

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED

L. Casey Manning, Circuit Court Judge

APR 22 2015

Appellate Case No. 2013-000635

S.C. Supreme Court

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

v.

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

**REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

Like the orders it wrote for the PCR judge's signature, Respondent's Return to Petition for Writ of Certiorari avoids the serious questions this case presents, focusing instead on the making and re-making of irrelevant points, and the obfuscation of legal issues that require this Court's attention. Petitioner, Sammie Louis Stokes, submits this brief Reply to demonstrate the inadequacy of Respondent's defense of the judgment below, and to underscore the need for resolution of the conflict of interest issues set forth in the Petition.

I. The Return does not address the actual conflict of interest that adversely affected defense counsel's representation.

Stokes' Petition sets forth a detailed explanation of the distinction between successive representation in related and unrelated cases, the legal authorities from other jurisdictions recognizing the heightened risk of conflicts in the former category as compared to the latter, and the reasons why this case represents a classic instance of related-case conflict that should be recognized and remedied by this Court. The State's Return fails to engage with – or to dispute Stokes' contentions concerning – any of these considerations. It does not acknowledge the widely accepted legal rule that separates a case like this from a case like *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007); it makes no reasoned effort to plausibly classify Stokes' 1991 and 1999 cases as “unrelated” within the prevailing legal rubric; and it offers no theory under which defense counsel, Thomas Sims, was *not* conflicted by the time his dual roles forced him to a confrontation with Audrey Smith, victim and star witness at the ABIK trial, and lead-off penalty phase witness at the capital trial. In short, the Return simply argues the case as the State

wishes it to be, while ignoring the case as the law and facts actually define it.¹

Apart from preventing the Return from contributing to informed consideration of the issues, the State's omissions – none of which could have been inadvertent by this point in the litigation – also warrant a set of inferences that support Stokes' contentions. For instance, by refusing even to acknowledge, let alone attempt to distinguish or undermine, the legal authorities holding that successive representation in related cases produces a conflict, the State implicitly concedes those authorities are right. If its intentions were otherwise, the State would have made some effort to say so by now. Similarly, the State's silence on the stark differences between Sims' conflicted cross-examination of Audrey Smith at the 1999 trial and the cross-examination by unconflicted counsel in 1991 speaks volumes. Stokes has consistently pointed to that comparison as strong, tangible proof that the conflict adversely affected Sims' representation, and the State has chosen not to contest that assertion.² If there were a plausible alternative reading of the two cross-examinations, surely the State would have offered it. It has not because it cannot.

¹ This is nothing new in the history of this case. The record of the proceedings before the Circuit Court is replete with instances of the State, both directly and via orders drafted for and signed by the PCR judge, willfully ignoring the law of related-case conflicts and the facts demonstrating such a conflict here. *See, e.g.*, App. 2007-14 (Applicant's Reply) (detailing Respondent's failure to address relevant issues of law and fact); App. 2189-90 (Motion to Alter or Amend the Judgment) (objecting to adoption of State's proposed order because it failed to address central issues); App. 2219-2230 (hearing on Motion to Alter or Amend the Judgment) (argument concerning State-written order's failure to address key issues).

² Moreover, the State acknowledges that Sims thought – in defiance of long-settled law – that he might succeed in burying the entire problem of having prosecuted Stokes in the 1991 Audrey Smith ABIK trial by excluding “[t]he prior convictions in the penalty phase, trying to rely on those rules [*i.e.*, *State v. Lyle* and Rules 404(b), 608 and 609].” Return at 12. The same was true of co-counsel, Virgin Johnson, who never spoke during the death penalty trial. “Johnson recalled that Stokes was told prior to the trial that the evidence of the prior conviction *could possibly* be presented.” Return at 14. (emphasis added).

Having failed to join issue on any of Stokes' challenges to the determination that his trial counsel did not have a conflict of interest, the Return does nothing to diminish this case as a worthy vehicle for settling an important open question of law in South Carolina, or to lessen the need for correction of the errors committed by the PCR court.

II. The Return also continues to ignore the glaring defects in the PCR order's waiver determination.

While the Return briefly pays lip service to the constitutional requirements for a valid waiver of the right to conflict-free counsel, *see* Return 27-28, its attempt to defend the waiver finding in the PCR order ignores those requirements entirely. Just as it did in the order it prepared for the PCR court, the State maintains in its Return that the conflict issue was settled once and for all the moment Stokes expressed a willingness to keep Sims as his lawyer after being reminded that Sims had prosecuted him in the 1991 case.³ That assertion is irreconcilable with basic principles of waiver law, and with the record in this case.⁴

To be valid, a defendant's waiver of "any potential conflict of interest" must be made

³ *See, e.g.*, Return 9 (defending PCR order on ground that trial counsel "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 ...") (emphasis added); Return 10 ("[T]he 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.'"); Return 13 ("Counsel Sims clarified that Stokes knew that he had been the one to prosecute him and his practice was to state that did [sic] he have any problems with that."); Return 21 ("The record is void of any attempt by the Petitioner to have counsel Sims removed with the uncontradicted record [sic] that Stokes was aware of the prior prosecution by Sims.").

⁴ The State also goes out of its way to emphasize trial counsel's testimony that Stokes expressed a desire to keep Sims as his lawyer even after the 1999 capital trial had ended. *See, e.g.*, Return 13. Even if true, that is irrelevant. Apart from having sat through the 1999 trial, Stokes knew no more about Sims' actual conflict by the end of that proceeding than he did before it started. He had still never been advised of key considerations relating to the conflict, and although he was present for Sims' cross-examination of Smith, he had no means of recognizing how anemic the questioning had been as compared to the examination that could have been carried out by an unconflicted lawyer.

“knowingly, voluntarily, and intelligently.” *Jordan v. State*, 406 S.C. 443, 450, 752 S.E.2d 538, 542 (2013); *see also, e.g., Thomas v. State*, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (“To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.”). Among other things, this requires that the defendant be “informed of the *precise nature* of the conflict of interest” before deciding whether to waive it. *Jordan*, 406 S.C. at 451, 752 S.E.2d at 542 (emphasis added); *see also id.* (citing *United States v. Swartz*, 975 F.2d 1042, 1048-49 (4th Cir.1992), for proposition that “a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results”); *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir.1990) (cited with approval in *Jordan*) (“A defendant cannot knowingly and intelligently waive what he does not know.”).⁵

Contrary to the State’s suggestion, the mere fact that Sims had previously prosecuted Stokes did not even begin to capture the “precise nature of the conflict,” *Jordan, supra*, that “eventually result[ed],” *Hoffman, supra*. Rather, as explained in the Petition at 26-29, there was much more to be known and understood before a valid waiver could be made, and the record is clear that Stokes was never made aware of any of it. *See* Petition at 29 (describing “Stokes’ undisputed ignorance of (a) the fact that Audrey Smith would testify for the prosecution; (b) the fact that Sims would cross-examine Smith when she testified; (c) how Sims had conducted

⁵ As this Court has repeatedly made clear, these requirements are best safeguarded through an on-the-record discussion with the trial court. *See, e.g., Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (emphasizing necessity of on-the-record colloquy establishing that prisoner understands full extent of proposed waiver to be made when accepting trial counsel as PCR counsel); *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013) (relying on numerous on-the-record colloquies to find knowing and intelligent waiver of conflict arising from counsel’s continued representation of Stanko in one proceeding while remaining the subject of an ineffective assistance of counsel claim based on counsel’s representation of Stanko in a separate proceeding). Here, as the State has conceded, there was no on-the-record waiver of any kind prior to or during Stokes’ capital trial.

himself as the prosecution's advocate for Smith and her story at the 1991 trial; (d) whether Sims' successive roles would impair his advocacy, consciously or unconsciously; (e) what Stokes' own rights were under state and federal law; and so on." The Return does not contest the accuracy or relevance of any of these essential facts, and for good reason: they establish conclusively that the waiver finding in the PCR order is unsustainable as a matter of law.

CONCLUSION

WHEREFORE, for these additional reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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BY: 

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April 22, 2015.

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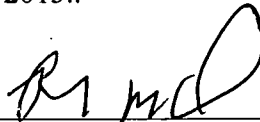
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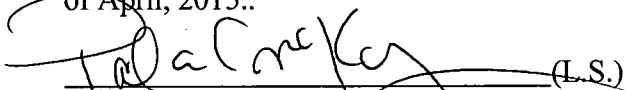
CERTIFICATE OF SERVICE

I certify that a true copy of the reply to return to petition for writ of certiorari in this case has been served on Donald J. Zelenka, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of April, 2015..


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of April, 2015..

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.