martin was that Stokes told him to "get the F in the car." App.p. 883, l. 19. Martin testified that Snipes got into the car also. Stokes told Syphrette to go down a dirt road and they suddenly stopped. App.p. 885-885. Stokes told Martin to get out of the vehicle and he got out with him. App.p. 885. Stokes then told Martin that he wanted him to do a job and to dig a grave. App.p. 886. After Martin initially said no, Stokes pulled a pistol and

Martin said OK and Stokes returned to the car and told him not to say anything. App.p. 887. Martin and Stokes got back in the car, and Syphrette drove off another road and they all got out and Syphrette was told to return to the car. Stokes took a shovel and a bag from the trunk.[8] At that point, Martin stated that Connie Snipes looked scared. They walked down to the woods and then Stokes told Martin to start digging. App.p. 891. After Martin stated that he had dug all he could dig, Stokes pointed the gun at Snipes and directed her to take off her clothes. App.p. 893. Martin stated he then had sex with Snipes while Stokes pointed the gun at each of them. App.p. 893, l. 8-20. After that, Martin stated Stokes had anal sex with the victim while Stokes still held the gun. App.p. 894. After Snipes screamed, Stokes shot her twice, according to Martin. App.p. 894. Martin testified that Stokes had run up to him and tried to put the gun in his hand. He stated that Snipes was screaming after the first shot and then Stokes shot her again. App.p. 895 - 897. Martin stated that she was lying on the sack when she had been raped. After Snipes was shot they dragged her through the woods. Martin stated that after the second shot, he became aware that Pattie Syphrette was there. Syphrette declared "I am glad the bitch is dead." App.p. 897. Martin left his hat, the shovel, his wallet and a police badge at the scene. In Martin's testimony, he stated that after they returned to the car, Stokes drove. Syphrette threw the bag with blood on it and some of Snipes items out of the window across the first bridge they passed. App.p. 899 - 901.

In Stokes original redacted statement presented to the jury in the guilt phase, he declared that there was a plan by Syphrette and Stokes to have the victim killed in return for $2000.

[8] Martin testified on cross-examination that Snipes went voluntarily into the woods initially and that he did not threaten her and he did not hear anyone else initially threaten her. App.p. 922-923. Martin stated that Snipes appeared nervous when he had the shovel after they had gotten out of the car. App.p. 932. He stated that the voluntary sex with Snipes occurred while the gun was pointed at them and before the grave was dug. App.p. 933. He stated that Snipes did not voluntarily engaged in anal sex with Stokes because she was trying to push him off of her. App.p. 933 – 935.

App.p. 969 – 971. In the guilt phase redacted statement, there was no reference to Snipes accompanying them with a belief to kill another man. See App.p. 966-979. However, Stokes stated therein Syphrette told him that Snipes had to go that night because DSS had told her that Snipes could not live with her anymore. App.p. 971. That night, Syphrette and Snipes showed up and got in the car and they went to look for Norris Martin. He said at one point Snipers agreed to get Martin and she got out and looked for him, found him and they both got in the car. He stated that the car stopped and Stokes got out with Martin and discussed for Martin to "handle his business" with her. Once there goy there, Stokes states he passed the gun back and forth with Martin and Pattie passed the shovel to Martin and Syphrette stayed to watch the car.

Stokes stated he caught up to Martin and Snipes in the back of the field and stated: "I'm sorry but it's you that Pattie wants dead and Connie said oh, my god, that fat bitch" and told him not to trust her because she would turn on them. App.p. 973. Stokes told her that she was paying $2000, but Snipes responded that she did not have 2 cents. App.p. 973. Connie then begged not to be killed, but Martin stated that he wanted to have sex with her. "Connie said okay and then Norris passed me the gun and said hold that. After they finished, according to Stokes, Snipes asked if he wanted some too and he initially stated to wait until they got back "but deep in my heart I knew she wasn't leaving with us so I said why not," and passed the gun to Martin. App.p. 973-974. After he finished, while Snipes was sitting on the ground, they took the bag and pulled it over her and then he claimed that Martin shot first and then Stokes fired the second shot at her head. App.p. 974.

In the penalty phase, there was evidence presented by the State through Stokes unredacted statement that Connie Snipes believed that she was accompanying Stokes and Syphrette to murder another man, particularly Doug Ferguson. See App.p. 1299, ll. 8-15 ("She

said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish it were true we could kill both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway. I know you've been talking to her on the phone); App.p. 1299, ll. 22-24 ("While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better. . .").

This information was redacted from Stokes's statement presented to the jury in the guilt phase. Compare App.p. 971, ll. 7-22 (trial testimony) with App.p. 1299, ll. 6-25, p. 1672, l. 12-16, ll, 19-21 (unredacted statement). This concept was also excluded by the trial judge during the guilt phase and the exclusion was upheld by this Court in the direct appeal.[9] See State v. Stokes, 345 S.C. 368, 373, 548 S.E.2d 202, 204 (2001).

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." App.p. 1432, ROA 1429. No request for any particular instruction on mitigating circumstances appears on the record.

During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. App.p. 1449, 1545, ROA 1446, 1451. Stokes made a personal statement of remorse. App.p. 1462-63, ROA 1459-1460. Counsel Sims made his

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[9] The excluded and redacted portion of a letter to police made by Stokes that the jury never heard in the guilt phase was the following:

> She [Syphrette] said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She [Syphrette] said I wish that were true so we could do all both of them. She said Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home....
>
> While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better....
>
> That's when Connie said well where he at is.

The unredacted portion of the letter continues, "I said 'Baby, I'm sorry but it's you that Pattie wants dead.' "

argument concerning former warden James Aiken's testimony that Sims would never be a free man and in a maximum security prison and the factors for a maximum security prison. App.p. 1469-70, ROA 1466-1467. Counsel Sims also stated in reference to the unredacted statement admitted in the penalty phase:

> I want to point out that in the first part of the trial when Sammie Stokes's statement was read, if you will recall there was nothing to tell you as to why Connie Snipes was out there. The question is whether or not she was there for sex. In the second statement it was read to you that Connie Snipes went out there to kill Doug Ferguson. That does not mean that anyone should be killed but it is an indication of everything that was going on in this scenario.

App.p. 1464, l. 12-20.

After the arguments, pre-charge objections were made which did not include either of the presently challenged issues. App.p. 1471, ROA 1468. Counsel Sims requested a limiting instruction concerning prior bad acts that was rejected. App.p. 1471 -1475.

During the jury charge, Judge Burch addressed mitigation circumstances. App.p. 1482-84, ROA 1479-1481. In particular, he stated:

> The law also requires that you consider any mitigating circumstances which are supported by the evidence. You must consider mitigating circumstances because if you are to make an individualized assessment of the appropriateness of the death penalty in the defendant's case, which the law of this state requires you to do, evidence about the defendant's background and character is a relevant consideration. In this regard it is also relevant for you to consider any positive attributes of the defendant's character in mitigating for punishment.
>
> A mitigating circumstance is neither justification nor excuse for the murder. It's simply lessens the degree of one's guilt, that is, makes him less blameworthy or less culpable.
>
> I charge you that you may consider any other mitigating circumstances which are supported by the evidence in this case.
>
> Now there are such things as statutory mitigating circumstances which are not alleged or brought forth in this case and then there are what we call non-statutory mitigating circumstances. A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which serves the same purpose, that is, to reduce the degree of the guilt of the offense or reduce the punishment that should be fairly imposed. An example of these which you may consider if found in the evidence would include the following, which the

> defendant asserts and should be found in the evidence, and that is, the defendant is adaptable to prison. . . .
>
> . . Furthermore, although I have instructed you that any finding of a statutory aggravating circumstance has been proven, if such a finding is made by you must be made unanimously and beyond a reasonable doubt. No such requirement exists for consideration of mitigating circumstances. Therefore, in deciding the appropriate punishment in this case, each individual juror must consider each mitigating circumstance which he or she finds to be supported by the evidence. It is not necessary that the entire jury unanimously agree on that existence of any mitigating factor before you, as jurors, may consider. Rather, the existence of mitigating circumstances and the weight to be accorded to such mitigating circumstances are matters which each juror may determine for himself or herself. Nor, as I told you a moment ago, is it necessary for the existence of any mitigating circumstances or circumstance to be proven beyond a reasonable doubt before each of you may consider it.
>
> The defendant does not bear any such burden of proving the existence of such mitigating circumstance, rather you are to consider each and every mitigating circumstance which you find to be supported by the evidence before you.

App.p. 1482, l. 11 – 1483, l. 20, p. 1482, l. 7-25. Judge Burch did not instruct the jury to consider any specific statutory mitigating circumstance.

After the instructions, there were no objections to the failure to instruct any particular statutory mitigating factor nor the alleged failure to hold an on the record charge conference. App.p. 1489, ROA 1486 (no objection to the charge by the defense).

PCR Hearing Testimony of Appellate Counsel

During the PCR hearing, former appellate counsel Joseph Savitz declared that he reviewed the trial record, but did not highlight any portion where there was a discussion concerning whether the victim was provoked or was a participant in the crime. App.p. 1832, PCR Tr.p. 24.[10] He concluded that he could not recall what he was thinking when he was preparing the brief, but suggested that it was something similar to what he had argued in State v. Humphries, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996), State v. Victor, 300 S.C. 220, 224, 387

[10] The Initial Brief of Appellant in the case was filed in 2000 by Savitz. The decision by this Court in Stokes was May 29, 2001.

S.E.2d 248, 250 (1989), and State v. Evans (Kamell), 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006). He asserted that it was his opinion that trial judges should do more and specifically make inquiry as to each mitigating factor on the record. However, Savitz conceded that the Court ultimately said it was not required. App.p. 1833, PCR Trp. 25. He could not recall why he would not have argued to have the matters addressed on the record as he had been arguing in the same time period - albeit unsuccessfully. App.p. 1833, PCR 25.

On cross-examination, Savitz admitted that when he rose non-objected statutory mitigating factors that it was usually related to issues of intoxication. App.p. 1834, PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. App.p. 1835, PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. App.p. 1835, PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. App.p. 1835-36, PCR 27-28. Mr. Savitz further admitted that he reviewed the objections made to the jury instructions and determined that no objection had been made to the failure to give statutory mitigating circumstances. App.p. 1836, PCR 28, l. 8. He further was aware that there was no objection to the failure to have an on the record discussion concerning the mitigators. App.p. 1836, PCR 28, l. 9-12.

Counsel Savitz further admitted that he was aware of the existence of a statutory mitigating factor of the victim was a participant in the crime or consented to the act at the time of the briefing. App.p. 1836, PCR 28. Further, he acknowledged that he was aware of the existence of evidence in the record and the fact that the judge did not give the instruction. App.p. 1836-37, PCR 28-29.

However, Savitz questioned whether in State v. Humphries the Supreme Court had held that a failure to object to a trial court's failure to give an instruction did not preserve the issue for

appeal. App.p. 1837, PCR 29. He felt that the Supreme Court did not resolve this procedural bar until the Kamell Evans case when he was arguing for a procedure to require the judge to go through each specific mitigating factor on the record. App.p. 1837, PCR 29. In admitted hindsight, Savitz stated that the judge has the discretion to hold a charge conference any time he wants to and admits that Judge Burch did hold a charge conference and mentioned the mitigator during the conference. However, Savitz stated that it was never mentioned again after the beginning of the penalty phase. Savitz suggested that he missed this issue and would have raised it had it seen it because this was an issue he was raising at the time in other cases. App.p. 1838, PCR 30. However, he recognized that he probably would not have won the issue, but thought that the law was uncertain at the time he briefed the appeal. App.p. 1838, PCR 30.

Savitz admitted that in State v. Humphries in 1993 the Supreme Court held that a failure to make a specific request for a statutory mitigating circumstance waived the right to raise the omission on appeal. He stated that he may have been missing the message that the Court was sending, because he still raised the issue in Kamell Evans (2006) contending that the law was uncertain concerning preservation of the issue. App.p. 1839-40, PCR 31-32. He admitted that in Evans, the Supreme Court made clear that a request for the factor had to be made to preserve the issue when it was not charged. App.p. 1841, PCR 33. However, he had no idea why he did not raise the issue in Stokes appeal brief. App.p. 1841, PCR 33, l. 5.

Counsel Sims conceded that he did not object to the failure to give the particular statutory mitigating circumstance instruction. App.p. 1873, PCR 65.

ANALYSIS

Deficient Performance Not Shown

The PCR court concluded that the Petitioner has failed to show either deficient performance or prejudice under Strickland v. Washington. App.p. 2161-62. Appellate counsel Savitz cannot be deficient under Strickland in failing to raise these two particular issues because neither issue was presented to the trial court by a timely objection on the record. Absent a specific request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for appellate review. State v. Evans (Kamell), 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

The PCR court reliance on Humphries and Victor to show that counsel was not deficient is well-founded. In State v. Victor, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), the Supreme Court set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

> 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.

See, State v. Stanko, 376 S.C. 571, 577-578, 658 S.E.2d 94, 97 - 98 (2008) (not preserved).

One of the earlier cases addressing this assertion was handled by appellate counsel Savitz prior to his handling in the instant case resulted in rejection of the argument as not preserved. State v. Humphries, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996). The Court has consistently rejected claims that certain mitigating factors should have been instructed absent request and objection, except in the intoxication evidence area which was corrected in Evans. The recent cases have stated that absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have been charged is not preserved for review. *See* State v.

Vazquez, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005); State v. Bowman, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005); and State v. Sapp, 366 S.C. 283, 621 S.E.2d 883, n. 3 (2005).

In the instant case, trial counsel did not request an instruction on the particular statutory mitigator "the victim was a participant in the defendant's conduct or consented to the act" at the conclusion of the penalty phase evidence presentation and did not object to the failure to give an instruction of the mitigating factors. App.p.1431-32 (conclusion of penalty phase evidence); App.p. 1489-90, ROA 1486-87 (discussion about jury request after instructions). Since there was no objection to the failure to instruct, nothing was preserved for the appeal on these issues.

Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002): Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."). See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

Counsel asserted that at the beginning if the penalty phases intent to pursue the mitigating factor that the victim was a participant in the defendant's conduct or consented to the act. App.p. 1085. Judge Burch deferred a decision at that time on this factor depending on how it developed in the record. App.p. 1086-1087. Like a motion in limine, the record did not support a request at the conclusion of the penalty phase or an objection to the exclusion of the instruction on the

mitigating factor. App.p. 1489-90. The PCR court properly concluded that appellate counsel Savitz was not deficient in failing to brief an unpreserved claim.

In addition, the state PCR court held that there was nothing in the record to show that the trial court failed to hold a charge conference. App.p. 2162. See App.p. 1432 (judge recessing to view his checklist). Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. App.p. 2161. The PCR Court reasonably found that appellate counsel cannot be found to be deficient when the issue was not raised at trial by an objection or request.

The Petitioner asserts that the record shows the court failed to undertake the review of the evidence prior to making its determination of mitigating factors. However, the record defeats that erroneous assumption. As noted above, the trial judge did include from his review of the evidence the non-statutory mitigating factor of adaptability to prison in his instructions. App.p. 1483, l. 14-15. The trial judge also noted in his instructions: "there are such things as statutory mitigating circumstances which are not alleged or brought forth in this case." App.p. 1483, l. 3-6. This explicitly suggests that the court considered matters prior to his instructions, as required under Victor. However, this general consideration does not preserve, absent objection or request, claims concerning the failure to charge a particular mitigating factor. This is borne out by the expressed failure on the part of trial counsel to object after the instructions to the failure to charge the statutory mitigating circumstance 16-3-20(C)(b)(3) that "the victim was a participant in the defendant's conduct or consented to the act."

Since there is no showing that the trial court refused to hold a charge conference or that the defense objected to the failure to instruct on the particular mitigating factor, reasonable appellate counsel could not have been required under the Constitution to assert these unpreserved

claims, particularly in 2000 when the appellant's brief was written after the decision in Humphries. His claims set forth in these two specifications must be dismissed.[11]

Prejudice Not Shown

Further, prejudice may not be shown by this failing because there is no reasonable probability that the appellate court would have reversed the sentence had counsel Savitz briefed either issue. First, the issues were not preserved for appellate review by an objection. State v. Humphries, supra. Second, this Court in the direct appeal of this case rejected a claim that the evidence showed that Snipes was a "participant in the defendant's conduct or consented to the act." As the Court found: "[C]ontrary to Stokes' assertion, the redacted portions do not reflect that Snipes voluntarily rode to her death but, rather, serve only to demonstrate that she was, in fact, tricked into going into the woods. As such, the fact that she was "inveigled" or "decoyed" into going to Branchville negates, in legal contemplation, the voluntariness of her participation." State v. Stokes, 345 S.C. 368, 373, 548 S.E.2d 202, 204 (2001). This Court further held:

> Moreover, even assuming arguendo, as Stokes claims, that the redacted portions of his statement were relevant to demonstrate the victim voluntarily accompanied them on the night of her murder, any error in the redaction is harmless. Both Stokes' letter and the testimony of Norris Martin amply demonstrate that Connie Snipes voluntarily went with Stokes and Syphrette to Branchville, and that she willingly walked into the woods with Martin and Stokes. Accordingly, the jury was well aware that she had accompanied them voluntarily, and Stokes has failed to demonstrate any prejudice from the redaction.

[11]This Court does not need to address whether there was any evidence of the statutory mitigating factor that "the victim was a participant in the defendant's conduct or consented to the act" under Section 16-3-20(b)(3), because the specific request was not made by trial counsel and a Sixth Amendment claim of ineffective assistance of trial counsel was not raised in the PCR court or hearing. However, even if asserted as a trial counsel claim under the Sixth Amendment, the "prejudice" prong cannot be satisfied where the evidence revealed that the victim's death was the idea and the plan by the Petitioner and Pattie Syphrette was to create a subterfuge and the intent was to kill her because of the problems Syphrette was facing with DSS. Simply put, Connie Snipes did not consent to the violence that was about to strike her involving the violent rape, stabbing, maiming and ultimately shooting. There is no reasonable probability that the result would have been different had request for the instruction been made or if the instruction had been given. Any suggestion otherwise is groundless in light of this horrific factual record of malice against the victim.

State v. Stokes, 345 S.C. 368, 374, 548 S.E.2d 202, 205 (2001). To suggest that she consented to her death and participated in her death and maiming is a misreading of this statutory mitigating factor. The plan was to kill her after sexual intercourse. Nothing suggests consent or participation in that plan by Snipes. This Court has already spoken - "Stokes' argument is akin to suggesting that a child molester who lures his child victim into his car with candy may be found not guilty of kidnapping, simply because the child "voluntarily" accompanied him in the hopes of receiving candy. We find such a position untenable." State v. Stokes, 345 S.C. 368, 373, 548 S.E.2d 202, 204, ft. 7.

Other courts in analogous situations have rejected the existence of the same mitigating factor. In Duest v. State, 855 So.2d 33 (Fla. 2003), the Florida Supreme Court rejected a request for the mitigating factor. Persuasively, the Florida court found:

> Our resolution of this issue is governed by Wuornos v. State, 676 So.2d 972 (Fla.1996), in which this Court rejected the argument that by seeking the services of a prostitute, the murder victim had assumed the risk of harm, justifying a finding of this mitigating circumstance. We stated: By its plain language, the statute permits this factor only where: The victim was a participant in the defendant's conduct or consented to the act. § 921.141(6)(c), Fla.Stat. (1989).
>
> It would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. What the language plainly means is that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person. An example would be two persons participating in a duel, with one being killed as a result. The statute does not encompass situations in which the killer surprises the victim with deadly force, as happened here under any construction of the facts. Id. at 975. These observations apply with equal force to the acts of Pope, the victim in this case, in picking up Duest in a bar and taking him home. As in Wuornos, the evidence shows that Duest surprised the victim with deadly force, rendering the mitigator of victim participation in or consent to the murder inapplicable. Additionally, Pope's failure to promptly seek medical treatment did not make him either a participant in the deadly attack or evince his consent to the murder. A construction of section 921.141(6) (c) making the failure to seek medical care tantamount to consent to or participation in the murder

> would be no more justified than the construction of the provision we rejected in Wuornos. Because there was no evidence from which the jury could lawfully have found that the victim participated in the conduct resulting in his death, the trial court properly denied the instruction.

Duest v. State, 855 So.2d 33, 43-44 (Fla. 2003). See State v. Sattler, 288 Mont. 79, 956 P.2d 54 (Mont. 1998) (victim was not participant in or consenter to defendant's acts of beating him to death, even if victim's acts produced defendant's responsive acts, and thus, defendant's self-defense related testimony did not constitute evidence of mitigating circumstance that victim participated in or consented to defendant's acts which resulted in his death for purposes of imposing death penalty upon conviction for deliberate homicide); Dill v. State, 600 So.2d 343 (Ala.Cr.App. 1991) (victim's status as drug dealer and refusal to give defendant cocaine did not make victim participant in defendant's conduct as statutory mitigating circumstance in capital murder prosecution). Other state courts have also strictly construed the consent, or participation, element of the "victim consent" mitigating factor. See, e.g., State of Tennessee v. Collier, 1997 WL 9722 at *7 (Tenn.Crim.App.1997) (finding that the "victim consent" mitigator did not apply where defendant was allegedly provoked to murder the mother of his son as a result of her boyfriend's threats that he would never see his son again; the court held: "These facts simply do not support any 'participation' or 'consent' on behalf of [the victim]."); State v. Ryan, 248 Neb. 405, 534 N.W.2d 766, 784–85 (1995) ("victim consent" mitigator inapplicable where victim was a member of a cult group and allegedly consented initially to corporal punishment inflicted by the group leader which resulted in his death by torture).[12]

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[12] The Model Penal Code and state decisional law interpreting similar mitigating circumstances are instructive. And, because the "victim consent" mitigator has as its origin Section 210.6(4) (c) of the Model Penal Code, the commentary note to that model provision is of special importance. The Code's commentary posits a strict and narrow application of the "victim consent" mitigator:

> Paragraph (c) addresses the case where the victim is partially responsible for his own death. This circumstance obtains chiefly in two kinds of situations. First, there are occasions in which the defendant and his victim are engaged jointly in an activity highly dangerous to each. If

Respondent submits that the Petitioner was not entitled to this statutory mitigating circumstance because she did not consent to the violent activity that was planned against her. She was neither a participant nor consenter to her own death. The claim otherwise is not supported by a reasonable reading of the statute.

Further, any error in the failure to instruct must be deemed harmless in light of the violence and the post-mortem abuse which was perpetrated on the victim and other acts of violence committed by Stokes. As this Court stated:

> According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head, and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, [n. 4] throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.
>
> Ft. 4 According to the pathologist, Snipes' injuries were consistent with having been scalped, had the nipple area cut from each breast, and having had the vaginal area cut out.

> each person's participation depends upon the cooperation of the other, a murder conviction may lie for the death of one actor, even though both share responsibility. An example may be the case of Russian roulette, at least where the defendant actually fires the shot that kills his partner. A second situation within the scope of Paragraph (a) is the true mercy killing. There the defendant's homicidal act may not have occurred had the victim not consented to it. In either of these contexts, the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence.

Model Penal Code § 210.6(4) (c) commentaries at 140–141 (emphasis added). The first example, of course, is a classic illustration of implied consent. The second is clearly actual consent.

In accordance, the state courts which have addressed the issue strictly and narrowly have construed the "victim consent" mitigating factor. For example, in Huffington v. State of Maryland, 304 Md. 559, 500 A.2d 272 (1985), cert. denied, 478 U.S. 1023, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), the Court of Appeals of Maryland (the state's highest court) rejected the defendant's argument that he was entitled, as a matter of law, to this mitigating factor. In Huffington, the victim was a co-conspirator of the defendant in a drug-purchasing transaction. The victim accompanied the defendant to a rural area in the middle of the night to purchase drugs. As the two exited their car, the defendant shot and killed the victim in his back. The defendant argued that "[a]ccompanying known drug dealers to a rural area in the middle of the night has much in common with 'Russian roulette'—the chance of becoming a victim of crime in that circumstance is probably better than one in six." Id. 500 A.2d at 283–84. The Court of Appeals, strictly interpreting the "victim consent" mitigator, rejected the defendant's claim that the victim participated in, or consented to, his criminal conduct. Id.

Stokes, supra. See App.p. 1158-60. Martin described Snipes screaming after Stokes cut her nipple and her breasts with the knife. App.p. 1159 – 1160. After the second shot, Martin described Stokes scalping the victim and then cutting her vagina out. App.p. 1163-64. The pathologist described that the cutting of the breasts would have been painful. App.p. 1222-23. Further the penalty phase record revealed a separate second murder of Douglas Ferguson by Stokes and Syphrette after the Snipes murder where duct tape was wrapped around his body and head suffocating him, which Petitioner admitted to doing in his statement. App.p. 1248-49. 1260-61. 1310-1312, 1342-1348, 1367-68.

Prejudice under Strickland has not been shown.

For the foregoing reasons, certiorari must be denied.

CONCLUSION

For all the foregoing reasons, Respondent submit that the Petition for Writ of Certiorari should

Respectfully submitted,

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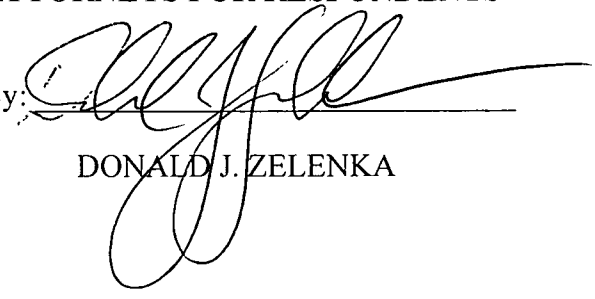
By: 

March 19, 2015

DONALD J. ZELENKA

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

The undersigned attorney hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari in the above referenced case has been served upon counsel for Petitioner by depositing one copy of same in the United States Mail, postage prepaid, to each attorney, addressed as follows:

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