

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

VOLUME FIVE

RECEIVED

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S.C. Supreme Court

SAMMIE LOUIS STOKES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000635

APPENDIX

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In A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), the committee opined that cross-examination of an adverse witness who is a client creates a disqualifying conflict, in the absence of appropriate client consent, depending upon the nature and degree of the conflict. As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

Not all conflicts may be waived, however. An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. See Kliti, 156 F.3d at 153; Levy, 25 F.3d at 153. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel. See Levy, 25 F.3d at 153.

In Schwarz, the Second Circuit described the distinction between waivable and unwaivable conflicts citing United States v. Fulton, 5 F.3d 605 (2d Cir.1993). Fulton involved the representation of a defendant by an attorney who had been accused of participating in criminal activity related to the crimes for which the defendant was on trial. See *id.* at 607-10. The district court had advised the defendant of the conflict and had obtained a waiver. See *id.* at 608. On appeal, the defendant argued that the waiver was ineffective. See *id.* at 612.

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The Second Circuit agreed and noted that, "[i]n such cases, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant." *Id.* at 613. The Court distinguished between conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are "of a different character" than the latter. *Id.* The Court concluded that because the conflict at issue there resulted in counsel's "[a]dvice as well as advocacy [being] permeated by counsel's self interest, and [because] no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation," the conflict was not waivable. *Id.* (Emphasis added).

Although the particular conflict at issue in Fulton belonged to that narrow category of conflicts that courts have deemed to be *per se* violations of the Sixth Amendment right to counsel, see *id.* at 611-12; Solina v. United States, 709 F.2d 160, 168-69 (2d Cir.1983), Fulton's rationale with respect to when an *attorney's self-interest* renders a conflict unwaivable is equally applicable to the unusual facts of Schwarz. The lawyers's representation of Schwarz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in

actual conflict existed between trial counsel's personal interest and professional obligation to the PBA and his representation of the defendant. *Id.* at 91-92. In particular, the defendant's interest in making a defense that would implicate another police officer in the assault--a strong, obvious interest--diverged with trial counsel's interest in refraining from any conduct that could harm the PBA, for example--making an argument that supported the conspiracy theory in the victim's civil lawsuit. *Id.* at 91-92.

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In Schwarz, trial counsel had a personal interest and professional obligation to another client that differed from his criminal client. Also, trial counsel refrained from making a particular defense in the criminal case because it ran counter to another client's interest.

In the instant case, Sims 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. As such, Schwarz does not support the defendant's position. See U.S. v. Peterson, 233 F.Supp. 2d 45 (E.D.N.Y. 2002).

In clarifying the narrow approach of the unwaivable conflict issue and application of Schwarz, the Second Circuit recently stated:

As we made plain in Fulton, however, *lesser conflicts*, such as an attorney's representation of two or more defendants or his prior representation of a trial witness, are generally waivable. See United States v. Fulton, 5 F.3d at 613. *Although such a conflict might require a defendant to abandon a particular defense or line of questioning, he can be advised as to what he must forgo*; he "can then seek the legal advice of independent counsel and make an informed judgment that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel." United States v. Fulton, 5 F.3d at 613. In the multiple representation situation, the defendant "can be advised by independent counsel of the dangers" of such matters as "one defendant's cooperating with the government," and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney's representation of another accused. *Id.* Where the defendant can rationally opt to retain counsel of his choice despite a conflict, the court conducts a Curcio hearing to determine whether the

the two-year, \$10 million retainer agreement his newly formed firm had entered into with the PBA. Like the conflict in Fulton, Worth's conflict "so permeate[ed] the defense that no meaningful waiver could be obtained." Fulton, 5 F.3d at 613. The Court held that: "[w]e must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interests for those of the PBA. Indeed, we think it likely that these very concerns motivated the government to argue to the district court at the *Curcio* hearing that the conflict created by the PBA retainer could not be waived. Thus, we conclude that the conflict between Worth's representation of Schwarz, on the one hand, and his ethical obligation to the PBA as his client and his self interest in the PBA retainer, on the other, was so severe that no rational defendant in Schwarz's position would have knowingly and intelligently desired Worth's representation. Cf. id. ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); cf. also United States v. Arrington, 867 F.2d 122, 129 (2d Cir.1989) (upholding district court's disqualification of attorney "saddled" with serious conflict where allowing waiver would have required defendant to "forego[] the presentation of ... evidence that would [have been] of great assistance")." The Schwarz court found that the conflict was unwaivable.

Schwarz is distinguishable from the present case. In Schwarz, the government charged the defendant, a police officer, with assaulting a victim in a bathroom at a police precinct. Id. at 79-80. There, the law firm of defendant's trial counsel had a \$10,000,000 retainer agreement with the police officers' union, the Patrolman's Benevolent Association (the "PBA"). Id. at 91. During the criminal proceedings, the victim filed a civil lawsuit against the PBA alleging that the PBA through its agents and its president conspired to injure him and then covered it up. Id. The Second Circuit found an

defendant knowingly and intelligently waives his right to conflict-free representation. See, e.g., United States v. Leslie, 103 F.3d 1093, 1098 (2d Cir.), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997); United States v. Levy, 25 F.3d at 153.

U.S. v. Perez, 325 F.3d 115 (2d Cir. April 4, 2003) (attorney's status as potential witness at defendant's trial was conflict of interest that was waivable).

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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 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.

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. Respondent respectfully submit that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed. ¹¹

¹¹Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

VI.

WHEREFORE, having made its Return to the application, as amended on August 9, 2004, the State requests that a hearing be held.

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February 16, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	

APPLICANT'S REPLY TO RESPONDENT'S POST-HEARING MEMORANDUM

Applicant, Sammie Louis Stokes, by and through undersigned counsel, submits this Reply to Respondent's Post-Hearing Memorandum (Resp. Mem.) pursuant to instructions issued by the Court at the conclusion of the August 5, 2009 evidentiary hearing.¹ Because most of the contentions in respondent's memorandum were either anticipated and addressed in Stokes' initial submission, or lack relevance to the issues before the Court, applicant's reply will be brief.²

I. LEAD TRIAL COUNSEL'S CONFLICT OF INTEREST.

Respondent's contentions with regard to the existence of a conflict of interest consist of intermingled assertions that there was no "*per se* conflict," *see* Resp. Mem. at 35, and several

¹At the conclusion of the hearing, the Court outlined the briefing procedure, under which the parties were to exchange initial briefs, take ten (10) days to prepare replies, and then submit their initial and reply briefs to the Court. *See* PCR Tr. 109. Undersigned counsel provided applicant's Post Hearing Memorandum to counsel for respondent electronically on Monday, Feb. 15, 2010, and received respondent's Post-Hearing Memorandum via U.S. Mail on Thursday, Feb. 18, 2010.

²Additionally, because undersigned counsel have determined that respondent's arguments with regard to Grounds 9(b) and (c) do not require a response, this reply will be limited to a discussion of the conflict of interest issue asserted in Ground 9(d).

conclusory assertions that there could have been no actual conflict because there was no relationship between the 1991 and 1999 proceedings, and because Thomas Sims failed to raise the issue with the trial court, and Stokes failed to take it upon himself to request new counsel, *see* Resp. Mem. at 36-38. These assertions fail to address both the actual circumstances presented by this case, and the legal conclusions those circumstances dictate.

A. Respondent's "*per se* conflict" argument is irrelevant.

Respondent's primary line of defense is that, pursuant to *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), *People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y. App. Div. 2002), and *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (Wis. Ct. App. 1998), the appointment as defense counsel of an attorney who previously prosecuted the defendant does not give rise to a *per se* conflict of interest. *See* Resp. Mem. at 35-38. Stokes has never sought to challenge that well established legal proposition, but it has nothing to do with the issue in this case.

Childers, *Abar* and *Cobbs* all involved defendants represented by lawyers who had previously prosecuted them, but none of the prior prosecutions had any relationship to the subsequent cases in which the former prosecutors served as defense counsel. *See Childers*, 373 S.C. at 372, 645 S.E.2d at 235; *Abar*, 290 A.D.2d at 593, 736 N.Y.S.2d at 156-57; *Cobbs*, 221 Wis.2d at 107, 584 N.W.2d at 711. Because no such relationship existed in those cases, the defendants could only have prevailed under a *per se* rule categorically barring any lawyer from defending someone he or she had previously prosecuted, regardless of whether the prior prosecution could have had any effect on the later defense.

This case occupies a much smaller and more unique category. Here the issue is not merely whether Sims' status as a former prosecutor automatically generated a *per se* conflict of interest.

Instead, it is whether Sims' participation on *both sides* of the Audrey Smith ABWIK – as trial prosecutor in 1991 and as 1999 defense counsel tasked with confronting Smith and the evidence from the 1991 trial – gave rise to an actual conflict. Neither *Childers*, *Abar* nor *Cobbs* speak to that issue, but the decisions cited and discussed in Stokes' Post-Hearing Memorandum at 13-17 do, and they all make clear that this sort of successive participation in related cases is impermissible.

B. Respondent wilfully ignores the relationship between the 1991 and 1999 proceedings.

Respondent asserts that “there was no connection between the former offense and the instant case.” Resp. Mem. 38. Rather, according to respondent, “[t]he only matter was the existence of the conviction - a proven fact - as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction.” *Id.* On their face, these two statements are irreconcilable. When the prosecution made the fact of the 1991 conviction a prominent feature of its 1999 case for death, it necessarily established a “connection” between the two proceedings. And when Sims came face to face with Audrey Smith – who appeared at the 1999 trial to tell a version of the very story Sims himself had elicited from her and vouched for in 1991 – the relationship between the two cases became undeniable. Respondent's assertions to the contrary are so conclusory because they have to be; one cannot discuss the actual circumstances of Sims' roles in the two proceedings without acknowledging the predicament in which he found himself. Whether or not respondent chooses to do so, this Court is obligated to recognize what the record makes plain: a real and tangible connection existed between the 1991 and 1999 proceedings, and that connection gave rise to an actual conflict of interest under settled law.

II. RESPONDENT'S WAIVER ARGUMENTS.

The relevant portion of the remainder of respondent's memorandum is devoted to promoting the general proposition that Stokes somehow waived his right to conflict-free counsel.³ *See* Resp. Mem. 39-40. As with its arguments on the existence *vel non* of the conflict, however, respondent leaves the important parts out.

A. Respondent never acknowledges the standard for establishing a valid waiver.

Respondent encourages this Court to reject Stokes' claim on the ground that "there was a knowing waiver of a conflict of interest." Resp. Mem. 39. Yet nowhere does respondent acknowledge either the legal standard for finding a waiver, or that respondent itself bears the burden of proving that standard was satisfied.⁴ In fact, the closest respondent comes to suggesting a waiver standard is its reference to several sources discussing circumstances under which conflicts may or may not be waived. *See* Resp. Mem. 39-40. On balance, however, these sources do respondent at least as much harm as good.

For example, respondent quotes the Comment to SCACR, Rule 407, Rule 1.7, as providing that, "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." In this case, a disinterested lawyer *would* so

³The final four and a half pages of text in respondent's memorandum contains a sustained effort to distinguish this case from a Second Circuit decision in *United States v. Schwarz*, for which a full citation is never provided. Stokes, however, has neither cited nor relied upon any *Schwarz* opinion, and respondent's extended discussion appears to be leftover content copied from a pleading in some other case.

⁴The governing legal standard and authority placing the burden on the state are detailed in Stokes' Post-Hearing Memorandum at 19-20.

conclude; indeed, Jeff Bloom effectively did so more than once in his pre-trial communications with Sims.⁵ By this authority – cited in respondent's own submission – Sims had no business even “ask[ing] for” Stokes’ consent to the representation.

The considerations respondent draws from *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir, 1991), and the A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), likewise undercut respondent’s waiver claim. The record before this Court provides no basis for concluding that Stokes was “in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation.” *United Sewerage Agency* (quoted in Resp. Mem. 39). The record similarly gives no indication of “appropriate client consent” to Sims’ “cross examination [Audrey Smith as] an adverse witness” A.B.A. Formal Ethics Opinion (also quoted in Resp. Mem. 39.). On the contrary, the most powerful message emanating from the record in this case is that neither Sims nor Johnson nor Stokes understood or appreciated the nature, extent or seriousness of the conflict at a time when a valid waiver could theoretically have occurred.⁶

⁵ After detailing the testimony of Sims and Johnson, Respondent relegates Mr. Bloom’s testimony to a single footnote, *see* Resp. Mem. at 35, n. 10, and seems to suggest that the conversations between Mr. Bloom and Sims might not have occurred. *See* Resp. Memo at 32, n. 8 (Sims’ recollection was “different from” Blooms’), 33 (Sims “had no recollection” of a discussion about the potential conflict of interest, and 35, n. 10 (“Sims did not recall any discussion with Bloom” regarding the conflict of interest issue). While Respondent’s recitation of the testimony is literally accurate, the implication – that Mr. Bloom never had a discussion with Sims about the clear conflict of interest – is not. On cross examination Sims clarified that he was not testifying that he and Mr. Bloom never spoke about the conflict of interest; rather, he simply could not, 10 years later, recall the conversation. PCR Tr. at 84. Indeed, it is likely that the conversation about the conflict did not stand out in Sims’ mind because, as Mr. Bloom suggested, Sims simply did not seem to grasp the gravity of the conflict or the logic of Mr. Bloom’s advice.

⁶ In a footnote on the last page of its memorandum, respondent asserts that Stokes’ affidavit should be excluded from consideration because the “record was closed” before it was submitted, and because the affidavit purportedly “contradict[s] the testimony of counsel Sims and Johnson.” Resp. Mem. 44, n. 11. This assertion should be rejected. Stokes’ affidavit was submitted on August 18,

B. No valid waiver occurred in this case.

Respondent's reason for failing to acknowledge or articulate the settled standard for waiver of a guarantee like the Sixth Amendment right to conflict-free counsel becomes clear after a review of the evidence upon which respondent purports to base a waiver in this case. According to respondent, Stokes waived his fundamental constitutional right – silently, and off-the-record – simply by failing to affirmatively request new counsel after being informed that Sims had been a prosecutor, and had once sent Stokes to prison. By implication, respondent treats as irrelevant Stokes' undisputed ignorance of (a) the fact that Audrey Smith would testify for the prosecution; (b) the fact that Sims would cross-examine Smith when she testified; (c) how Sims had conducted himself as the prosecution's advocate for Smith and her story at the 1991 trial; (d) whether Sims' successive roles would impair his advocacy, consciously or unconsciously; (e) what Stokes' own rights were under state and federal law; and so on. As authorities cited in respondent's own memorandum make clear, that is simply not how waiver law works. *See Cobbs*, 221 Wis.2d at 105, 584 N.W.2d at 711 (cited at Resp. Mem. 36-37) (“The waiver [of a conflict] must be knowing and

2009, less than two weeks after the evidentiary hearing, and was accompanied by a Motion to Supplement the Record which acknowledged respondent's right to cross-examine Stokes, and pledged cooperation should respondent elect to exercise that right. Respondent gave no indication of a desire to do so; in fact, it was not until some three months later that respondent – in an email – raised the two objections repeated in footnote 11 of its memorandum. Under these circumstances, respondent's observation that the record had been closed cannot justify exclusion of Stokes' affidavit. Respondent's characterization of the affidavit as an attempt “to contradict the testimony of both Sims and Johnson” also falls short. Respondent does not identify any *actual* contradictions between the affidavit and trial counsel's testimony, and the record makes quite clear that no such contradictions exist. On the contrary, Stokes' affidavit *corroborates* the relevant portions of Sims' and Johnson's testimony by confirming that they did little more than remind Stokes of Sims' prior prosecution, they did not explain to Stokes that his prior convictions would be admitted against him at the penalty phase of his trial, and they did not warn him that Audrey Smith would be permitted to testify or that Sims would be tasked with her cross-examination.

voluntary.”); *id.* (““The judge should ensure that the defendants *understand the potential conflicts and determine whether they want separate counsel....* [T]his determination [to allow representation] *should not be made unless it is clear the defendants have made a voluntary and knowing waiver of their right to separate counsel.*”) (modifications by the court) (citation omitted) (emphasis added); *United States v. Perez*, 325 F.3d 115, 127 (2nd Cir. 2003) (cited at Resp. Mem. 43-44) (“Although [a waivable] conflict might require a defendant to abandon a particular defense or line of questioning, he can be *advised as to what he must forgo*; he “can then seek the *legal advice of independent counsel and make an informed judgment* that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel.”) (quoting *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir.1993)) (emphasis added); *see also* Applicant’s Post-Hearing Memorandum at 19-22.

In the end, respondent’s suggestion that relief be denied on the ground that Stokes waived Sims’ conflict is equivalent to urging acceptance of a guilty plea based only on a lawyer’s assurance that he told his client the name of the charged offense, asked him, “Do you want to plead guilty?,” and received “Yes” as an answer. No court familiar with the waiver rules laid down in *Boykin v. Alabama*, 395 U.S. 238 (1969), would even consider such a request.⁷ The very same principles apply to waivers of the right to conflict-free counsel. *See, e.g., Glasser v. United States*, 315 U.S. 60, 70 (1942) (insisting that “we indulge every reasonable presumption against the waiver of fundamental

⁷*See Boykin*, 395 U.S. at 243 (“We cannot presume a waiver of these three important federal rights from a silent record”); *id.* at 243 n.5 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (to be valid, waiver of constitutional right “must be ‘an intentional relinquishment or abandonment of a known right or privilege’”); *id.* at 243-44 (“What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”)

rights,” and refusing to find that defendant, himself an “experienced attorney,” “tacitly acquiesced” to conflicted counsel’s representation by failing to timely object). Respondent’s suggestion that the record in this case somehow shows a valid waiver is unworthy of serious consideration by this Court.

III. CONCLUSION

For the foregoing reasons and those contained in Mr. Stoke’s Post-Hearing Memorandum this Court should vacate applicant’s sentence and remand the case to the Orangeburg County Court of General Sessions for a new sentencing trial.

Respectfully submitted,

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March 1, 2010



Counsel for Mr. Stokes

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Jon Ozmint, Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

Certificate of Service

I hereby certify that a copy of Applicant's Reply to Respondent's Post Hearing Memorandum has been served upon the Respondent, via U.S. mail, first-class, postage prepaid, at the following address:

Donald J. Zelenka
 Deputy Assistant Attorney General
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211

This the 1st day of March, 2010.


 Robert Lominack

2016



HENRY McMASTER
ATTORNEY GENERAL

June 17, 2010

Honorable Winnifa B. Clark
Clerk of Court, Orangeburg County
P. O. Drawer 9000
Orangeburg, SC 29116

Re: Sammie Louis Stokes v. State
01-CP-38-1240

Dear Ms. Clark:

Our records do not reflect whether or not you previously received our post-hearing memorandum in the above-referenced matter, therefore, we are forwarding to you the *Respondent's Post-Hearing Memorandum* in this case.

We apologize for any inconvenience.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert E. Lominack, Esquire
Keir Weyble, Esquire
Honorable Casey Manning
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES, #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	RESPONDENT'S POST-HEARING
	)	MEMORANDUM
vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

The Respondents, above-named, hereby make a Post-Hearing Memorandum of Law to the amended application for post-conviction relief received August 9, 2004.

The Applicant made an initial application on May 6, 2002. The Application was filed by his court-appointed counsel, Robert Lominack and Keir Weyble of Columbia, South Carolina. The Respondent made a Return to the initial application on July 3, 2002. The matter was initial set for a hearing on September 13, 2004. On August 9, 2004, the Applicant made an amended application. The matter was continued by Order of Continuance dated August 26, 2004 to allow the South Carolina Department of Disabilities and Special Needs complete an evaluation of the Applicant on whether he possessed the disability of mental retardation. On October 22, 2007, the Department submitted a report to Judge Manning that opined the Petitioner was not mentally retarded.

The Respondents requested a status conference. On June 4, 2009 a status conference was held in Richland County. During the conference, the Applicant's counsel advised the Court that it was abandoning the issue concerning lethal injection. Upon inquiry, the Court was also advised

that it was abandoning the issue concerning mental retardation raised in the application. The Court scheduled a hearing for August 5, 2009 in Orangeburg County. The Respondent made a Return to the Amended Application on August 5, 2009.

On August 5, 2009 a hearing was convened in Orangeburg County before the Honorable Casey Manning, Presiding Judge. The Applicant was present and represented by appointed counsel Weyble and Lominack. The Respondent was represented by Donald J, Zelenka. Testimony was received from prior appellate counsel Joseph Savitz (PCR Tr.p. 19-39), Jeffrey Bloom (PCR Tr.p. 40-48), prior trial counsel Thomas Sims (PCR .Tr.p. 49-98) and Virgin Johnson (PCR Tr.p. 100-108).. The Applicant did not testify. At the conclusion of the hearing, it was agreed that simultaneous briefing would occur after receipt of the transcripts. On December 28, 2009, Applicant's counsel advised Respondents that it was abandoning allegation 9(a) and only proceeding on allegations 9(b), 9(c), and 9(d). This Briefing follows:

I.

PROCEDURAL HISTORY

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims and Virgin Johnson

There were two pretrial hearings. The first, on January 19, 1999, before the Honorable Duane Shuler, concerned the qualification of defense counsel and a request for an evaluation. ROA, p. 1500 - 1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. ROA 1510-1642.

The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. In his Final Brief of Appellant, he asserted the issues on appeal as follows:

- I. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.
- II. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

State v. Stokes, Final Brief of Appellant, p. 3. The Respondents restated the issues as:

- I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.
- II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

The South Carolina Supreme Court denied the appeal in *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied..

STATEMENT OF FACTS

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for \$2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. *See Stokes Confession (Court's Exhibit 4), R. pp. 1658-59.*

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62. Then, as related by Mr. Stokes, the situation developed as follows:¹

I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. *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 that were true so we could do all 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 when Roy calls and I wasn't home.*² You just

¹ Although the original confession was transcribed as one long non-paragraphed statement, respondent has inserted paragraphs into this passage for ease of review.

² This phrase was redacted from the Confession published to the jury during the guilt phase. *See R.* at 969, ll.16-17.

better not flip on me for her. I laughed and said see yall at 9:30 P.M.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. 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.³ I just laughed and looked at Pattie.

We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm

³This phrase also was redacted from the Confession published to the jury during the guilt phase. See R. at 969, ll.22-23.

tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.

I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me

....

Stokes Confession, R. pp. 1662-63.

Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, 1.4-1157, 1.2⁴. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, 1.4-854, 1.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, 1.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, 11.13-23, then cut her vagina out. *Id.* at 1160, 1.24-1161, 1.10. A pathologist confirmed these injuries. *Id.* at 1218, 1.8-1221, 1.13.

⁴This testimony was elicited during the sentencing phase, and not during the guilt phase.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, ll.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, ll.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, ll.6-11.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, l.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, "[D]o you know me." R. at 1340, l.15-1341, l.16. Mr. Ferguson kept saying no. *Id.* at 1341, ll.16-17; Stokes Confession. Then, Mr. Stokes said, "Motherfucker, you're going to know me." *Id.* at 1341, ll.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, ll.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p.1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, ll.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, ll.1-9.

II. Allegations

Prior to the entry of the order on October 17, 2001, appellate counsel for Mr. Stokes initially filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received “ineffective assistance of counsel” and that it was based upon a “failure to present mitigating evidence.” On May 6, 2002, the Respondents received the “First Amended Application for Post-conviction Relief.” In the 2002 Application, made by current counsel, Stokes alleged the following:

9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).*

10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state’s medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state’s version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim’s death. But for trial counsel’s deficient performance, there exists a reasonable probability that the result of Applicant’s trial would have been different.

9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*

10(b) The facts supporting the claim are as follows:

1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant’s trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant’s sentencing proceeding would have been different. *Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).*

2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); see also, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

On August 9, 2004, Respondents received a pleading styled "Amended Application for Post-Conviction Relief" dated August 6, 2004. In the application, he raised the following:

1. *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument. 9(a)*
 - a. The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument

violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 414, 362 S.E.2d 13 (1987). 10(a)

2. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.* 9(b)
 - a. Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(b).
3. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.* 9(c)
 - a. S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider...the following...mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C.

430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds*, *Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(c)

4. *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.* 9(d)
 - a. The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. *See, e.g., Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989); *United States v. Kitchen*, 592 F.2d 900 (5th Cir. 1979). 10(d)
5. *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.* 9(e)
 - a. The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and

by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). 10(e)

6. *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison.* 9(f)
 - a. The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. See S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886). 10(f)
7. *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.* 9(g)
 - a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

During the status conference on June 4, 2009, counsel for the Applicant advised the Court and opposing counsel that he was withdrawing amended ground 7 set out as 9(g) [Applicant's

sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution]. [The Respondents had made a motion to dismiss the allegation on August 25, 2004 under SCCP 12(b)(1) and 12(b)(6) as beyond the jurisdiction of the court in a state post-conviction relief proceeding under *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000)].

During the proceeding on June 4, 2009, counsel for the Applicant also advised the Court and opposing counsel that he was abandoning ground five - allegation 9(e) [*Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation*]. [The October 22, 2007 submission by the South Carolina Department of Disabilities and Special Needs opined that Stokes did not meet the diagnostic criteria for mental retardation].

Finally, during post-hearing briefing, Respondents were advised that Applicant was also abandoning allegation 9(a). [*counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument*].

III.

GENERAL LAW RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to

deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Stokes' attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Ard bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." *Id.* at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See *Id.* And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See *Id.* at 691-92, 104 S.Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See *id.* at 694, 104 S.Ct. at 2068.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066)).

9 (A) - Ineffective Assistance in Failing to Object to Penalty Phase Closing Argument .

In his first amended allegation, Stokes, through counsel, contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in the Department of Corrections. This issue was specifically abandoned in the post-hearing briefing. As such, it must be dismissed for lack of prosecution.

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.

In specification 9(b) and 9(c), the Applicant asserts that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was deficient in failing to present two separate grounds in the 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." Respondent submits that counsel cannot be deemed deficient because neither issue was preserved for review by objection or ruling by the trial court.

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).⁵

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 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

⁵The 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).

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).

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).

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).

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

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

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." ROA 1429. During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. ROA 1446, 1451. Stokes made a personal statement of remorse. ROA 1459-1460. Counsel Sims made his 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. ROA 1466-1467.

Pre-charge objections were made which did not include either of the presently challenged issues. ROA 1468. During the jury charge, Judge Burch addressed mitigation circumstances. ROA 1479-1481. In particular, he stated: " 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 ..." ROA 1480, ll. 3-6. 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 failure to hold an on the record charge conference. ROA 1486 (no objection to the charge by the defense).

During the PCR hearing, counsel 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. PCR Tr.p. 24. 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*, *State v. Victor* and *State v. Evans*. 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. 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. PCR 25.

On cross-examination, Savitz admitted that when he raised non-objected statutory mitigating factors that it was usually related to issues of intoxication. PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. 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. 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. 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. 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. PCR 28-29.

However, Savitz questioned whether in *State v. Humphries*, that the Court had held that a failure to object to the trial court's failure to give an instruction did not preserve the issue for appeal. PCR 29. He felt that until the *Kamell Evans* case that he was arguing a procedure to require the judge to go through each mitigating factor on the record. 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 it and would have raised it had it seen it because this was an issue he was raising at the time. PCR 30. However, he recognized that he probably would not win, but thought that the law was uncertain at the time. PCR 30.

Savitz however, admitted that in 1993 in *Humphries* the Court had held that a failure to make a specific request for a mitigation circumstance waived the right and that he may have been missing the message that the Court was sending, but still raised the issue in *Evans* contending that the law was uncertain concerning preservation of the issue. PCR 31-32. He admits that in *Evans*, the Court made clear that a request for the factor had to be made to preserve the issue when it was not charged. PCR 33. However, he had no idea why he did not raise the issue. PCR 33, l. 5.

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

ANALYSIS

Respondent submits that the Applicant has failed to show either deficient performance or prejudice under *Strickland v. Washington*. Appellate counsel Savitz cannot be deemed deficient in failing to raise these two issues because neither were presented to the trial court by a timely objection on the record. Absent a request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for review. *State v. Evans (Kamell)*, 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

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 (S.C., 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 constantly rejected this claim 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).

Here, there was no request by counsel for the instruction on the particular statutory mitigator and no objection to the failure to give the instruction. ROA 1486-87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court must conclude that counsel was not deficient.

Further, there was nothing in the record to show that the trial court failed to hold a charge conference. Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found to be deficient when the issue was not raised at trial.

Since there is no showing that the 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. ⁶

⁶This 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 is not raised. However, even if asserted as a trial counsel claim, the prejudice prong cannot be satisfied where the evidence revealed that the victim's death was the idea and the plan by the Applicant was to create a subterfuge. 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.

9(d) - Conflict of Interest - Thomas Sims as Prosecutor in 1991.

The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had personally previously prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that resulted in a 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 conviction and sentence was introduced by the state in the penalty phase in State Exhibit One in the chart [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on n the record before the jury that Sims had prosecuted Stokes.

Respondent submits that there is credible evidence in the record, based upon the 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. Respondents note that the Applicant failed in their burden of proof at the hearing and failed to call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement after the hearing is insufficient to satisfy their burden of proof.

How This Issue Was Presented

The record initially reveals that 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. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims 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. ROA 1085.

The Stokes-Audrey Smith Trial

This Court has before it the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. Plaintiff Exhibit 1. The record reveals that Sims personally prosecuted the case and signed the indictment against Stokes. The victim, Audrey Smith, the ex-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. 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. 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. Tr.p. 44. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. Tr.p. 46. She later woke up in the field and called 911 from a nearby house. 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. 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. 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. Tr.p. 52-53. A little while after the friends left, she stated that they had sex. Tr.p. 53. She stated sometime after that he put the cord around her neck but she could not be definite about the time. Tr.p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. 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. 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. Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. 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. 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. Tr.p. 71-72.

Audrey Smith's Testimony in the Penalty Phase

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

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.

ROA. 1110-1111.

The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. 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. 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. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. 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. 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. ROA 1125. She stated that she was

in the hospital for 3 to 4 weeks. 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. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received a 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. ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. 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. 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. 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. ROA 1141.⁷

⁷ 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.

ANALYSIS

Respondent submit that Sims prior prosecution of Stokes does not create an actual conflict of interest requiring a retrial. First, the Respondent submits that there is 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, 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.

December 3, 1993 - gambling.

July 28, 1993 - lying to employees.

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. 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. ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. ROA 1147-49. There were 10 sutures. 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. 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. ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. ROA 1279. It required Windburn being sent to the hospital. 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. ROA 1283, 1. 17-25. He stated there was nothing unusual about the punishment. ROA 1283-84.

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

Testimony of Counsel

Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. 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. 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.

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."

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."

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. 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." PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. PCR 57.⁸

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

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. 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. 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. PCR 59-60. He stated that he reviewed these matters with Stokes. 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. PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. 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. PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. PCR 61.

Counsel does not recalled whether they made any formal motion about the earlier prosecution, but thinks it was more fully developed in the record in the second case. Sims asserted

⁸ 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. PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. PCR 58.

that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. PCR 61.

On cross-examination, Sims stated that he research the admissibility of prior convictions prior to trial. PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. PCR 71. He noted that he looked at State v. Lyle and Rules 404(b), 608 and 609. 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. PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. 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. PCR 83. He stated that they talked about the indictment that he had signed also. PCR 83. However, he stated that he could not stated that he asked him if he still wanted him on the case. PCR 83-84.

Counsel Sims again confirmed that he had ne recollection of any discussion with Jeff Bloom concerning a conflict of interest. PCR 84. However, counsel Sims thought that there was a discussion with a judge at some time concerning the prior prosecution. PCR 85.

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. PCR 87. He stated that it was one of the things that they got and would likely use. 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. PCR 87, ROA 1636.⁹ It was agreed it would be removed from being presented to the jury. PCR 87. See also, ROA 1085. Counsel Sims stated that

⁹It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

he wanted to be sure that there were no slips up in court concerning his name on the indictment. 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. PCR 88-90. He stated that Mr. Johnson was present during the discussions. PCR 89. Further, counsel 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. PCR . 89-90. Counsel stated that he expected the material 1 to be introduced. PCR 93-94, 98. He stated that he anticipated the 1991 conviction evidence to be introduced. PCR 98.

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. PCR 101. Johnson stated that at some point he learned that Sims had prosecuted Stokes previously. Johnson stated that recalled Sims discussing the prior prosecution with Sammie at the beginning. He recalled Sims telling Stokes that he put him in jail and that Sammie recalled that . 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. 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. 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. 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. PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. PCR 105.¹⁰

1. No Per Se Conflict of Interest.

Independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution 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

¹⁰In the PCR hearing, the Applicant called Richland County Attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue.

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 fact support Petitioner’s position.

Petitioner may submit that *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), provides that Petitioner was not required to show prejudice where his right to choice of counsel was violated. Respondent does 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. Petitioner was represented by an appointed counsel and did not request the services of another whom he could

retain or who would waive compensation. The particular right evaluated in *Gonzalez-Lopez* was not invoked in the instant case. “[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, Respondent asserts that two of Petitioner’s critical factual assertions lack support in the record.

The record is void of any attempt by the Applicant to have counsel Sims removed with the uncontradicted record that he was aware of the prior prosecution. 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 court in *Childers* adopted the logic of other jurisdictions that essentially 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.

In this case, with at least a six (6) year lapse between even being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. 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 - a person whom he never represented. There were no divided loyalties in the matter.

The simple fact of the former prosecution did not, in and of itself, 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 this 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).

Further, Respondent submits that there was a knowing waiver of a conflict of interest. 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."

In United Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1991), the court set out factors which may be used in

- 1.) the nature of the litigation;
- 2.) the type of information the lawyer may have access;
- 3.) whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation; and
- 4.) the issues in dispute.

See generally, Jarvis and Tellum, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflict. 33 Williamette L. Rev. 14t (1997).

In A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), the committee opined that cross-examination of an adverse witness who is a client creates a disqualifying conflict, in the absence of appropriate client consent, depending upon the nature and degree of the conflict. As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

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Not all conflicts may be waived, however. An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. See Kliti, 156 F.3d at 153; Levy, 25 F.3d at 153. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel. See Levy, 25 F.3d at 153.

In Schwarz, the Second Circuit described the distinction between waivable and unwaivable conflicts citing United States v. Fulton, 5 F.3d 605 (2d Cir.1993). Fulton involved the representation of a defendant by an attorney who had been accused of participating in criminal activity related to the crimes for which the defendant was on trial. See *id.* at 607-10. The district court had advised the defendant of the conflict and had obtained a waiver. See *id.* at 608. On appeal, the defendant argued that the waiver was ineffective. See *id.* at 612.

The Second Circuit agreed and noted that, "[i]n such cases, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant." *Id.* at 613. The Court distinguished between conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are "of a different character" than the latter. *Id.* The Court concluded that because the conflict at issue there resulted in counsel's "[a]dvice as well as advocacy [being] permeated by counsel's self interest, and [because] no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation," the conflict was not waivable. *Id.* (Emphasis added).

Although the particular conflict at issue in Fulton belonged to that narrow category of conflicts that courts have deemed to be *per se* violations of the Sixth Amendment right to counsel, see *id.* at 611-12; Solina v. United States, 709 F.2d 160, 168-69 (2d Cir.1983), Fulton's rationale with respect to when an *attorney's self-interest* renders a conflict unwaivable is equally applicable to the unusual facts of Schwarz. The lawyers's representation of Schwarz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in

the two-year, \$10 million retainer agreement his newly formed firm had entered into with the PBA. Like the conflict in Fulton, Worth's conflict "so permeate[ed] the defense that no meaningful waiver could be obtained." Fulton, 5 F.3d at 613. The Court held that: "[w]e must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interests for those of the PBA. Indeed, we think it likely that these very concerns motivated the government to argue to the district court at the *Curcio* hearing that the conflict created by the PBA retainer could not be waived. Thus, we conclude that the conflict between Worth's representation of Schwarz, on the one hand, and his ethical obligation to the PBA as his client and his self interest in the PBA retainer, on the other, was so severe that no rational defendant in Schwarz's position would have knowingly and intelligently desired Worth's representation. Cf. *id.* ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); cf. also United States v. Arrington, 867 F.2d 122, 129 (2d Cir.1989) (upholding district court's disqualification of attorney "saddled" with serious conflict where allowing waiver would have required defendant to "forego[] the presentation of ... evidence that would [have been] of great assistance")." The Schwarz court found that the conflict was unwaivable.

Schwarz is distinguishable from the present case. In Schwarz, the government charged the defendant, a police officer, with assaulting a victim in a bathroom at a police precinct. *Id.* at 79-80. There, the law firm of defendant's trial counsel had a \$10,000,000 retainer agreement with the police officers' union, the Patrolman's Benevolent Association (the "PBA"). *Id.* at 91. During the criminal proceedings, the victim filed a civil lawsuit against the PBA alleging that the PBA through its agents and its president conspired to injure him and then covered it up. *Id.* The Second Circuit found an

actual conflict existed between trial counsel's personal interest and professional obligation to the PBA and his representation of the defendant. Id. at 91-92. In particular, the defendant's interest in making a defense that would implicate another police officer in the assault--a strong, obvious interest--diverged with trial counsel's interest in refraining from any conduct that could harm the PBA, for example--making an argument that supported the conspiracy theory in the victim's civil lawsuit. Id. at 91-92.

In Schwarz, trial counsel had a personal interest and professional obligation to another client that differed from his criminal client. Also, trial counsel refrained from making a particular defense in the criminal case because it ran counter to another client's interest.

In the instant case, Sims 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. As such, Schwarz does not support the defendant's position. See U.S. v. Peterson, 233 F.Supp. 2d 45 (E.D.N.Y. 2002).

In clarifying the narrow approach of the unwaivable conflict issue and application of Schwarz, the Second Circuit recently stated:

As we made plain in Fulton, however, *lesser conflicts*, such as an attorney's representation of two or more defendants or his prior representation of a trial witness, are generally waivable. See United States v. Fulton, 5 F.3d at 613. *Although such a conflict might require a defendant to abandon a particular defense or line of questioning, he can be advised as to what he must forgo; he "can then seek the legal advice of independent counsel and make an informed judgment that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel."* United States v. Fulton, 5 F.3d at 613. In the multiple representation situation, the defendant "can be advised by independent counsel of the dangers" of such matters as "one defendant's cooperating with the government," and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney's representation of another accused. Id. Where the defendant can rationally opt to retain counsel of his choice

despite a conflict, the court conducts a Curcio hearing to determine whether the defendant knowingly and intelligently waives his right to conflict-free representation. See, e.g., United States v. Leslie, 103 F.3d 1093, 1098 (2d Cir.), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997); United States v. Levy, 25 F.3d at 153.

U.S. v. Perez, 325 F.3d 115 (2d Cir. April 4, 2003) (attorney's status as potential witness at defendant's trial was conflict of interest that was waivable).

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 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.

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. Respondent respectfully submit that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed. ¹¹

¹¹Respondents note that the Applicant - subsequent to thee hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

VI.

WHEREFORE, having made its Return to the application, as amended on August 9, 2004, the State requests that the matter be dismissed.

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

By 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

Columbia, South Carolina
February 16, 2010

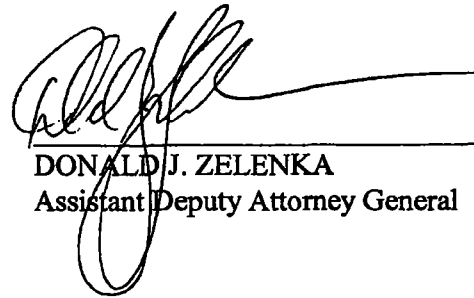
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the ***Respondent's Post-Hearing Memorandum*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Robert E. Lominack, Esquire
P. O. Box 5508
Columbia, SC 29250

Keir Weyble, Esquire
P. O. Box 1744
Columbia, SC 29211

This 17th day of June, 2010.



DONALD J. ZELENKA
Assistant Deputy Attorney General

2010 JUN 18 A 11:21
CLERK OF COURT
JANUARY 12, 2010
CLERK OF COURT

Sammie Stokes DP PCR - 01-CP-38-1240 - Respondent's Anticipatory Proposed Order

Don Zelenka <AGDZELENKA@scag.gov>

Sun 8/29/2010 6:44 PM

To:cmanningj@sccourts.org <cmanningj@sccourts.org>;

Cc:Keir Weyble </O=LAWFIRM/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KEIR>; Robert Lominack <rlominack@gmail.com>; robert@lominacklaw.com <robert@lominacklaw.com>; Lonnie Brawley <AGLBRAWLEY@scag.gov>; cmanninglc@sccourts.org <cmanninglc@sccourts.org>;

 3 attachments

Stokes, Sammie Louis - Respondents PROPOSED ORDER OF DISMISSAL.PDF; Stokes, Sammie Louis - Respondents PROPOSED ORDER OF DISMISSAL August 27 2010.DOC; WordPerfect 6.1.WPD;

To: Honorable L Casey Manning

CC: Robert Lominack, Keir Weyble

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549

7/25/2014 **2064**

Sammie Stokes DP PCR - 01-CP-38-1240 - Respondent's Anticipat... - Keir Weyble

Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES, #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	PROPOSED ORDER OF DISMISSAL
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before this Court by an initial application filed October 17, 2001. An amended application was filed by his court-appointed counsel, Robert Lominack and Keir Weyble of Columbia, South Carolina. The Respondent made a Return to the initial application on July 3, 2002. The matter was initial set for a hearing on September 13, 2004. On August 9, 2004, the Applicant made an amended application. The matter was initially continued by Order of Continuance dated August 26, 2004 to allow the South Carolina Department of Disabilities and Special Needs complete an evaluation of the Applicant on whether he possessed the disability of mental retardation. On October 22, 2007, the Department submitted a report to this Court that opined the Petitioner was not mentally retarded.

On June 4, 2009 a status conference was held in Richland County. During the conference, the Applicant's counsel advised the Court that it was abandoning the issue concerning lethal injection. Upon inquiry, the Court was also advised that it was abandoning the issue concerning mental retardation raised in the amended application. The Court scheduled a hearing for August

5, 2009 in Orangeburg County. The Respondent made a Return to the Amended Application on August 5, 2009.

On August 5, 2009 a hearing was convened in Orangeburg County before this Court. The Applicant was present and represented by appointed counsel Weyble and Lominack. The Respondent was represented by Donald J. Zelenka. Testimony was received from prior appellate counsel Joseph Savitz (PCR Tr.p. 19-39), Jeffrey Bloom (PCR Tr.p. 40-48), prior trial counsel Thomas Sims (PCR .Tr.p. 49-98) and Virgin Johnson (PCR Tr.p. 100-108).. The Applicant did not testify. At the conclusion of the hearing, it was agreed that simultaneous briefing would occur after receipt of the transcripts. On December 28, 2009, Applicant's counsel advised Respondent's counsel that he was abandoning allegation 9(a) and only proceeding on allegations 9(b), 9(c), and 9(d). Post hearing memorandum were prepared and sent on February 16, 2010 by both parties.

This Court has reviewed the evidence, pleadings and memorandum of law. It is constrained to make the following findings of fact and conclusions of law and dismiss and deny the application, as amended, in its entirety, pursuant to S.C. Code § 17-27-80, 160.

I.

PRIOR PROCEDURAL HISTORY

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims and Virgin Johnson

There were two pretrial hearings. The first, on January 19, 1999, before the Honorable Duane Shuler, concerned the qualification of defense counsel and a request for an evaluation.

ROA, p. 1500 - 1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. ROA 1510-1642.

The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. In his Final Brief of Appellant, he asserted the issues on appeal as follows:

- I. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.
- II. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

State v. Stokes, Final Brief of Appellant, p. 3. The Respondent restated the issues as:

- I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.
- II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

The South Carolina Supreme Court denied the appeal in *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied..

STATE'S VERSION OF THE FACTS

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for \$2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. *See Stokes Confession* (Court's Exhibit 4), R. pp. 1658-59.

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62.

Then, as related by Mr. Stokes, the situation developed as follows:¹

I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. 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 that were true so we could do all 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

¹Although the original confession was transcribed as one long non-paragraphed statement, paragraphs are asserted into this passage for ease of review.

to her on the phone when Roy calls and I wasn't home.² You just better not flip on me for her. I laughed and said see yall at 9:30 P.M.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. 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.³ I just laughed and looked at Pattie.

We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

² This phrase was redacted from the Confession published to the jury during the guilt phase. See R. at 969, ll.16-17.

³ This phrase also was redacted from the Confession published to the jury during the guilt phase. See R. at 969, ll.22-23.

Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.

I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me

....

Stokes Confession, R. pp. 1662-63.

Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, 1.4-1157, 1.2⁴. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, 1.4-854, 1.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, 1.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, 11.13-23, then cut

⁴This testimony was elicited during the sentencing phase, and not during the guilt phase.

her vagina out. *Id.* at 1160, 1.24-1161, 1.10. A pathologist confirmed these injuries. *Id.* at 1218, 1.8-1221, 1.13.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, 11.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, 11.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, 11.6-11.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, 1.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, "[D]o you know me." R. at 1340, 1.15-1341, 1.16. Mr. Ferguson kept saying no. *Id.* at 1341, 11.16-17; Stokes Confession. Then, Mr. Stokes said, "Motherfucker, you're going to know me." *Id.* at 1341, 11.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, 11.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p. 1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, 11.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, 11.1-9.

II. Allegations

Prior to the entry of the stay and assignment order on October 17, 2001, appellate counsel for Mr. Stokes initially filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received "ineffective assistance of counsel" and that it was based upon a "failure to present mitigating evidence." On May 6, 2002, the Respondent received the "First Amended Application for Post-conviction Relief." In the 2002 Application, made by current counsel, Stokes alleged the following:

9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).*

10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state's version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim's death. But for trial counsel's deficient performance, there exists a reasonable probability that the result of Applicant's trial would have been different.

9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*

10(b) The facts supporting the claim are as follows:

1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).*

2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

On August 9, 2004, Respondent received a pleading styled "Amended Application for Post-Conviction Relief" dated August 6, 2004. In the application, he raised the following:

1. *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument.* 9(a)
 - a. The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 414, 362 S.E.2d 13 (1987). 10(a)

2. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.* 9(b)

- a. Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(b).

3. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.* 9(c)

- a. S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider...the following...mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds, Torrence*, 305 S.C. 45,

406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. See *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(c)

4. *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.* 9(d)
 - a. The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. See, e.g., *Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979). 10(d)
5. *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.* 9(e)
 - a. The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). 10(e)

6. *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison.* 9(f)
 - a. The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. *See* S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886). 10(f)
7. *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.* 9(g)
 - a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

During the status conference on June 4, 2009, counsel for the Applicant advised the Court and opposing counsel that he was withdrawing amended ground 7 set out as 9(g) [Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in

unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution]. [The Respondent had made a motion to dismiss the allegation on August 25, 2004 under SCCP 12(b)(1) and 12(b)(6) as beyond the jurisdiction of the court in a state post-conviction relief proceeding under *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000)].

During the proceeding on June 4, 2009, counsel for the Applicant also advised the Court and opposing counsel that he was abandoning ground five - allegation 9(e) [*Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation*]. [The October 22, 2007 submission by the South Carolina Department of Disabilities and Special Needs opined that Stokes did not meet the diagnostic criteria for mental retardation].

Finally, during post-hearing briefing, the Applicant abandoned allegation 9(a). [*counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument*].

III.

GENERAL LAW RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that

appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Stokes' attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Stokes bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In

assessing counsel's performance, courts bear in mind that the review is "highly deferential." *Id.* at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See *Id.* And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See *Id.* at 691-92, 104 S.Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See *id.* at 694, 104 S.Ct. at 2068.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066)).

9 (A) - Ineffective Assistance in Failing to Object to Penalty Phase Closing Argument .

In his first amended allegation, Stokes, through counsel, contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in

the Department of Corrections. This issue was specifically abandoned in the post-hearing briefing. This Court dismisses the ground for lack of prosecution.

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.

In specification 9(b) and 9(c), the Applicant asserts that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was deficient in failing to present two separate grounds in the 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." This Court concludes that appellate counsel cannot be found deficient because neither issue was preserved for review by objection or ruling by the trial court. He has failed in his burden of proof on the initial prong under Strickland v. Washington, 466 U.S. 668(1984). These claims must be dismissed.

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).⁵

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 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

⁵The 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).

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).

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).

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).

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

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

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." ROA 1429. During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. ROA 1446, 1451. Stokes made a personal statement of remorse. ROA 1459-1460. Counsel Sims made his 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. ROA 1466-1467.

Pre-charge objections were made which did not include either of the presently challenged issues. ROA 1468. During the jury charge, Judge Burch addressed mitigation circumstances. ROA 1479-1481. In particular, he stated: " 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 ..." ROA 1480, ll. 3-6. 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 failure to hold an on the record charge conference. ROA 1486 (no objection to the charge by the defense).

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. PCR Tr.p. 24. 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*, *State v. Victor* and *State v. Evans*. 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. 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. PCR 25.

On cross-examination, Savitz admitted that when he raised non-objected statutory mitigating factors that it was usually related to issues of intoxication. PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. 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. 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. 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. 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. 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. 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. 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. 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. 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* contending that the law was uncertain concerning preservation of the issue. 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. PCR 33. However, he had no idea why he did not raise the issue in *Stokes* appeal brief. PCR 33, l. 5.

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

ANALYSIS

This Court concludes the Applicant has failed to show either deficient performance or prejudice under *Strickland v. Washington*. Appellate counsel Savitz cannot be *Strickland* deficient 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).

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 (S.C., 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 constantly rejected this claim 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 and did not object to the failure to give an instruction of the mitigating factors. ROA 1486-87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court concludes that appellate counsel Savitz was not deficient in failing to brief an unpreserved claim.

Further, there was nothing in the record to show that the trial court failed to hold a charge conference. Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found to be deficient when the issue was not raised at trial.

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. ⁶

⁶This 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 is not raised. 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 Applicant was to create a subterfuge. 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

9(d) - Conflict of Interest - Thomas Sims as Prosecutor in 1991.

The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had previously personally prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that 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 [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on the record before the jury that Sims had prosecuted Stokes.

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.

How This Issue Was Presented

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.

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. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims 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. ROA 1085.

The Stokes-Audrey Smith Trial

This Court has 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-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. 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. 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. 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. 1991 Tr.p. 46. She later woke up in the field and called 911 from a nearby house. 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. 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. 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. 1991 Tr.p. 52-53. A little while after the friends left, she stated that they had sex. 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. 1991 Tr.p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. 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. 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. 1991 Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. 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. 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. 1991 Tr.p. 71-72.

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.

ROA. 1110-1111.

The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. 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. 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. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. 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. 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. ROA 1125. She stated that she was in the hospital for 3 to 4 weeks. 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. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received a 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. ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. 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. 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. 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. ROA 1141. ⁷

⁷ 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.

ANALYSIS

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

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.

July 28, 1993 - lying to employees.

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. 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. ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. ROA 1147-49. There were 10 sutures. 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. 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. ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. ROA 1279. It required Windburn being sent to the hospital. 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. ROA 1283, l. 17-25. He stated there was nothing unusual about the punishment. ROA 1283-84.

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

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.

Testimony of Counsel

Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. 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. 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.

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." 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."

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. 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." PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. PCR 57.⁸

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

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. 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. 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. PCR 59-60. He stated that he reviewed these matters with Stokes. 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. PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. 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. PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. PCR 61.

⁸ Counsel Sims recollection of Mr. Jeffrey Bloom's role and advice was different than 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. PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. 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. Sims asserted that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. PCR 61.

On cross-examination, Sims stated that he researched the admissibility of prior convictions prior to trial. PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. PCR 71. He noted that he looked at *State v. Lyle* and Rules 404(b), 608 and 609. 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. PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. 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. PCR 83. He stated that they talked about the indictment that he had signed also. PCR 83. However, he stated that he could not state that he asked him if he still wanted him on the case. PCR 83-84.

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

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. 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. PCR 87, ROA 1636.⁹

⁹It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

It was agreed his name would be removed from any document being presented to the jury. PCR 87. See also, 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. 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. PCR 88-90. He stated that Mr. Johnson was present during the discussions. 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. PCR . 89-90. Counsel stated that he expected the material to be introduced. PCR 93-94, 98. He re-confirmed that he anticipated the 1991 conviction evidence to be introduced prior to its introduction. PCR 98.

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. 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. 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. 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. 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. 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. PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. PCR 105.¹⁰

1. No Per Se Conflict of Interest.

This Court concludes, independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution 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:

¹⁰In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. This Court has determined that Mr. Sims testimony is credible.

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 fact support Petitioner's position.

This Court distinguishes any reliance upon *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), provides that Petitioner was not required to show prejudice where his right to choice of counsel was violated. This Court does 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 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, this Court finds that two of Petitioner’s critical factual assertions lack support in the record.

The record is void of any attempt by the Applicant 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.

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 case. 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 he 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).

This Court alternately finds that there was a knowing waiver of a conflict of interest. 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."

In United Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1991), the court set out factors which may be used in

- 1.) the nature of the litigation;
- 2.) the type of information the lawyer may have access;
- 3.) whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation; and

4.) the issues in dispute.

See generally, Jarvis and Tellum, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflict, 33 Williamette L. Rev. 14t (1997).

In A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), the committee opined that cross-examination of an adverse witness who is a client creates a disqualifying conflict, in the absence of appropriate client consent, depending upon the nature and degree of the conflict. As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

Not all conflicts may be waived, however. An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant

would knowingly and intelligently desire that attorney's representation. See Kliti, 156 F.3d at 153; Levy, 25 F.3d at 153. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel. See Levy, 25 F.3d at 153.

In Schwarz, the Second Circuit described the distinction between waivable and unwaivable conflicts citing United States v. Fulton, 5 F.3d 605 (2d Cir.1993). Fulton involved the representation of a defendant by an attorney who had been accused of participating in criminal activity related to the crimes for which the defendant was on trial. See *id.* at 607-10. The district court had advised the defendant of the conflict and had obtained a waiver. See *id.* at 608. On appeal, the defendant argued that the waiver was ineffective. See *id.* at 612.

The Second Circuit agreed and noted that, "[i]n such cases, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant." *Id.* at 613. The Court distinguished between conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are "of a different character" than the latter. *Id.* The Court concluded that because the conflict at issue there resulted in counsel's "[a]dvice as well as advocacy [being] permeated by counsel's self interest, and [because] no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation," the conflict was not waivable. *Id.* (Emphasis added).

Although the particular conflict at issue in Fulton belonged to that narrow category of conflicts that courts have deemed to be *per se* violations of the Sixth Amendment right to counsel, see *id.* at 611-12; Solina v. United States, 709 F.2d 160, 168-69 (2d Cir.1983), Fulton's rationale

with respect to when an *attorney's self-interest* renders a conflict unwaivable is equally applicable to the unusual facts of Schwarz. The lawyers's representation of Schwarz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, \$10 million retainer agreement his newly formed firm had entered into with the PBA. Like the conflict in Fulton, Worth's conflict "so permeate[ed] the defense that no meaningful waiver could be obtained." Fulton, 5 F.3d at 613. The Court held that: "[w]e must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interests for those of the PBA. Indeed, we think it likely that these very concerns motivated the government to argue to the district court at the *Curcio* hearing that the conflict created by the PBA retainer could not be waived. Thus, we conclude that the conflict between Worth's representation of Schwarz, on the one hand, and his ethical obligation to the PBA as his client and his self interest in the PBA retainer, on the other, was so severe that no rational defendant in Schwarz's position would have knowingly and intelligently desired Worth's representation. Cf. *id.* ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); cf. also United States v. Arrington, 867 F.2d 122, 129 (2d Cir.1989) (upholding district court's disqualification of attorney "saddled" with serious conflict where allowing waiver would have required defendant to "forego[] the presentation of ... evidence that would [have been] of great assistance")." The Schwarz court found that the conflict was unwaivable.

Schwarz is distinguishable from the present case. In Schwarz, the government charged the defendant, a police officer, with assaulting a victim in a bathroom at a police precinct. *Id.* at 79-80. There, the law firm of defendant's trial counsel had a \$10,000,000 retainer agreement with the police

officers' union, the Patrolman's Benevolent Association (the "PBA"). Id. at 91. During the criminal proceedings, the victim filed a civil lawsuit against the PBA alleging that the PBA through its agents and its president conspired to injure him and then covered it up. Id. The Second Circuit found an actual conflict existed between trial counsel's personal interest and professional obligation to the PBA and his representation of the defendant. Id. at 91-92. In particular, the defendant's interest in making a defense that would implicate another police officer in the assault--a strong, obvious interest--diverged with trial counsel's interest in refraining from any conduct that could harm the PBA, for example--making an argument that supported the conspiracy theory in the victim's civil lawsuit. Id. at 91-92.

In Schwarz, trial counsel had a personal interest and professional obligation to another client that differed from his criminal client. Also, trial counsel refrained from making a particular defense in the criminal case because it ran counter to another client's interest.

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. As such, Schwarz does not support the defendant's position. See U.S. v. Peterson, 233 F.Supp. 2d 45 (E.D.N.Y. 2002).

In clarifying the narrow approach of the unwaivable conflict issue and application of Schwarz, the Second Circuit recently stated:

As we made plain in Fulton, however, *lesser conflicts*, such as an attorney's representation of two or more defendants *or his prior representation of a trial witness, are generally waivable*. See United States v. Fulton, 5 F.3d at 613. *Although such a conflict might require a defendant to abandon a particular defense or line of questioning, he can be advised as to what he must forgo; he "can then seek the legal advice of independent counsel and make an informed judgment that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel." United States v. Fulton, 5 F.3d at 613. In the*

multiple representation situation, the defendant "can be advised by independent counsel of the dangers" of such matters as "one defendant's cooperating with the government," and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney's representation of another accused. *Id.* Where the defendant can rationally opt to retain counsel of his choice despite a conflict, the court conducts a Curcio hearing to determine whether the defendant knowingly and intelligently waives his right to conflict-free representation. See, e.g., United States v. Leslie, 103 F.3d 1093, 1098 (2d Cir.), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997); United States v. Levy, 25 F.3d at 153.

U.S. v. Perez, 325 F.3d 115 (2d Cir. April 4, 2003) (attorney's status as potential witness at defendant's trial was conflict of interest that was waivable).

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 F.3d 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 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.

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. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed. ¹¹

CONCLUSION

For all the foregoing reasons, the entire Application for Post-Conviction Relief must be denied and dismissed. This Court finds that the Applicant has failed in his burden of proof in this proceeding. Therefore, this Court is constrained to deny the application for post-conviction relief in its entirety.

AND IT IS SO ORDERED this ____ day of _____, 2010.

L. CASEY MANNING
Presiding Judge

_____, South Carolina

¹¹ This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	
	)	

PROPOSED ORDER GRANTING RELIEF

This matter is before the Court on the application for post-conviction relief filed by Sammie Louis Stokes, who was previously convicted of murder and sentenced to death. For the reasons discussed below, this Court grants the requested penalty phase relief.

I. RELEVANT PROCEDURAL HISTORY.

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

that hearing, Stokes presented evidence relevant to Grounds 9(b), 9(c) and (9(d) of the amended application. This order discusses those grounds for relief in light of the evidence and relevant law.¹

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Ground 9(d): Stokes' claim that his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of representation by counsel who labored under an actual conflict of interest.

A. Findings of fact.

1. Crimes, arrest, and appointment of counsel.

In early 1998, Stokes was finishing a ten year prison sentence for aggravated assault and battery when his cellmate, Roy Toothe, approached him about a plan to murder Toothe's girlfriend, Connie Snipes. At the time, Snipes was living with Toothe's mother, Pattie Syphrette. Syphrette wanted Snipes killed because of her belief that Snipes had been unfaithful to Toothe, and because she disapproved of Snipes' treatment of her children, who were Syphrette's grandchildren; DSS had already taken custody of one child, and its investigation was ongoing. ROA 1658-59. Stokes agreed to the plan.

Stokes was released from prison in early May, 1998. ROA 782; 1660. Shortly thereafter, DSS ordered Syphrette to evict Snipes from her home or risk losing another grandchild to removal by DSS. 1661-62. Unwilling to have another grandchild taken, Syphrette contacted Stokes and set her plan in motion. As a ploy to lure Snipes to a secluded area, Syphrette asked her to assist in the

¹Stokes did not proceed on Claims 9(a), 9(e), and 9(f) in Applicant's Amended Application for Post-Conviction Relief. Additionally, respondent previously argued that this Court should dismiss Claim 9(g) – the lethal injection claim – because it was not cognizable within the Uniform State Post-Conviction Act. Stokes agreed with the respondent's argument and for the purposes of these proceedings withdrew this claim. However, he reserved the right to litigate this claim at a later date and in a different procedural posture.

murder of one Doug Ferguson. Snipes agreed. ROA 1662. Stokes and Syphrette then picked up Snipes and another man, Norris Martin, and drove to a wooded area, ostensibly for the purpose of killing Ferguson. After Stokes, Martin, and Snipes walked some distance into the woods, the true purpose of the venture was revealed to Snipes. Martin had sex with Snipes, and she was then shot to death. ROA 888-92; 1663.

Approximately five days later, a farmer happened across Snipes' decomposing corpse and notified authorities. ROA 810-13. At the crime scene, investigators found items known to belong to Norris Martin, including a state-issued identification card. ROA 819, 821-22. After interviewing Martin and obtaining other information linking Syphrette to the crime, the police made their way to her house. As it happened, Syphrette was then in the process of actually carrying out the Ferguson murder.² Just before the police arrived, Syphrette and Stokes wrapped Ferguson with duct tape; the tape covered his mouth and nose, and he suffocated. ROA 1206. Stokes and Syphrette were arrested a short time later.³

Orangeburg County attorneys Thomas Sims and Virgin Johnson were appointed to defend Stokes. The trial court held a formal appointment hearing at which attorneys Sims and Johnson placed their qualifications on the record. Describing his criminal law experience, Sims emphasized his handling of "major criminal prosecutions" in the First Circuit Solicitor's office from 1982 until 1993, but said nothing about any individual cases he took part in as a prosecutor. ROA 1502-03.

²Syphrette wanted Ferguson dead because he knew too much about the Snipes homicide. Syphrette had originally approached him about taking part in killing Snipes, but he had refused and Syphrette feared he would go to the police and implicate her.

³Stokes pled guilty to the Ferguson murder and was sentenced to life in prison without the possibility of parole.

Satisfied with counsel's qualifications, and unaware of any countervailing circumstances, the trial court designated Sims as lead counsel.

2. Sims' 1991 prosecution of Stokes.

Just over seven years before his appointment as Stokes' lead defense counsel for the Snipes capital murder trial, Sims, then an assistant solicitor, signed an indictment against Stokes for assault and battery with intent to kill. The victim was Stokes' ex-wife, Audrey Smith. On March 12, 1991, Sims appeared at the trial on that indictment as the only representative for the State; he presented all of the evidence, which consisted primarily of testimony from Audrey Smith; he made all of the arguments to the judge and jury; and he secured a conviction for aggravated assault and battery. Stokes himself appeared in the courtroom only briefly, before the trial began. After the trial judge denied his request for time to locate and hire a private attorney, Stokes declined to be present for the actual trial proceedings. As a result, Stokes observed none of the prosecution's case against him, and none of Sims' activities as the prosecutor. 1991 Tr. 14-15, 33-34. Stokes also declined to be present for the reading of the verdict or for sentencing.⁴ 1991 Tr. 138-39..

The 1991 prosecution arose out of a December 1990 domestic violence incident. In testimony elicited by Sims, Audrey Smith claimed that she and Stokes had sex in a schoolyard, then walked to a nearby field where Stokes choked her until she lost consciousness. 1991 Tr. 42-46. Some time later, Smith, still lying in the field, woke up, walked to a nearby house, and called 9-1-1. 1991 Tr. 46. Smith also claimed that before they walked to the field, Stokes had her read a letter in which he expressed an intent to kill her, and that Stokes then told her he had changed his mind. 1991

⁴It was during the resulting ten year prison term that Stokes became acquainted with Roy Toothe and Patty Syphrette.

Tr. 44.

In a cross-examination spanning approximately twenty pages, Stokes' defense counsel raised doubts about Smith's claims by establishing a series of inconsistencies between the testimony she had given at a preliminary hearing and the story she told at trial. *See* 1991 Tr. 48-67. Defense counsel also called two other witnesses who saw Stokes and Smith just before the alleged assault and described the couple as having appeared normal. 1991 Tr. 97-99; 103-05. In his closing argument Sims responded to the attacks on Audrey Smith's credibility, insisting that Smith had been truthful, and that her story was accurate. 1991 Tr. 124. As shown by the jury's guilty verdict, Sims' advocacy on behalf of Audrey Smith's veracity were successful.

3. Neither the trial judge nor Stokes understood Sims' role in the 1991 prosecution.

The parties have not disputed, and this Court specifically finds, that neither Sims nor anyone else ever informed the 1999 trial court that Sims had personally prosecuted Stokes in 1991. Consistent with this finding, the record of pre-trial and trial proceedings associated with the Snipes case contains no mention of the issue. With no knowledge of his own about the possibility that lead defense counsel was (or could be) burdened by a conflict of interest, the trial judge made no inquiry, conducted no colloquy, and secured no waiver.

Having observed and considered the testimony presented in these PCR proceedings, this Court further finds as a fact that Sims' statements to Stokes were not sufficient to apprise Stokes of the role Sims had played in the 1991 case or its potential to affect the 1999 case. According to Sims, his co-counsel Johnson, and Stokes himself, Sims did little more than remind Stokes in broad terms

that he had been a prosecutor, and that he had once prosecuted Stokes.⁵ While Sims and Johnson both recalled these communications to Stokes, neither of them had any recollection of informing Stokes of any of the ways in which Sims' work as the prosecutor at the Audrey Smith ABWIK trial could affect his representation if Smith were to appear as a prosecution witness at the Snipes capital murder trial.⁶ Stokes, whose absence from the 1991 trial left him with no independent knowledge of Sims' work or Smith's testimony at that proceeding, likewise recalls that neither Sims nor Johnson discussed these matters with him.⁷ Consistent with Stokes' account, Sims also had no

⁵See PCR Tr. 55 (Sims: "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him."); *id.* at 56 (Sims, explaining his rationale for reminding Stokes of who he was: "For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes."); *id.* at 84 (Sims' advice to Stokes about 1991 prosecution was limited to reminder that Sims had prosecuted Stokes, and that Stokes had gone to prison as a result); *id.* at 88 (Sims: "Let me put it this way, [Stokes] knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that?"); *id.* at 102 (Johnson: "Only thing I can remember is ... [Sims] said ... you know I put you in jail or I prosecuted you and [Stokes] said yes. And it went through the questions of do you have a problem with me representing you ... do you want somebody else and he said no."); Affidavit of Sammie Stokes at para. 2 ("After they were appointed to my case, Mr. Sims and Mr. Johnson mentioned that Mr. Sims had prosecuted me in 1991 for assaulting my wife. Mr. Sims told me that if I had a problem with this fact, I could ask for another attorney. Neither Mr. Sims nor Mr. Johnson said anything else about this issue.").

⁶PCR Tr. at 95-96 (Lominack: "You don't have any recollection about talking to Mr. Stokes about Audrey Smith taking the witness stand and you cross-examining her?" Sims: "No, I don't."); *id.* at 105 (Johnson generally recalled advising Stokes about types of evidence prosecution might present).

⁷Affidavit of Sammie Stokes at para. 4-5 ("Neither Mr. Sims nor anyone else ever told me that my prior convictions would be used against me at my death penalty trial. I also was never told that Audrey Smith would be allowed to testify about the prior crime at my death penalty trial. Because I was not present for my 1991 trial and did not see Audrey Smith testify, I did not know enough about her testimony to know whether or not Mr. Sims could, or did, do a good job cross-examining her.").

recollection of advising Stokes that Smith would testify and Sims would cross-examine her.⁸ Sims further admitted that he never arranged to make another attorney available to Stokes for the purpose of advising him on the conflict of interest issue. PCR Tr. 85.

4. Sims' failure to appreciate the gravity of the issue.

The evidence presented to this Court indicates that Sims was advised by Jeffrey Bloom, an experienced capital defense attorney whom Sims had attempted to enlist as a jury selection expert,⁹ of the importance of alerting the trial court to his apparent conflict of interest. When Bloom learned of Sims' role in the 1991 prosecution, he immediately recognized it as a "very substantial and serious issue." PCR Tr. 43. At the PCR hearing Bloom testified that he "tr[ie]d to impress upon Mr. Sims that if he had previously prosecuted Mr. Stokes that that prior conviction would be an issue at a capital sentencing proceeding."¹⁰ *Id.* Sims, however, did not "fully underst[an]d how or why that

⁸PCR Tr. at 96 (Lominack: "But you wouldn't have told [Stokes] that Audrey Smith was going to testify and you were going to cross-examine her, because you did not think she was going to testify, right?" Sims: "I have no recollection that I either did or did not.").

⁹This Court is familiar with Mr. Bloom. He worked as a public defender for fourteen years, including seven years as head of the Richland County Public Defender Office, and possesses substantial experience in capital cases. PCR Tr. 40.

¹⁰Bloom was correct. The admissibility of character and prior bad acts evidence in a capital sentencing proceeding was firmly established long before Stokes' trial:

Information as to a defendant's record of previous criminal convictions has always been deemed relevant to the process of imposing sentence upon a plea or verdict of guilt. So fundamental is this proposition that it requires no citation of authority . . . We . . . hold that information concerning prior criminal convictions shall be admissible as additional evidence during the sentencing or resentencing phase of a capital trial under our statute.

State v. Plath, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984).

would be.” *Id.* Bloom nevertheless urged him to, “at a minimum[,] ... request a hearing in front of the assigned circuit judge ..., request in writing that it be an *ex parte* hearing ..., and let the circuit judge be aware of it, and let the circuit judge conduct a hearing where that issue could be played out and fully discussed.” *Id.* at 44. When Sims responded that there was nothing to “worry about” because Stokes had “waived that,” Bloom tried again: “I said, well ... it may be one thing for you to sit in the jail with Mr. Stokes and he verbally tells you he doesn’t have a problem with it, but there may be some other consequences there affects [sic] from there.” *Id.*

Bloom further explained that he again emphasized the conflict problem to Sims during a subsequent phone call, but Sims “still didn’t seem[] concerned about it.” PCR Tr. 45. Bloom pressed: “I told him that really needed to be something that was settled on the record long before trial. I again emphasized to him that it seemed to me to be the type of conflict of interest issue that was fluid” *Id.* Once again, Sims “didn’t seem at all to appreciate the gravity of the conflict of interest issue.” *Id.* Unable to get through to Sims, Bloom “concluded that [he] just needed to sever any professional relationship to the case because ... [he] didn’t want to work with an attorney who failed to appreciate the gravity of that issue.” *Id.* at 46.

This Court finds that Bloom’s testimony was credible. His impression that Sims did not recognize the import of his conflict is consistent, not only with Sims’ actions before and during the trial, but also with Sims’ testimony before this Court; at no time has Sims exhibited an appreciation for the conflict that existed. Additionally, this Court had the opportunity to observe Bloom’s testimony, and both his expressions of concern over Sims’ circumstances and his efforts to address that concern were genuine. The Court further notes that Bloom was the only witness at the evidentiary hearing who had never represented Stokes and was, therefore, the only witness with

nothing to gain or lose from his testimony.¹¹

The Court further finds that Sims' failure to appreciate his own apparent conflict rested, in substantial part, on his belief that he would not be called upon to face Audrey Smith as Stokes' trial. This is confirmed by Sims' conduct at Stokes' trial, and by his testimony at the PCR hearing, both of which demonstrate Sims' mistaken belief that evidence of a defendant's character or prior convictions is inadmissible at the penalty phase of a capital trial.¹² At the time of Stokes' trial, Sims researched and prepared written and oral arguments asserting that the 1991 conviction was inadmissible under Rules 404(b), 608, and 609, SCRE. ROA 1088-89, 1607, 1737-38; PCR Tr. 68-69. He also filed a pretrial "Motion to Prevent Use of Prior Bad Act," in which he argued that evidence of a defendant's prior bad acts was admissible only to impeach a defendant who chose to testify, and that the "facts underlying such convictions, not to mention facts which have been alleged but never proven, have been excluded from evidence." Motion to Prevent Use of Prior Bad Act, ¶ 1, filed September 20, 1999. At the hearing on his motion, Sims further suggested that Stokes' prior

¹¹In his own testimony, Sims professed no recollection of having met with Bloom, but did not deny that the meeting occurred. The contrast between Bloom's specific and credible recollections on the one hand, and Sims' inability to recall communications with Bloom on the other hand, reflects the seriousness with which each witness viewed the possibility of a conflict. Bloom recognized the dangers for what they were; Sims did not.

¹²That Sims' lack of concern over the conflict rested on his belief that he could avoid confronting Smith, rather than on a belief that actually having to confront her would not give rise to a conflict, is illustrated by his response to the prosecution's request to admit the 1991 indictment. Rather than objecting to its admission, Sims merely expressed concern that the jury not see his name on it, and added – as if to suggest his signature on the indictment was merely *pro forma* – that, "back when I was prosecuting, I would sign all of the indictments." ROA 1636. This Court construes Sims' desire to prevent the jury from seeing his signature as evidence that he understood, on some level, the impropriety of acting (or at least being seen) as prosecutor and then as defense counsel. His failure to seize the opportunity to alert the court to the rest of the story, however, is strong evidence of his mistaken belief that he had seen the last of Audrey Smith.

conviction might not be admissible because it may not have met the felony requirement of Rule 609, SCRE.¹³ Sims also argued that even if Rule 609's requirement's were met, Rule 404(b) and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), precluded admission of the 1991 conviction. ROA 1607. These arguments were all wrong. *See* note 10, *supra*; *see also* ROA 1638.

Sims' misapprehension of the range of evidence admissible at a capital penalty phase remained apparent until moments before Audrey Smith took the stand for the prosecution. Relying on two non-capital cases, *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998), and *State v. Brooks*, 335 S.C. 140, 515 S.E.2d 764 (Ct. App. 1999), Sims articulated the general rule that in order to admit evidence of prior crimes, there must be some connection to the charged crime. ROA 1088. But as the Solicitor correctly pointed out, the general rule invoked by Sims did not apply at a capital sentencing trial; rather, the law made clear that evidence of a defendant's character and propensity for violence – *i.e.*, the type of evidence Audrey Smith could provide – was admissible in such a proceeding. ROA 1089-90.

Sims' PCR testimony further illustrated his belief that there was a plausible legal basis for preventing Audrey Smith from testifying about the facts underlying Stokes' 1991 conviction. PCR Tr. 81.¹⁴ In that testimony Sims admitted having been confident during trial that he could preclude

¹³Rule 609, SCRE, entitled Impeachment by Evidence of Conviction of Crime, sets out the requirements which must be met before a witness may be confronted with a prior conviction.

¹⁴Elsewhere in his PCR testimony, Sims answered questions from Respondent's counsel by suggesting that he had anticipated that the trial court would admit the evidence of Stokes' prior conviction, and that Smith would be permitted to testify about the underlying facts of that conviction. PCR Tr. 60, 98. These suggestions contradict other portions of Sims' PCR testimony cited in this Order, and cannot be reconciled with his consistent course of conduct prior to and during the trial itself. Having observed and considered the testimony in its entirety, this Court is persuaded that Sims lacked a realistic appraisal of the likelihood that he would be confronted with Smith at the 1999 trial.

the state from introducing evidence of the prior conviction, PCR Tr. 81, and he agreed that he would have expressed this confidence to his client, PCR Tr. 95. Sims was also confident that the trial court would prevent Audrey Smith from taking the stand and testifying about the incident underlying the 1991 conviction. Even at the PCR hearing held years after the trial, Sims adhered to his belief that the prior conviction and the evidence supporting it were inadmissible. *See, e.g.*, PCR Tr. 92 (reiterating view that classification of prior conviction as felony is relevant to admissibility at penalty phase of a capital trial).

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

As dictated by settled law, *see, e.g., State v. Plath, supra*, the trial judge rejected Sims' arguments against admission of the 1991 conviction and Audrey Smith's story supporting it. ROA 1090. Moments later, the concerns expressed months earlier by Bloom were realized as the prosecution called Smith as its first penalty phase witness. ROA 1111. On the witness stand, Smith gave approximately sixteen pages of direct testimony detailing two assaults she claimed to have suffered at the hands of Stokes, one of which was the 1990 incident for which Sims had been the prosecutor. While Smith's story generally followed the version Sims had elicited from her at the 1991 trial, there were material differences in the details. For example:

- ◆ On cross-examination at the 1991 trial, Smith was forced to concede that she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. 1991 Tr. 65-67. This fact was not mentioned at the 1999 trial.
- ◆ At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. 1991 Tr. 44, 54. In her 1999 testimony, Smith made no mention of Stokes changing his mind. ROA 1120-21.
- ◆ At the 1991 trial, Smith was confronted with an inconsistency between her

preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. 1991 Tr. 55. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 trial.

- ◆ At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." 1991 Tr. 45. At the 1999 trial, Smith claimed Stokes had actually been looking for guns. ROA 1123.
- ◆ At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." In 1999, Smith simply said that "he put it around my neck and I passed out." ROA 1124.

In contrast to the twenty-page cross-examination of Smith conducted by Stokes' public defender at the 1991 trial, Sims' cross-examination at the capital trial covered a mere two pages of the transcript. While Smith had provided Sims with multiple opportunities to challenge the details of her claims, and in so doing to raise at least some questions about her portrayal of what had transpired between she and Stokes, Sims made use of none of them. He did not expose Smith's own role in reinitiating contact with Stokes; he did not highlight the changes in her testimony (all of which favored the prosecution); and he did not confront her with the fact that she had been forced to deny the accuracy of a court transcript in an effort to defend testimony Sims himself had elicited from her at the 1991 trial. Instead, Sims merely asked Smith to confirm that she had not heard from Stokes since his release from prison in 1998, that it had been some time since Stokes had written to her, and that Stokes had been jealous and possessive. ROA 1139-40. Sims then sat down, putting a quick end to his unexpected and awkward confrontation with the woman whose story he had himself convinced a jury to accept eight years earlier.

B. Conclusions of law.

1. The law governing conflicts of interest.

The Sixth Amendment guarantees that the accused in a criminal case be afforded counsel whose ability to act on his client's behalf is unimpaired by a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Wood v. Georgia*, 450 U.S. 261 (1981). Our justice system presumes that counsel will act as an accused's advocate, *Anders v. California*, 386 U.S. 738 (1967), and the Supreme Court of the United States has emphasized that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); see also *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Nowhere is the fundamental safeguard of conflict-free counsel more essential to ensure the proper functioning of our adversarial system, and to maintain the public confidence through the appearance of impartiality, than in the trial of a capital case. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Conflicts of interest can take a variety of forms. As a general matter, "an actual conflict of interest occurs[] '... when a defense attorney places himself in a situation inherently conducive to divided loyalties'" *State v. Gregory*, 364 S.C.150, 153, 612 S.E.2d 449, 450 (2005) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)); see also, e.g., *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). To establish entitlement to relief, "a defendant need not demonstrate prejudice if there is an actual conflict of interest." *Gregory*, 364 S.C. at 153, 612 S.E.2d

at 450 (citing *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (where counsel's representation is adversely affected by conflict of interest, there is no need "to indulge in nice calculations as to the amount of prejudice arising from [the] denial [of the right to conflict-free counsel]"); see also *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (a prisoner alleging a conflict of interest must ordinarily show an "actual conflict" "adversely affected his counsel's performance"); *id.* at 172 n.5 (quoting *Holloway*, 435 U.S. at 482) ("[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."); *Holloway v. Arkansas*, 435 U.S. at 489 ("representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing") (emphasis added); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).

Successive engagement as prosecutor and then defense lawyer carries inherent risks which, depending upon the circumstances, can ripen into actual conflict. While it is ordinarily permissible for counsel who prosecuted an individual to later represent that same individual in a different, wholly unrelated proceeding,¹⁵ counsel's representation of an individual he previously prosecuted in the same matter or, as is the case here, in a different but related matter, is universally prohibited.¹⁶

¹⁵See, e.g., *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2006); *Hendricks v. State*, 128 P.3d 1017, 1021-22 (Mo. 2006); *State v. Cobbs*, 584 N.W.2d 709, 710 (Wis. Ct. App. 1998); *Smart v. Maass*, 939 P.2d 1184 (Or. Ct. App. 1997) (defense counsel prosecuted defendant on a burglary charge 13 years prior to his representation of defendant on statutory rape charges); *Maiden v. Bunnell*, 35 F.3d 477, 481-82 (9th Cir. 1994).

¹⁶Because the conflicts they generate are so acute, and the need to avoid them is so obvious, such cases arise very infrequently. Consequently, the number of reported decisions addressing such conflicts is small. While it appears that there are no published decisions precisely on point from the

United States v. Ziegenhagen, 890 F.2d 937, 940 (7th Cir. 1989) (“[G]overnment employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper.”); *People v. Martin*, 564 N.Y.S.2d 503, 506 (N.Y.App.Div. 1990) (“The fact that [counsel] had previously prosecuted defendant should have alone ... been sufficient to establish a conflict of interest”); see also *State v. Wareham*, 143 P.3d 302, 306-07 (Utah Ct. App. 2007) (“defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client”); *Worthen v. State*, 715 P.2d 81, 81 (Okla. Crim. App. 1986) (same); *People v. Hoskins*, 392 N.E.2d 405, 408 (Ill. App. Ct. 1979).¹⁷

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

South Carolina appellate courts, this Order identifies the relevant cases from elsewhere in the country, all of which condemn the type of successive representation present in this case.

¹⁷See also *United States v. Sheppard*, 121 Fed. Appx. 508, 510 (4th Cir. 2005) (defendant’s appellate counsel initially appeared on behalf of the prosecution in the same matter); *Skelton v. State*, 672 P.2d 671 (Okla. 1983) (defendant’s trial counsel originally appeared on behalf of the state at arraignment and preliminary hearing in same matter); *People v. Kester*, 261 N.E.2d 569; 570 (Sup. Ct. Ill. 1977) (same).

punishment for subsequent conviction rendered with same attorney then acting as defense counsel); *Worthen*, 715 P.2d at 81 (attorney prosecuted defendant twice and both resulting convictions were used to enhance punishment for later offense as to which same attorney served as defense counsel); *Hoskins*, 392 N.E.2d at 742 (attorney prosecuted defendant and secured probationary sentence, which was later revoked for conduct as to which same attorney represented defendant).

Counsel's participation in a "related" prior prosecution is regarded as sufficiently personal and substantial to generate an impermissible conflict if he appeared on behalf of the government in the earlier proceeding, and would be required to challenge the result of the earlier proceeding in his new capacity as defense counsel.¹⁸ This is so because the close relationship between proceedings places counsel in the impossible position of having to attack his own work product and the credibility of a former client or complainant. *See Wareham*, 143 P.3d at 307 ("defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client"); *Ziegenhagen*, 890 F.2d at 940 (conflict arose where "defense attorney was required to make a choice of advancing his own interests to the detriment of his client's interests"); *see also United States v. Sheppard*, 121 Fed. Appx. 508, 511 (4th Cir. 2005) (observing that court of appeals knew of no "instance where counsel were permitted to appear before a court as counsel of record, argue on the record, and then successfully argue that the words and arguments were not attributable to them"); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (conflict of interest can "exist between an attorney's own personal interest and those of the client"); *United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991)

¹⁸By contrast, there is no substantial or personal relationship between proceedings if counsel merely served as a prosecutor in the relevant government agency at the time that the defendant was prosecuted. *Hernandez v. Johnson*, 108 F.3d 55, 560 (5th Cir. 1997).

(counsel's circumstances must not cause him to "harbor substantial personal interests which conflict with the clear objective of his representation of the client"). Counsel in such circumstances also confront the choice of having to inappropriately rely upon or ignore confidences obtained while serving in their former capacity. *See, e.g., United States v. Nicholson*, 475 F.3d 241, 250-52 (4th Cir. 2007); *Pinkney v. United States*, 851 A.2d 479, 488 (D.C. 2004); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991).

Personal and substantial participation as prosecutor and then defense counsel in related cases is so intolerable both because of the influence, tangible and intangible, that counsel's successive roles have on the representation, and because of the unseemly shadow such representation casts across the integrity of a criminal proceeding. *See State v. Gregory*, 364 S.C. at 153, 612 S.E.2d at 450-51 (even the possibility that counsel may be tempted "to dampen the ardor of his defense" is sufficient to prove an actual conflict of interest requiring relief); *Kester*, 361 N.E.2d at 572 (under such conditions counsel is "subject to subtle influence which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner," and this influence can be expected to generate a "subliminal reluctance" to attack prior work); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980) ("Both the fact and the appearance of total professional commitment are endangered by adverse representation in related cases."). Impermissible successive representation is especially disturbing and erosive of public confidence when it occurs in a capital case. *See, e.g., Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) ("It . . . is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"); *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (acknowledging "the notion, deeply rooted in the common law, that 'justice must satisfy the

appearance of justice”); *Howerton v. State*, 640 P.2d 566 (Okla.Crim.App. 1982) (“The public has a right to absolute confidence in the integrity and impartiality of the administration of justice”).

2. Thomas Sims labored under a conflict of interest.

This Court finds that Sims’ successive engagement, first as the prosecutor at Stokes’ 1991 trial for ABWIK against Audrey Smith, and later as defense counsel tasked with confronting Smith at Stokes’ 1999 capital trial, resulted in an impermissible conflict of interest that adversely affected his performance. Sims’ participation in the 1991 prosecution was both personal and substantial; as described *supra*, he not only signed the indictment against Stokes, he also appeared as the sole representative of the prosecution at the jury trial, and advocated for Smith’s credibility when it was attacked by Stokes’ public defender. This Court further finds that the two proceedings became related when the prosecution made the 1991 judgment and the live testimony of Audrey Smith a featured component of its case for a death sentence at the 1999 trial. Under the decisions discussed above, these findings alone are sufficient to dictate the conclusion that Sims’ representation violated the Sixth Amendment, and that a new sentencing trial must be ordered. *See, e.g., Gregory, supra; Ziegenhagen, supra; Wareham, supra; Worthen, supra.*

That Sims’ role as prosecutor and advocate for Audrey Smith in 1991 was irreconcilable with his duty as lead defense counsel for Stokes in 1999 is confirmed by his handling of the issues relating to the 1991 case at the 1999 capital trial. While he managed to avoid alerting the trial judge to the full measure of his involvement in the 1991 case, Sims’ arguments based on *Lyle, Cutro, Brooks* and the Rules of Evidence could not shield him from a confrontation with the conviction he secured at the 1991 trial, or with the live testimony of Audrey Smith. And when that confrontation occurred, Sims reacted in the manner a conflicted lawyer would: by pulling his punches in the cross-

examination of Audrey Smith.¹⁹ In so yielding to the urge "to dampen the ardor of his defense," *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450, and by making the "choice of advancing his own interests to the detriment of his client's interests," *Ziegenhagen*, 890 F.2d at 940, Sims cemented the conflict Bloom had warned him about months earlier.

Finally, the Court must emphasize that this case differs from the other cases cited herein in an important respect. Whereas the conflicted attorneys in those cases compromised their representation of defendants facing prison time, the conflict in this case manifested itself in the sentencing phase of a death penalty trial. This not only raised the stakes of Sims' gamble that he could avoid a run-in with Audrey Smith to the highest possible level, it also meant that when his gamble failed – as it did – Sims was confronted with both the *result* of his prior prosecution, as well as the very *witness* whose story he had embraced and vouched for as an officer of the court in 1991. The result was a clearer, more tangible manifestation of conflict than was necessary to support a grant of relief in any of the other cases, and a death sentence imposed under circumstances that defy the fundamental expectation that a man on trial for his life will be represented by loyal, conflict-free counsel.

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

In opposing Stokes' application for post-conviction relief, Respondent has argued that Stokes waived his right conflict-free counsel by not requesting a new attorney based on the limited

¹⁹The Court also notes that Sims' failure to use what was available to him in the cross-examination of Audrey Smith stands in sharp contrast to his handling of the Norris Martin cross-examination, where Sims appeared to regard no detail as too small or trivial to warrant inquiry. See ROA 903-29 (guilt phase); 1167-83 (penalty phase). The source of the disparity in Sims' approaches is self-evident: he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination.

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

In the context of a potential (or in this case, actual) conflict of interest, any waiver purporting to be valid must be preceded by specific advice to the defendant regarding his right to effective representation, the details of his attorney’s possible conflict, the potential perils of the conflict, and an opportunity to discuss the matter with outside counsel. *See, e.g., United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992) (citations omitted); *Pinkney v. United States*, 851 A.2d 479, 488-89 (D.C. 2004); *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991). A valid waiver of a conflict also requires “at least

some affirmative effort by the trial court to inform the defendant of the way the conflict might operate to impact deleteriously upon the reasoned and competent presentation of his or her defense.” *United States v. Casiano*, 929 F.2d 1046, 1053 (5th Cir. 1991); *see also Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994) (finding defendant’s acknowledgment during colloquy that defense counsel previously prosecuted him, and that defendant nevertheless desired that counsel remain on case, insufficient to constitute valid waiver). Additionally, because conflicts are inherently fluid, a waiver at the commencement of representation may not “serve to waive all conflicts of interest that arise throughout the course of that defendant’s criminal proceedings.” *Swartz*, 975 F.2d at 1048 (defendant’s waiver did not extend to the sentencing phase of trial when defense counsel chose to pursue new strategy and argument).

This Court finds that none of the essential elements of a valid waiver are present in this case. To begin with, the trial record contains no mention of Sims’ 1991 prosecution of Stokes, let alone a discussion or colloquy with Stokes about the effects of Sims’ prior engagement on his representation in connection with the 1999 capital trial. *See* PCR Tr. 14 (respondent’s concession at the outset of the evidentiary hearing: “I cannot find in the record that there was any reference specifically to Mr. Sims prosecuting Mr. Stokes previously.”).

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

and possible effects of his conflict.

Sims' and Johnson's PCR hearing testimony confirms that no such assessment was ever made available to Stokes. As described above, Sims and Johnson testified consistently that their advice to Stokes about Sims' past consisted of nothing more than a reminder that he had been a prosecutor and had once prosecuted Stokes, and an inquiry about whether Stokes had a "problem" with that. PCR Tr. at 88; 102. Neither attorney had any recollection of specifically informing Stokes that the 1991 conviction was likely to be admitted, that Audrey Smith was likely to testify for the prosecution, or that Sims would face a conflict if called upon to challenge Smith's story on Stokes' behalf.

This Court also recognizes that the omissions were especially significant in this case because Stokes himself had been absent from virtually all of the 1991 trial, and therefore had no independent knowledge of how Audrey Smith had testified, how her story had been challenged by his public defender, or how then-Assistant Solicitor Sims had conducted himself at the 1991 proceeding. And like his attorneys, Stokes also had no knowledge that either the 1991 conviction or, more importantly, the testimony upon which it rested, would be admitted at the 1999 trial. In short, by everyone's account – Sims', Johnson's and Stokes' – Stokes was not told of, and did not otherwise know of, most of the information that would have been essential to a valid waiver of Sims' conflict of interest. As reflected in Stokes' sworn affidavit, had he been properly informed, he would not have waived the conflict. Because he was not so informed, the record in this case does not support a finding of a "knowing, intelligent" waiver "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

Based on the foregoing findings and conclusions, this Court holds that Stokes' Sixth

Amendment right to representation by counsel unencumbered by conflict of interest was violated, and he is entitled to post-conviction relief from his death sentence.

Grounds 9(b) and (c): Stokes' claims that appellate counsel failed to raise on direct appeal the trial court's related failures to: (1) conduct an independent assessment of the evidence to determine which statutory mitigators were supported by the evidence and (2) instruct the jury on a mitigator for which there was evidentiary support.

Stokes also claims that he received ineffective assistance of counsel in connection with the direct appeal of his death sentence. Under *Strickland v. Washington*, 466 U.S. 688 (1984), a prisoner claim ineffective assistance of counsel must establish that his attorney's representation "fell below an objective standard of reasonableness." *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The same standards apply to review of appellate counsel's performance. *Evitts v. Lucey*, 469 U.S. 387 (1985). To prove that deficient performance of appellate counsel was prejudicial, Stokes must show that, but for counsel's errors, there is a reasonable probability that the claim not raised would have prevailed on appeal.

A. Findings of fact.

Up until the moment she was killed, Connie Snipes, who believed she was accompanying Stokes and Syphrette to murder another man, willingly participated in the events preceding her death.

The trial evidence was sufficient to support findings that:

- Snipes located Martin and asked him to go with her and Stokes. ROA 878-79.
- Snipes voluntarily got in the car with Stokes, Martin, and Syphrette. ROA 882.
- When they arrived at the designated location, Snipes voluntarily accompanied Martin and Stokes into the woods. ROA 888-89, 920.

- Snipes voluntarily had sex with Martin and Stokes once in the woods. ROA 922, 971-72; 1169.

The Solicitor himself conceded that there was evidence from which the jury could infer that Snipes had accompanied Stokes and Martin voluntarily and that she had sex with them voluntarily. ROA 989-90.

These facts formed the basis of the defense theory that Snipes voluntarily participated in at least some of Stokes' conduct and thus, there was evidence to support the statutory mitigator relating to a victim's participation. *See* S.C. Code § 16-3-20(C)(b)(3) ("The victim was a participant in the defendant's conduct or consented to the act."). Just before the penalty phase began, Sims, in response to the court's question, indicated that the defense intended to establish that Snipes' conduct satisfied the victim participation statutory mitigator. ROA 1082-83. While the court expressed some skepticism about the evidentiary support for this mitigator, ROA 1084-85, it never revisited the issue. There is also no indication that the court ever conducted the statutorily-required assessment of the evidence at the conclusion of the penalty phase. This omission by the trial court prevented the defendant from lodging an objection to the court's evaluation of the evidence. Ultimately the court did not include the § 16-3-20(C)(b)(3) mitigating factor in its instructions to the jury. ROA 1479-80.

On direct appeal Stokes's lawyer, Joseph Savitz, failed to raise either the trial court's failure to conduct the statutorily-required evidentiary review or the trial court's failure to instruct the jury on a mitigating factor that was supported by the evidence. In his testimony at the PCR evidentiary hearing Savitz did not offer a strategic reason for these omissions. PCR Tr. 24-25. To the contrary, Savitz testified that in other cases before and after the Stokes appeal, he had pressed these very issues because he believed they had merit. *Id.*

B. Conclusions of law.

1. The trial court's failure to independently assess the mitigation evidence.

The Eighth Amendment requires that a jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Any impediment to a juror's consideration of a relevant mitigating factor is unconstitutional. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury's consideration of penalty phase evidence); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation). To that end South Carolina's death penalty statute obligates the trial court to conduct its own independent review of the penalty phase evidence in order to determine which statutory mitigating factors are supported. Indeed, absent a waiver from the defense the court is required to submit to the jury any mitigating circumstance with evidentiary support. S.C. Code § 16-3-20(C).

To ensure compliance with this statutory requirement, the our Supreme Court has set out a specific procedure for trial courts.

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

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

In the years following *Victor*, the Supreme Court has consistently approved this approach.

More importantly, it has never suggested a deviation from the statutory requirement. *See State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Rogers*, 338 S.C. 435, 438, 527 S.E.2d 101, 103 (2000); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997). Therefore, for at least 10 years prior to Stokes's trial the law was settled that the trial court had an obligation to assess the penalty phase evidence to determine which statutory mitigators were supported by the evidence.

Such an evaluation never occurred at Stokes's trial. The trial court simply did not conduct the required analysis and never engaged in the procedure set out in *Victor*. While subsequent cases have clarified defense counsel's duty to object to the trial court's initial determination at the "*Victor* conference," *see e.g., State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997), these cases are grounded in the assumption that a *Victor* conference actually occurs. Here, the trial court never engaged in its own review of the evidence and, therefore, contrary to the cases cited *supra*, the defense was never presented with an opportunity to object to the trial court's determination. Given the trial court's rather clear failure to satisfy the statutorily-required evaluation of evidence, appellate counsel's failure to raise this issue on direct appeal represented ineffective assistance of counsel.

2. The trial court's obligation to instruct the jury on all mitigators that are supported by the evidence.

As discussed above, ample evidence presented at both phases of Stokes's trial established that Snipes at the very least participated in Stokes' conduct. The state Supreme Court acknowledged as much. *State v. Stokes*, 345 S.C. 368, 374, 548 S.E.2d 202, 205 (2001) (noting evidence that Snipes voluntarily accompanied Stokes into the woods). Based on the evidence that had already been presented, trial counsel alerted the court to its reliance on this statutory mitigating factor at the outset of the penalty phase. ROA 1084. The trial court ultimately did not charge the jury on this or any

other statutory mitigating circumstance. This failure was error.

The trial judge "shall include in his instructions to the jury for it to consider . . . the following . . . mitigating circumstances which may be supported by the evidence." S.C. Code § 16-3-20(C). That statute imposes an obligation, which existed at the time of Stokes's trial, on the trial court to instruct the jury on any mitigating factor that was supported by the evidence. *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Bowman*, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005) (acknowledging duty of trial court to instruct on mitigating factor supported by evidence), *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006); *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (trial court was required to instruct the jury on a statutory mitigator raised by evidence of intoxication); *State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991) (same). When assessing mitigating evidence, a trial court should not narrowly construe what is relevant and what is not. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation); *Tennard*, *supra*. In fact, the trial court must instruct on every mitigating factor for which there is any evidence without regard to the weight of the evidence. *Pierce*, 289 S.C. at 435, 346 S.E.2d at 711.

The trial court's premature refusal to charge the jury on an instruction both supported by the evidence and requested by trial counsel appears to have rested on the court's guilt phase assessment of this evidence. "The victim having participated in the act situation, if that goes back to what was not allowed [in the guilt phase] because of the way the letter came in and all, you're not going to be able to do it. . ." ROA 1084 (trial court's response to request to charge victim participation mitigator). The court may well have been correct in its assessment that evidence of Snipes's conduct

was irrelevant to the defendant's guilt and was, therefore, inadmissible at the guilt phase of the trial. But this guilt phase evidentiary ruling should not have governed the analysis at the penalty phase given the very different issues to be decided by the jury at that point in the trial.

The record before this Court establishes that appellate counsel failed to include this claim on direct appeal and had no strategic reason for this omission. PCR Tr. 24-25. This Court finds that there exists a reasonable probability that the result of applicant's appeal would have been different had appellate counsel properly raised this claim. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Stokes is therefore entitled to post-conviction relief from his death sentence.

III. CONCLUSION

Based on the foregoing findings of fact and conclusions of law, this Court vacates Stokes' death sentence and remands this case to the Orangeburg County Court of General Sessions for a resentencing.

L. Casey Manning, Circuit Judge

_____, 2010

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Jon Ozmint, Commissioner,
South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

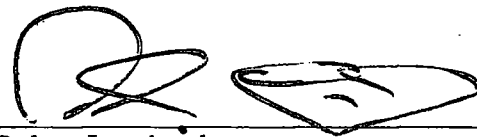
Case No.: 01-CP-38-1240

Certificate of Service

I hereby certify that a copy of Applicant's Proposed Order Granting Relief has been served upon the Respondent, via U.S. mail, first-class, postage prepaid, at the following address:

Donald J. Zelenka
Deputy Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

This the 1st day of October, 2010.



Robert Lominack

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

ORDER OF DISMISSAL

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

This matter comes before this Court by an initial application filed October 17, 2001. An amended application was filed by his court-appointed counsel, Robert Lominack and Keir Weyble of Columbia, South Carolina. The Respondent made a Return to the initial application on July 3, 2002. The matter was initial set for a hearing on September 13, 2004. On August 9, 2004, the Applicant made an amended application. The matter was initially continued by Order of Continuance dated August 26, 2004 to allow the South Carolina Department of Disabilities and Special Needs complete an evaluation of the Applicant on whether he possessed the disability of mental retardation. On October 22, 2007, the Department submitted a report to this Court that opined the Petitioner was not mentally retarded.

On June 4, 2009 a status conference was held in Richland County. During the conference, the Applicant's counsel advised the Court that it was abandoning the issue concerning lethal injection. Upon inquiry, the Court was also advised that it was abandoning the issue concerning mental retardation raised in the amended application. The Court scheduled a hearing for August

5, 2009 in Orangeburg County. The Respondent made a Return to the Amended Application on August 5, 2009.

On August 5, 2009 a hearing was convened in Orangeburg County before this Court. The Applicant was present and represented by appointed counsel Weyble and Lominack. The Respondent was represented by Donald J. Zelenka. Testimony was received from prior appellate counsel Joseph Savitz (PCR Tr.p. 19-39), Jeffrey Bloom (PCR Tr.p. 40-48), prior trial counsel Thomas Sims (PCR Tr.p. 49-98) and Virgin Johnson (PCR Tr.p. 100-108).. The Applicant did not testify. At the conclusion of the hearing, it was agreed that simultaneous briefing would occur after receipt of the transcripts. On December 28, 2009, Applicant's counsel advised Respondent's counsel that he was abandoning allegation 9(a) and only proceeding on allegations 9(b), 9(c), and 9(d). Post hearing memorandum were prepared and sent on February 16, 2010 by both parties.

This Court has reviewed the evidence, pleadings and memorandum of law. It is constrained to make the following findings of fact and conclusions of law and dismiss and deny the application, as amended, in its entirety, pursuant to S.C. Code § 17-27-80, 160.

I.

PRIOR PROCEDURAL HISTORY

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims and Virgin Johnson

There were two pretrial hearings. The first, on January 19, 1999, before the Honorable Duane Shuler, concerned the qualification of defense counsel and a request for an evaluation.

ROA, p. 1500 - 1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. ROA 1510-1642.

The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. In his Final Brief of Appellant, he asserted the issues on appeal as follows:

- I. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.
- II. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

State v. Stokes, Final Brief of Appellant, p. 3. The Respondent restated the issues as:

- I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.
- II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

The South Carolina Supreme Court denied the appeal in *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied..

STATE'S VERSION OF THE FACTS

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for \$2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. *See Stokes Confession* (Court's Exhibit 4), R. pp. 1658-59.

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62. Then, as related by Mr. Stokes, the situation developed as follows:¹

I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. *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 that were true so we could do all 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*

¹Although the original confession was transcribed as one long non-paragraphed statement, paragraphs are asserted into this passage for ease of review.

to her on the phone when Roy calls and I wasn't home.² You just better not flip on me for her. I laughed and said see yall at 9:30 P.M.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. 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.³ I just laughed and looked at Pattie.

We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

² This phrase was redacted from the Confession published to the jury during the guilt phase. See R. at 969, ll.16-17.

³This phrase also was redacted from the Confession published to the jury during the guilt phase. See R. at 969, ll.22-23.

Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.

I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us \$2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me

....

Stokes Confession, R. pp. 1662-63.

Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, 1.4-1157, 1.2⁴. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, 1.4-854, 1.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, 1.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, 11.13-23, then cut

⁴This testimony was elicited during the sentencing phase, and not during the guilt phase.

her vagina out. *Id.* at 1160, 1.24-1161, 1.10. A pathologist confirmed these injuries. *Id.* at 1218, 1.8-1221, 1.13.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, 11.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, 11.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, 11.6-11.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, 1.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, "[D]o you know me." R. at 1340, 1.15-1341, 1.16. Mr. Ferguson kept saying no. *Id.* at 1341, 11.16-17; Stokes Confession. Then, Mr. Stokes said, "Motherfucker, you're going to know me." *Id.* at 1341, 11.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, 11.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p.1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, 11.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, 11.1-9.

II. Allegations

Prior to the entry of the stay and assignment order on October 17, 2001, appellate counsel for Mr. Stokes initially filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received “ineffective assistance of counsel” and that it was based upon a “failure to present mitigating evidence.” On May 6, 2002, the Respondent received the “First Amended Application for Post-conviction Relief.” In the 2002 Application, made by current counsel, Stokes alleged the following:

9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).*

10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state’s medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state’s version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim’s death. But for trial counsel’s deficient performance, there exists a reasonable probability that the result of Applicant’s trial would have been different.

9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*

10(b) The facts supporting the claim are as follows:

1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant’s trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant’s sentencing proceeding would have been different. *Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).*

2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

On August 9, 2004, Respondent received a pleading styled "Amended Application for Post-Conviction Relief" dated August 6, 2004. In the application, he raised the following:

1. *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument. 9(a)*
 - a. The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument

violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); see also, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 414, 362 S.E.2d 13 (1987). 10(a)

2. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.* 9(b)

- a. Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. See, e.g., *Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(b).

3. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.* 9(c)

- a. S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider...the following...mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. See *State v. Pierce*, 289 S.C.

430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds*, *Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(c)

4. *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.* 9(d)
 - a. The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. *See, e.g., Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leake*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979). 10(d)
5. *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.* 9(e)
 - a. The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and

by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). 10(e)

6. *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison.* 9(f)
 - a. The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. See S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886). 10(f)
7. *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.* 9(g)
 - a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

During the status conference on June 4, 2009, counsel for the Applicant advised the Court and opposing counsel that he was withdrawing amended ground 7 set out as 9(g) [Applicant's

sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution]. [The Respondent had made a motion to dismiss the allegation on August 25, 2004 under SCCP 12(b)(1) and 12(b)(6) as beyond the jurisdiction of the court in a state post-conviction relief proceeding under *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000)].

During the proceeding on June 4, 2009, counsel for the Applicant also advised the Court and opposing counsel that he was abandoning ground five - allegation 9(e) [*Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation*]. [The October 22, 2007 submission by the South Carolina Department of Disabilities and Special Needs opined that Stokes did not meet the diagnostic criteria for mental retardation].

Finally, during post-hearing briefing, the Applicant abandoned allegation 9(a). [*counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument*].

III.

GENERAL LAW RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to

deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Stokes' attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Stokes bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." *Id.* at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See *Id.* And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See *Id.* at 691-92, 104 S.Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See *id.* at 694, 104 S.Ct. at 2068.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066)).

9 (A) - Ineffective Assistance in Failing to Object to Penalty Phase Closing Argument .

In his first amended allegation, Stokes, through counsel, contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in the Department of Corrections. This issue was specifically abandoned in the post-hearing briefing. This Court dismisses the ground for lack of prosecution.

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.

In specification 9(b) and 9(c), the Applicant asserts that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was deficient in failing to present two separate grounds in the 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." This Court concludes that appellate counsel cannot be found deficient because neither issue was preserved for review by objection or ruling by the trial court. He has failed in his burden of proof on the initial prong under Strickland v. Washington, 466 U.S. 668(1984). These claims must be dismissed.

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).⁵

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 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

⁵The 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).

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).

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).

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).

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

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

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." ROA 1429. During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. ROA 1446, 1451. Stokes made a personal statement of remorse. ROA 1459-1460. Counsel Sims made his 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. ROA 1466-1467.

Pre-charge objections were made which did not include either of the presently challenged issues. ROA 1468. During the jury charge, Judge Burch addressed mitigation circumstances. ROA 1479-1481. In particular, he stated: " 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 ..." ROA 1480, ll. 3-6. 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 failure to hold an on the record charge conference. ROA 1486 (no objection to the charge by the defense).

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. PCR Tr.p. 24. 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*, *State v. Victor* and *State v. Evans*. 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. 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. PCR 25.

On cross-examination, Savitz admitted that when he raised non-objected statutory mitigating factors that it was usually related to issues of intoxication. PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. 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. 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. 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. 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. 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. 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. 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. 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. 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* contending that the law was uncertain concerning preservation of the issue. 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. PCR 33. However, he had no idea why he did not raise the issue in *Stokes* appeal brief. PCR 33, l. 5.

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

ANALYSIS

This Court concludes the Applicant has failed to show either deficient performance or prejudice under *Strickland v. Washington*. Appellate counsel Savitz cannot be *Strickland* deficient 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).

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 (S.C., 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 constantly rejected this claim 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 and did not object to the failure to give an instruction of the mitigating factors. ROA 1486-87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court concludes that appellate counsel Savitz was not deficient in failing to brief an unpreserved claim.

Further, there was nothing in the record to show that the trial court failed to hold a charge conference. Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found to be deficient when the issue was not raised at trial.

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. ⁶

⁶This 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 is not raised. 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 Applicant was to create a subterfuge. 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

9(d) - Conflict of Interest - Thomas Sims as Prosecutor in 1991.

The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had previously personally prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that 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 [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on the record before the jury that Sims had prosecuted Stokes.

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.

How This Issue Was Presented

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.

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. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims 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. ROA 1085.

The Stokes-Audrey Smith Trial

This Court has 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-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. 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. 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. 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. 1991 Tr.p. 46. She later woke up in the field and called 911 from a nearby house. 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. 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. 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. 1991 Tr.p. 52-53. A little while after the friends left, she stated that they had sex. 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. 1991 Tr.p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. 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. 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. 1991 Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. 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. 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. 1991 Tr.p. 71-72.

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.

ROA. 1110-1111.

The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. 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. 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. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. 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. 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. ROA 1125. She stated that she was in the hospital for 3 to 4 weeks. 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. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received a 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. ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. 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. 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. 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. ROA 1141.⁷

⁷ 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.

ANALYSIS

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

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.

July 28, 1993 - lying to employees.

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. 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. ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. ROA 1147-49. There were 10 sutures. 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. 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. ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. ROA 1279. It required Windburn being sent to the hospital. 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. ROA 1283, 1. 17-25. He stated there was nothing unusual about the punishment. ROA 1283-84.

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

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.

Testimony of Counsel

Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. 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. 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.

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."

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."

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. 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." PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. PCR 57.⁸

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

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. 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. 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. PCR 59-60. He stated that he reviewed these matters with Stokes. 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. PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. 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

⁸ Counsel Sims recollection of Mr. Jeffrey Bloom's role and advice was different than 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. PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. PCR 58.

the best of his ability that he would not have been in the case. PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. PCR 61.

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. Sims asserted that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. PCR 61.

On cross-examination, Sims stated that he researched the admissibility of prior convictions prior to trial. PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. PCR 71. He noted that he looked at *State v. Lyle* and Rules 404(b), 608 and 609. 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. PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. 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. PCR 83. He stated that they talked about the indictment that he had signed also. PCR 83. However, he stated that he could not state that he asked him if he still wanted him on the case. PCR 83-84.

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

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. 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. PCR 87, ROA 1636.⁹ It was agreed his name would be removed from any document being presented to the jury. PCR 87. See also, 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. 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. PCR 88-90. He stated that Mr. Johnson was present during the discussions. 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. PCR . 89-90. Counsel stated that he expected the material to be introduced. PCR 93-94, 98. He re-confirmed that he anticipated the 1991 conviction evidence to be introduced prior to its introduction. PCR 98.

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. 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. PCR 102. Johnson stated that they went through questions of do you have a problem with me representing you, do you think - -

⁹It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

you know do you want somebody else and he [Stokes] said no. 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. 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. 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. PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. PCR 105.¹⁰

1. *No Per Se Conflict of Interest.*

This Court concludes, independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution 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

¹⁰In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. This Court has determined that Mr. Sims testimony is credible.

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 fact support Petitioner's position.

This Court distinguishes any reliance upon *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), provides that Petitioner was not required to show prejudice where his right to choice of counsel was violated. This Court does 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 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, this Court finds that two of Petitioner’s critical factual assertions lack support in the record.

The record is void of any attempt by the Applicant 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.

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 case. 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 he 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).

This Court alternately finds that there was a knowing waiver of a conflict of interest. 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."

In *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1991), the court set out factors which may be used in

- 1.) the nature of the litigation;
- 2.) the type of information the lawyer may have access;
- 3.) whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation; and
- 4.) the issues in dispute.

See generally, Jarvis and Tellum, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflict, 33 Williamette L. Rev. 14t (1997).

In A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), the committee opined that cross-examination of an adverse witness who is a client creates a disqualifying conflict, in the absence of appropriate client consent, depending upon the nature and degree of the conflict. As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S. v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because

the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

Not all conflicts may be waived, however. An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. See Kliti, 156 F.3d at 153; Levy, 25 F.3d at 153. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel. See Levy, 25 F.3d at 153.

In Schwarz, the Second Circuit described the distinction between waivable and unwaivable conflicts citing United States v. Fulton, 5 F.3d 605 (2d Cir.1993). Fulton involved the representation of a defendant by an attorney who had been accused of participating in criminal activity related to the crimes for which the defendant was on trial. See *id.* at 607-10. The district court had advised the defendant of the conflict and had obtained a waiver. See *id.* at 608. On appeal, the defendant argued that the waiver was ineffective. See *id.* at 612.

The Second Circuit agreed and noted that, "[i]n such cases, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant." *Id.* at 613. The Court distinguished between conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are "of a different character" than the latter. *Id.* The Court concluded that because the conflict at issue there resulted in counsel's "[a]dvice as well as advocacy [being] permeated by counsel's self interest, and [because] no rational defendant would knowingly

and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation," the conflict was not waivable. *Id.* (Emphasis added).

Although the particular conflict at issue in Fulton belonged to that narrow category of conflicts that courts have deemed to be *per se* violations of the Sixth Amendment right to counsel, see *id.* at 611-12; Solina v. United States, 709 F.2d 160, 168-69 (2d Cir.1983), Fulton's rationale with respect to when an *attorney's self-interest* renders a conflict unwaivable is equally applicable to the unusual facts of Schwarz. The lawyers's representation of Schwarz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, \$10 million retainer agreement his newly formed firm had entered into with the PBA. Like the conflict in Fulton, Worth's conflict "so permeate[ed] the defense that no meaningful waiver could be obtained." Fulton, 5 F.3d at 613. The Court held that: "[w]e must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interests for those of the PBA. Indeed, we think it likely that these very concerns motivated the government to argue to the district court at the *Curcio* hearing that the conflict created by the PBA retainer could not be waived. Thus, we conclude that the conflict between Worth's representation of Schwarz, on the one hand, and his ethical obligation to the PBA as his client and his self interest in the PBA retainer, on the other, was so severe that no rational defendant in Schwarz's position would have knowingly and intelligently desired Worth's representation. Cf. *id.* ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); cf. also United States v. Arrington, 867 F.2d 122, 129 (2d Cir.1989) (upholding district court's disqualification of attorney "saddled" with serious conflict where allowing waiver would have required defendant to "forego[] the

presentation of ... evidence that would [have been] of great assistance")." The Schwarz court found that the conflict was unwaivable.

Schwarz is distinguishable from the present case. In Schwarz, the government charged the defendant, a police officer, with assaulting a victim in a bathroom at a police precinct. Id. at 79-80. There, the law firm of defendant's trial counsel had a \$10,000,000 retainer agreement with the police officers' union, the Patrolman's Benevolent Association (the "PBA"). Id. at 91. During the criminal proceedings, the victim filed a civil lawsuit against the PBA alleging that the PBA through its agents and its president conspired to injure him and then covered it up. Id. The Second Circuit found an actual conflict existed between trial counsel's personal interest and professional obligation to the PBA and his representation of the defendant. Id. at 91-92. In particular, the defendant's interest in making a defense that would implicate another police officer in the assault--a strong, obvious interest--diverged with trial counsel's interest in refraining from any conduct that could harm the PBA, for example--making an argument that supported the conspiracy theory in the victim's civil lawsuit. Id. at 91-92.

In Schwarz, trial counsel had a personal interest and professional obligation to another client that differed from his criminal client. Also, trial counsel refrained from making a particular defense in the criminal case because it ran counter to another client's interest.

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. As such, Schwarz does not support the defendant's position. See U.S. v. Peterson, 233 F.Supp. 2d 45 (E.D.N.Y. 2002).

In clarifying the narrow approach of the unwaivable conflict issue and application of

Schwarz, the Second Circuit recently stated:

As we made plain in Fulton, however, *lesser conflicts*, such as an attorney's representation of two or more defendants *or his prior representation of a trial witness, are generally waivable*. See United States v. Fulton, 5 F.3d at 613. *Although such a conflict might require a defendant to abandon a particular defense or line of questioning, he can be advised as to what he must forgo*; he "can then seek the legal advice of independent counsel and make an informed judgment that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel." United States v. Fulton, 5 F.3d at 613. In the multiple representation situation, the defendant "can be advised by independent counsel of the dangers" of such matters as "one defendant's cooperating with the government," and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney's representation of another accused. *Id.* Where the defendant can rationally opt to retain counsel of his choice despite a conflict, the court conducts a Curcio hearing to determine whether the defendant knowingly and intelligently waives his right to conflict-free representation. See, e.g., United States v. Leslie, 103 F.3d 1093, 1098 (2d Cir.), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997); United States v. Levy, 25 F.3d at 153.

U.S. v. Perez, 325 F.3d 115 (2d Cir. April 4, 2003) (attorney's status as potential witness at defendant's trial was conflict of interest that was waivable).

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 F.3d 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 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

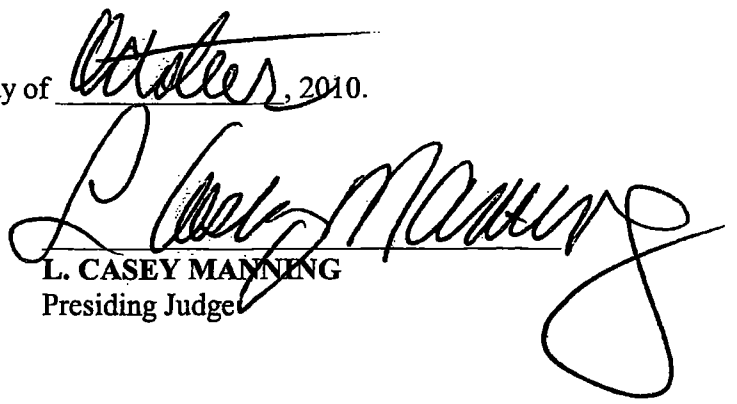
prisoner's wife to represent him where record established that defense counsel had actual conflict of interest between representation of defendant and two prosecution witnesses.

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. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed. ¹¹

CONCLUSION

For all the foregoing reasons, the entire Application for Post-Conviction Relief must be denied and dismissed. This Court finds that the Applicant has failed in his burden of proof in this proceeding. Therefore, this Court is constrained to deny the application for post-conviction relief in its entirety.

AND IT IS SO ORDERED this 21 day of October, 2010.


L. CASEY MANNING
Presiding Judge

¹¹ This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

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Orangeburg County South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

MOTION TO ALTER OR
AMEND THE JUDGMENT2010 NOV 17 A 9:17
FILED FOR RECORD
CLERK
A.B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Applicant, Sammie Louis Stokes, by and through undersigned counsel, submits this motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC.¹ In this motion Stokes addresses the impermissibility of the Court's adoption of respondent's slightly modified adversarial brief as its final order, the order's erroneous and unfair exclusion of Stokes' sworn affidavit, and the order's misleading characterizations of the testimony of Jeffrey P. Bloom. In so limiting the scope of this motion, however, Stokes in no way abandons or waives any previous argument or issue raised in prior pleadings or hearings.

I. Due process, fundamental fairness, and South Carolina law mandate that a judge, not a party, resolve the legal and factual issues in a capital post-conviction relief action.

At the conclusion of the August 5, 2009 evidentiary hearing in this case, the Court suggested that the parties submit proposed orders. PCR Tr. 109. Undersigned counsel objected, explaining, *inter alia*, that "what we want is [the Court's] findings," and that "[w]e don't want Mr. Zelenka's

¹Although the order at which this motion is directed was signed on October 21, 2010, undersigned counsel did not learn of its existence until a November 1, 2010 telephone call to the Orangeburg County Clerk of Court. At that time, counsel requested written notice of the order, which was received via U.S. Mail on Thursday, November 4, 2010. Therefore, pursuant to Rules 6(a) and 59(e), the time for filing this motion extends to and includes Monday, November 15, 2010.

findings” *Id.* at 110. In response to this concern, the Court established a procedure under which the parties would submit briefs rather than proposed orders, *id.* at 110-11, and both parties proceeded according to that agreement. On August 29, 2010, however, respondent’s counsel contacted the Court by e-mail, noting the impending deadline for decision previously imposed *sua sponte* by the South Carolina Supreme Court, *see State v. Stokes*, 2001-CP-38-01240 (June 17, 2001) (directing that “[a] final order shall be issued in the PCR case by September 1, 2010”), and attaching an apparently unsolicited proposed order, which was in all material respects identical to the adversarial brief respondent had filed approximately six months earlier. This Court thereafter secured an extension of time in which to resolve the case, and contacted undersigned counsel to request a proposed order on behalf of Stokes. On October 1, 2010, undersigned counsel complied with the Court’s request by submitting a proposed order in three electronic “formats to facilitate the drafting of a final order” Oct. 1, 2010 e-mail from Robert Lominack to Hon. L. Casey Manning. Three weeks later, the Court signed respondent’s proposed order denying relief without making a single modification.

The South Carolina Supreme Court does not approve of wholesale adoption of proposed orders in capital post-conviction relief cases. On the contrary, the Court has “strongly encourage[d]” judges presiding in such cases to “draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which unequivocally requires that *courts*, not *parties*, perform the critical function of objectively assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) (“The *court* shall make specific findings of fact, and state expressly

its conclusions of law, relating to each issue presented”) (emphasis added); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) (“the *hearing judge* in writing *shall make* specific findings of fact and state expressly *the judge's* conclusions of law relating to each issue”) (emphasis added).²

²South Carolina law disapproving the verbatim adoption of a party’s proposed order reflects a nationwide consensus against that practice. *See, e.g., Dobyne v. State*, 2000 WL 869500 (Ala.Crim.App. 2000) (capital case); *Smith v. Smith*, 845 P.2d 1090, 1093 (Alaska 1993) (“Verbatim adoption of findings and conclusions prepared by counsel is appropriate only when the findings and conclusions reflect the court’s independent view of the weight of the evidence.”)(citation and internal quotation marks omitted); *Elliott v. Elliott*, 796 P.2d 930 (Ariz.Ct.App. 1990) (“The court may not rely upon the parties to prepare findings that support its judgment.”) (citations and internal quotation marks omitted); *Grayson v. Grayson*, 494 A.2d 576, 283 (Conn.App.Ct. 1985) (“we do not approve of this practice”); *Stevens v. Humana of Delaware Inc.*, 832 P.2d 1076 (Colo.Ct.App. 1992) (“[W]e agree that it is the better practice for the trial court, if possible, not to delegate this responsibility to counsel”); *B.E.T. Inc. v. Board of Adjustments of Sussex County*, 449 A.2d 811, 812 (Del. 1985) (“An opinion, in which the Court merely adopts and incorporates by reference the brief of one of the parties, is inadequate and unacceptable.”); *Sacks v. Rothberg*, 569 A.2d 150, 1013 (D.C. 1990) (“[W]e do not recommend the practice utilized by the trial court [and] have serious doubts that the underlying purposes of the rule can be fulfilled in the majority of cases where a trial court [adopts findings made by a litigant.]”); *Corporate Management Advisors Inc., v. Boghos*, 756 So.2d 246, 249 (Fla.Dist.Ct. App. 2000) (“It is the [trial] court’s unique responsibility to make the decisions on the various issues of the case based on the pleadings before it and its view of the evidence presented. The court does not fulfill this responsibility by merely choosing the better proposed judgment or the better option or options contained in competing proposed judgments presented by the attorneys.”); *PDA Inc. v. Hass Corp.*, 366 S.E. 2d 169 (Ga.Ct.App. 1988) (“The common practice of directing counsel for the prevailing party to prepare the judgment for the trial court’s signature, although not reversible error, has been greatly disfavored by this court”); *In the Interest of Jane Doe*, 22 P.3d 987, 994 (Haw.Ct.App.), *rev’d on other grds*, 26 P.3d 562 (Haw. 2001) (“[findings] should be ‘the independent product of the court’s own thinking ...’”) (internal citations omitted); *Rosencrans v. Intermountain Soap and Chemical Co.*, 605 P.2d 963, 967 (Idaho 1980); *Shaprio v. Regional Board of School Trustees*, 451 N.E. 2d 1282 (Ill App. 1983); *Kroblin v. RDR Motels Inc.*, 347 N.W. 2d 430 (Iowa 1984); *Duffin v. Patrick*, 512 P.2d 422 (Kan. 1973); *Mansfield v. Voedisch*, 672 S.W.2d 678 (Ky. Ct. App. 1984); *In re Sabrian M.*, 460 A.2d 1009 (Me. 1983); *Makino U.S. A. Inc., v. Metlife Capital Credit Corp.*, 518 N.E. 2d 519, 526 (Mass.App.Ct. 1988) (“Whenever a trial judge adopts verbatim findings suggested by one side, a gnawing doubt arises about how much the judge injected his own intelligence into the process.”); *Researchers Inc. v. Hiter*, 512 So.2d 1263 (Miss. 1987) (“[T]he judge is a judge and not a rubber stamp. He may not be able to afford the luxury of practicing his culinary art a la the Cordon Bleu. He should remember, however, that his oath precludes a McDonald’s approach to the judicial process.”); *First National*

Verbatim adoption of a party's proposed findings is so widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 572-573 (1985) (expressing disapproval of "uncritically accepted findings prepared without judicial guidance by the prevailing party"); *Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with

Bank of Missoula v. McGuinness, 705 P.2d 579, 584-85 (Mont. 1985) ("This Court has expressed its dissatisfaction, if not outright disapproval, of verbatim adoption of findings of fact proposed by one party or the other in a case tried without a jury."); *Mora v. Martinez*, 451 P.2d 992 (N.M. 1969) ("We agree with the federal cases which, without exception, require adequate findings and insist on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties."); *Schmidkuntz v. Schmidkuntz*, 529 N.W. 2d 857, 858-59 (N.D. 1995) ("Because such an approach may fail to foster the appearance of fairness and impartiality in our courts, and may thereby reduce confidence in our judicial system, we cannot approve it as a practice."); *Kaechelev. Kaechelev*, 594 N.E.2d 241, 227 (Ohio Ct. App. 1991) ("[I]t is a poor policy and should not be practiced."); *Golson v. O.N.G. Western Inc.*, 756 P.2d 1209, 1211 (Okla. 1998) ("That duty requires the court to examine proposed findings using its independent judgment of the facts and applicable law with a view to adopting only those findings and conclusions justified in the cause being considered."); *Commonwealth v. Williams*, 732 A.2d 1167, 1176 (Pa. 1999) (capital post-conviction case) ("We cannot, ... in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief ... [T]he independent role of the judiciary cannot properly be served in this case absent some autonomous judicial expression of the reasons for dismissal. For this reason alone, a remand is warranted."); *Delevan-Delta Corp. v. Roberts*, 611 S.W. 2d 51, 52-53 (Tenn. 1981) ("We agree that the preparation of findings and conclusions is a high judicial function. We are committed to the requirement that the trial court's findings and conclusions be its own."); *State of West Virginia ex. rel. Thorton v. Cooperton*, 470 S.E. 2d 162, 168 (W. Va. 1995); *University of Vermont v. Town of Colchester*, 392 A.2d 413, 414 (Vt. 1978) ("Proper performance of the judicial function requires impartial patience and adequate reflection, not demonstrated where findings are copied verbatim from the requests of the parties."); *Brenger v. Brenger*, 125 N.W. 109 (Wis. 1910) ("a very dangerous practice").

which we have expressed disapproval on a number of occasions.”).

The order adopted by the Court in this case powerfully illustrates the dangers inherent in ceding responsibility for resolving critical questions to counsel for an interested party. Stokes’ assertion that his Sixth Amendment right to conflict-free trial counsel was violated turned primarily on two key issues: whether such a conflict existed, and if so, whether it was validly waived. As explained in Stokes’ March 1, 2010 Reply, Respondent’s Post-Hearing Memorandum – which was later repackaged as the proposed order adopted verbatim by the Court – flatly ignores the legal rules governing both of these issues. On the question whether trial counsel’s successive engagement as prosecutor and defender gave rise to a conflict, the order relies on three decisions declining to find conflicts because the matters on which the attorneys had been successively engaged were *unrelated*.³ Yet the order fails even to acknowledge the well settled corollary rule that where counsel’s successive engagements involve *related* matters – as was the case with Stokes’ 1991 and 1999 trials – a conflict *does* result. *See* Stokes’ Post-Hearing Memorandum at 13-17 (describing relevant case law and explaining its application to this case); Stokes’ Reply at 2-3 (criticizing respondent’s materially incomplete analysis). Similarly, on the question of waiver, the order purports to find that Stokes validly relinquished his fundamental, Sixth Amendment right to conflict-free counsel without so much as mentioning, let alone applying, the bedrock rules that any such waiver must be knowing, voluntary and intelligent, and that a reviewing court may not simply assume facts necessary to satisfy that standard. *See* Stokes’ Post-Hearing Memorandum at 19-22 (describing binding waiver law and explaining the impossibility of a valid waiver in this case); Stokes’ Reply at 4-8 (criticizing

³*See* Order at 37 (relying on *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), *People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y. App. Div. 2002), and *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (Wis. Ct. App. 1998)).

respondent's failure to acknowledge or apply governing legal rules and reiterating the impossibility of a valid waiver in this case); *see also, e.g., Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

It is an unfortunate fact of capital litigation that partisans' briefs will at times ignore governing law when it does not favor their positions. However, when such one-sided, wilfully selective analysis is then adopted wholesale as the official court order denying post-conviction relief, the resulting disposition of a death-sentenced prisoner's constitutional claims is arbitrary and unfair in violation of the Eighth and Fourteenth Amendments, and incompatible with the requirements of South Carolina law. *See* S.C. Code §§17-27-80 & 160(D); *Hall v. Catoe, supra*; *cf. Zant v. Stephens*, 462 U.S. 862, 890 (1983) (emphasizing importance of meaningful appellate review in order "to avoid arbitrariness" in capital sentencing); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Because the order adopted in this case fails to fairly or accurately analyze the issues critical to the proper resolution of Stokes' claims, this Court should rescind that order and replace it with a decision produced in accordance with state and federal law.

II. The order adopted by the Court improperly excludes Stokes' sworn affidavit.

In a footnote appearing on its final page, the order adopted by the Court excludes Stokes' sworn affidavit on the grounds that the "record was closed" before the affidavit was submitted, and that the affidavit purportedly "contradict[s] the testimony of counsel Sims and Johnson." Order at 45 n.11. Neither of these bases for excluding Stokes' affidavit are sound or supported by the record.

Stokes' affidavit was submitted on August 18, 2009, less than two weeks after the evidentiary hearing, and was accompanied by a Memorandum Clarifying Ground 9(d) and Motion to

Supplement the Record which acknowledged respondent's right to cross-examine Stokes, and pledged cooperation should respondent elect to exercise that right. At the time the motion and affidavit were submitted, there had been no ruling by the Court that the "record was closed," and at no time during the intervening fourteen months prior to the adoption of respondent's proposed order did the Court give any indication of unwillingness to grant Stokes' motion and accept his affidavit. For its part, respondent ignored its opportunity to cross-examine, and waited nearly three months after the filing of Stokes' motion and affidavit before voicing – in a November 12, 2009 e-mail message – the same objections later repeated in the proposed order. If the Court had been unwilling to admit Stokes' affidavit, or had entertained doubts about the propriety of doing so, there was ample time to have notified the parties prior to the submission of post-hearing briefs in February 2010. To instead withhold resolution of that issue until the adoption of respondent's proposed order unfairly deprived Stokes of the opportunity to address any concerns the Court may have had.

Moreover, to the extent its exclusion of Stokes' affidavit rests on the premise that it "attempts to contradict the testimony of both Sims and Johnson," the order is simply wrong. The order does not identify any *actual* contradictions between the affidavit and trial counsel's testimony, and the record makes quite clear that no such contradictions exist. On the contrary, Stokes' affidavit *corroborates* the relevant portions of Sims' and Johnson's testimony by confirming that they did little more than remind Stokes of Sims' prior prosecution, they did not explain to Stokes that his prior convictions would be admitted against him at the penalty phase of his trial, and they did not warn him that Audrey Smith would be permitted to testify or that Sims would be tasked with cross-examining her. Thus, as explained in the August 18, 2009 Memorandum and Motion, Stokes' affidavit merely "corroborat[ed] what his trial counsel ha[d] already acknowledged: that Stokes was

never advised of the specific conflict arising out of counsel's successive service as prosecutor and defense counsel, of the ways in which that conflict could manifest itself at the 1999 trial, of the adverse effects that could flow from the conflict, or of his right to insist upon representation by (or at least consultation with) non-conflicted counsel." Memorandum and Motion at 2.

In short, the rationales set forth in the order denying relief fall far short of justifying the belated exclusion of Stokes' affidavit. This Court should therefore rescind that order, reconsider the issues in light of the content of the affidavit, and formulate a new order granting post-conviction relief.

III. The order adopted by the Court mischaracterizes the testimony of Jeffrey Bloom.

In a footnote the Court addressed the testimony of Jeffrey Bloom in a manner that could be erroneously perceived as a finding that Bloom testified falsely about his pre-trial interactions with Sims. Because Bloom's testimony was credible, supported by circumstantial evidence, and, most importantly, not contradicted, the order should be modified to avoid this unsupported characterization.

Prior to trial Sims sought the assistance of Bloom, a long-time and respected Columbia-area attorney with substantial experience in capital litigation. Bloom testified at the PCR hearing about his brief involvement in this case and specifically recounted his efforts to help Sims understand the nature of the conflict and the steps necessary to ensure that the issue was addressed by the trial court. See PCR Tr. 41-46. After it became apparent to Bloom that Sims simply did not grasp the gravity of the conflict and its ramifications and had no intention of addressing the issue, Bloom decided that

he could no longer have any involvement in the case.⁴ On cross-examination, respondent asked Bloom two questions, neither of which elicited evidence that cast doubt on his detailed testimony about his conversations with Sims.

For his part Sims did not dispute that Bloom had warned him about the conflict and had provided specific guidance about how to proceed. He simply could not recall the conversations. *See* PCR Tr. 58 (“Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict of interest based upon your prior prosecution? A. I don’t. Q. You don’t have any recollection? A. I don’t have any recollection of that.”); PCR Tr. 84 (“Q. You’re not saying [the conversation with Bloom] didn’t happen, you just don’t recall it 10 years later, right? A. Yes. That’s what I’m saying.”). In short, respondent did not present any evidence contradicting Bloom’s account of his interactions with Sims.

The Court has now signed an order that could be read to cast doubt on the truthfulness of Bloom’s testimony. On one hand, the order suggests that Bloom’s account was something less than a specific factual recollection of his interactions with Sims. *See* Order at 35, n. 10 (“Mr. Bloom *suggested* that he recalled a conversation . . .”; “Mr. Bloom *contended* that he told Sims . . .”). On the other hand, the order could be read to find that Sims’ failure to recall the conversations was proof that they did not occur. *See* Order at 35, n. 10 (“[C]ounsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. This Court has determined that Mr. Sims’

⁴ Bloom’s perception that Sims did not understand the true nature of the conflict and how it could impact his representation is corroborated by the evidence, which established Sims’ belief that testimony about Stokes’ prior conviction would not be admissible. This ignorance about the admissibility of prior convictions – including detailed accounts of the crimes – in the penalty phase of a capital case accounts for his failure to understand Bloom’s concerns, his failure to bring this issue to the trial court’s attention, and his failure to engage Stokes in a meaningful discussion about waiver.

testimony was credible.”). The testimony of Bloom and Sims was not mutually exclusive. Sims was asked whether he denied that the conversations had occurred, and he said that he did not, and that he simply could not recall them. *See* PCR Tr. 84. To the extent the order signed by the Court might be read to find that Mr. Bloom perjured himself when he detailed his brief involvement in this case and the specific conversations he had with Sims, it should be corrected to conform to the evidence, which clearly establishes that Bloom’s testimony was credible and that Sims merely lacked a recollection of the conversations. Indeed, Sims himself agreed with this interpretation.

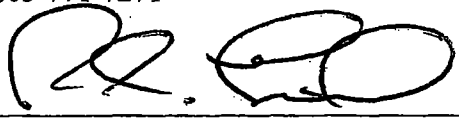
IV. Conclusion.

WHEREFORE, for the foregoing reasons, this Court should rescind its October 21, 2010 adoption of respondent’s proposed order, conduct an objective review of the facts and law in light of the arguments presented by the parties, and independently formulate a new order granting post-conviction relief.

Respectfully submitted,

Keir M. Weyble
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803 765-1044 or
607 255 3805

Robert E. Lominack
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803-771-7271

By: 

Counsel for Sammie Louis Stokes

November 15, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Jon Ozmint, Commissioner,
 South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 01-CP-38-1240

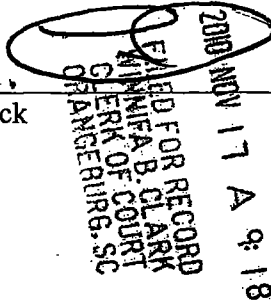
CERTIFICATE OF SERVICE

I hereby certify that a copy of Applicant's Motion to Alter or Amend the Judgment has been served upon the respondent, via U.S. mail, first-class, postage prepaid, at the following address:

Donald J. Zelenka
 Deputy Assistant Attorney General
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211

This the 15th day of November, 2010.


 Robert Lominack



FILED FOR RECORD
 KIMMIEA B. CLARK
 CLERK OF COURT
 ORANGEBURG, SC
 2010 NOV 17 A 9:18

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

RESPONDENT'S RESPONSE

IN OPPOSITION TO RULE 59 MOTION

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

FILED FOR RECORD
 WILLIAM B. CLARK
 CLERK OF COURT
 ORANGEBURG, SC
 2010 NOV 30 A 11:55

The Respondent, above-named, hereby make a Response in Opposition to the Rule 59 Motion by Applicant Sammie Lee Stokes dated November 15, 2010 and received November 16, 2010. The Respondent would show this Court the following:

I.

In his Rule 59 motion Stokes essentially makes the following assertions as to why the October 21, 2010 Order of this Court should be altered. First, he claims that the hearing judge erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law. The record reveals that the Supreme Court of South Carolina initially gave the hearing judge a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided the hearing judge with a proposed order of dismissal by email.¹ The Respondent subsequently learned that opposing counsel had

¹In the August 29, 2010 email to the Court, counsel for Respondent stated:
 "To: Honorable L Casey Manning

similarly provided a proposed order to the court on October 1, 2010, at the court's request.

The Applicant's broad complaint against the order is unclear. It appears that he relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Court did not preclude requesting proposed orders and confirming them after review, but stated:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's proposed order was error

CC: Robert Lominack, Keir Weyble

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by the hearing judge 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 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.

Order, p. 25. (emphasis added). (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.**

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

The hearing judge further relied upon SCACR Rule 407, Rule 1.7 (b). The hearing court specifically found: "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. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

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The Applicant's objection is one of form, not of substance. It is evident that the hearing judge was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that Judge Manning performed acceptable procedures under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandum were received by the Court by February 2010. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme Court and the Petitioner provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of respondent's proposed order, nearly one month after receipt of Applicants order, and over 7 months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

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In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present during the hearing. However, the Applicant failed to call the Applicant either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for further evidence - particularly when the Applicant 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 matters.

Subsequently, the Applicant submitted on August 18, 2009, Stokes belated affidavit which he now purports merely corroborated what his trial counsel had already acknowledged. To the contrary, the broadly worded affidavit does attempt to contradict the testimony of Virgin Johnson and Mr. Sims concerning the substance of the discussions and his. However, this one-sided presentation did more - it prevented the State from cross-examine Stokes in an already closed record about the discussions that both his counsel had with him - matters that were uncontradicted at the time of the hearing, about whether his prior convictions could be used against him at trial, about who the prosecutor was at his initial trial. It also did not include the information about the fact that after seeking to have Sims represent him in his subsequent trials after he was aware of the prior prosecution and the cross-examination by Sims of Audrey Smith -

evidence that contradicts the affidavit of Stokes. Simply put the credibility of the affidavit is plainly at issue. In asserting that he was not aware that Sims had prosecuted him previously, it varies from the testimony of Sims and Johnson - it does not corroborate it. This was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. A process that the hearing judge had made available by securing a reasonable length of time for the evidentiary hearing.

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In the State's post-hearing memorandum, the State urged the Hearing Judge 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 Applicant would have opened himself up to impeachment and further testimony concerning the issues. Respondent's Post-Hearing Memorandum, p. 44, n. 11.²

In the Order of Dismissal, Judge Manning addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order, p. 2. In rejecting the affidavit's belated submission, the hearing judge stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in their case in chief and on reply. Contrary to the assertions and characterization of counsel, it does seek to contradict the combined testimony of Mr. Sims and Johnson about their discussions and the knowledge of Stokes concerning Sims prior prosecution and Stokes desire with the knowledge of the prior involvement to have Sims continue as defense counsel. Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that the hearing judge reasonably decided to reject the gamesmanship of belatedly inserting an unchallenged affidavit which expresses matters inconsistent with testimony presented which had been subjected to adversarial testing before the fact-finder was a proper rejection when the full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be

denied.

III.

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In the final suggestion to alter or amend, the Applicant asserts that the hearing judge mischaracterized the testimony of Jeffrey Bloom. As the court must recall, there was a contested issue of fact concerning alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Simply put, Mr. Bloom testified that certain matters happened and subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony claimed that he had no recollection of the alleged discussion about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). Simply put, the Court was faced with making a credibility determination where the issue was seen as one of substance - not one of memory. The Court recognized this during the PCR hearing when he questioned Bloom concerning the failure to provide Sims with a case and may have provided information in a telephone call, and at the conclusion of the hearing noted that Mr. Bloom never wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded. Tr.p. 108, l. 3-8.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, Judge Manning was able to assess the particular credibility of the witnesses, the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no knowledge of it prior to his own testimony, and Mr. Sims demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what did not occur] between two lawyers.

In making the assessment, the Court concluded:

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In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, Order, p.32, n. 8.

Respondent submit that there is a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. If this is consistent with the Hearing Judge's judge's conclusions - the motion to alter should be denied.

IV.

WHEREFORE, having made a response to the motion to alter or amend, Respondent respectfully requests that it be denied.

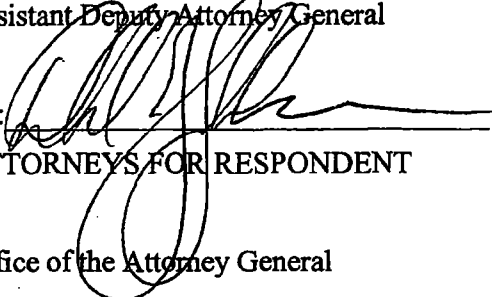
Respectfully submitted,
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH

Chief Deputy Attorney General

DONALD J. ZELENKA

Assistant Deputy Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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Telephone: (803) 734-6305

Columbia, South Carolina

November 29, 2010

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December 6, 2010

Honorable L. Casey Manning
Resident Judge
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202

Re: *Sammie Louis Stokes v. Ozmint*, Case No. 01-CP-38-1240

Dear Judge Manning,

I write to request oral argument on Mr. Stokes' Motion to Alter or Amend the Judgment, which is pending before the Court. While oral argument on such a motion is not always necessary, the subject matter of the motion in this case, and the positions taken by the State in its Response in Opposition (hereinafter "Response"), warrant an in-court hearing.

At the close of the evidentiary hearing in this case, we expressed concern over the abuses that can and do occur when counsel for the State is permitted to formulate factual and legal determinations on behalf of a court in a capital post-conviction relief case. The order recently adopted by the Court in this case, and the State's Response to our Motion to Alter or Amend that order, establish that our concerns were well-founded.

For example, footnote 10 of the order written by counsel for the State and adopted by the Court can be read to indicate that Jeffrey Bloom testified falsely when he recounted his pre-trial conversations with Thomas Sims. While the language of the footnote is somewhat ambiguous, the State's Response makes clear that it intends in future proceedings to rely upon that language as a finding by this Court that Mr. Bloom lied under oath. The record contains no support for any such finding, and this attempt by the State to manufacture an advantage for itself through an opaquely worded, discretely placed footnote is a cynical abuse of the order-drafting power. The State's maneuver is all the more outrageous because Mr. Bloom is a respected member of the Richland County Bar with a well-deserved reputation for integrity. If left uncorrected, a finding that he perjured himself will likely impact other cases in which he has served as counsel or as a consultant. Moreover, if counsel for the State (or, for that matter, this Court) truly believes Mr. Bloom lied under oath, then he is ethically obligated to

The Honorable L. Casey Manning

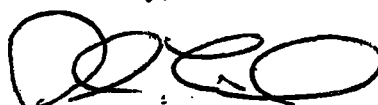
December 6, 2010

Page 2 of 2

report that allegation to the South Carolina Bar. *See* Rule 8.3(a), S.C. Rules of Professional Responsibility. Because of the implications for Mr. Bloom, I have notified him of the order and the State's allegations and have copied him on this letter.

As discussed in the Motion to Alter or Amend, the highly improper treatment of Mr. Bloom's testimony is only one example of the fundamental defects that pervade the order written by the State and signed by the Court. The order's selective acknowledgement of evidence and willful disregard for binding legal principles further distort the issues that were put before the Court for adjudication. In light of the range and gravity of these defects, and their consequences for Mr. Stokes in this and future proceedings, we respectfully request that the Court set this case for oral argument.

Sincerely,

A handwritten signature in black ink, appearing to read 'RL', with a stylized, overlapping loop structure.

Robert Lominack

cc: Donald J. Zelenka
Keir M. Weyble
Jeffrey P. Bloom
Winnifa Brown-Clark, Clerk of Court

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
2 COUNTY OF RICHLAND) COURT
3)
4 SAMMIE LOUIS STOKES,)
5) TRANSCRIPT
6 -V-) OF
7) RECORD
8 STATE OF SOUTH CAROLINA,) 2001-CP-38-1240
9 DEFENDANT.)

10

11

DECEMBER 8, 2011

12

RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

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HONORABLE CASEY L. MANNING, JUDGE;

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17 A-P-P-E-A-R-A-N-C-E-S:

18

FOR THE PLAINTIFF:

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DONALD ZELENKA, ESQ.

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21

FOR THE DEFENDANT:

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KEIR WEYBLE, ESQ.

23

ROBERT LOMINACK

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1 (The following proceedings were held on
2 December 8, 2011.)

3 THE COURT: Come around, Mr. Stokes.
4 Are we all ready?

5 MR. ZELENKA: Yes, Your Honor.

6 MR. LOMINACK: Yes, Your Honor.

7 THE COURT: All right, sir.

8 MR. LOMINACK: Your Honor, if I could -- we're
9 going to both argue. I'd like to address a very specific
10 finding regarding the testimony of Thomas Sims and Jeff
11 Bloom, it was in the order and then Mr. Weyble is going to
12 address the larger issue of the conflict of interest legal
13 claim and what we view are the defects in the order as
14 drafted by --

15 THE COURT: All right.

16 MR. LOMINACK: -- Mr. Zelenka. Just to set the
17 context, in this case, Thomas Sims, an attorney in
18 Orangeburg, represented Mr. Stokes at his capital trial.
19 Prior to defending him in that capital trial Mr. Sims had
20 prosecuted Mr. Stokes in a highly aggravated assault case,
21 domestic violence assault case, and the victim from that
22 prosecution was the leadoff witness for the state at the
23 capital case at which Mr. Sims was now Mr. Stokes's defense
24 attorney. Before that trial and, of course, I should say
25 that at the trial -- at the -- at the assault trial where

1 Mr. Sims was the prosecutor, he was the only person I
2 believed that did anything in the courtroom. I mean, he did
3 openings. He presented this victim as a witness. He did
4 closings, he argued for the sentence and at the capital
5 trial when he was the defense attorney he's the only
6 attorney who speaks on the record.

7 Before the capital trial, Mr. Sim reached out to a
8 Richland County Bar Attorney, Jeff Bloom, and asked for his
9 assistance in jury selection which is something Mr. Bloom
10 has done for years.

11 Mr. Bloom traveled down to Orangeburg and met with
12 Mr. Sims, and during the meeting stumbled into the
13 information that Mr. Sims previously prosecuted Mr. Stokes
14 and immediately recognized that as a potential concern, told
15 Mr. Sims he believed it was a conflict of interest and he
16 provided advice on how he thought Mr. Sims should address
17 that which included at the very least informing the trial
18 court. And a few -- and Mr. Bloom, Mr. Bloom, went on his
19 way. A few weeks later, some time later, he spoke with
20 Mr. Sims by telephone and he asked what the statue of that
21 conflict was, whether he had taken any of the steps Mr.
22 Bloom had suggested and according to Mr. Bloom's testimony
23 at the PCR hearing Mr. Sims had not done any of those
24 things. The trial court still did not know that Mr. Sims
25 had previously prosecuted Mr. Stokes. And Mr. Bloom

1 believed that Mr. Sims just didn't understand the nature of
2 the conflict or how serious it was.

3 Now, Mr. Bloom as he said in his testimony, he
4 recognized the inevitable which was this prior conviction
5 was going to come in at the penalty phase of the capital
6 trial, it just is. I mean, that's -- that is the nature of
7 the penalty phase at the capital trial, prior crimes are
8 going to come in. Even had it not -- even had Mr. Stokes
9 had not been convicted the evidence would have probably come
10 in but certainly his conviction was coming in.

11 It became clear to the PCR hearing that -- and
12 through the evidence adduced at the PCR hearing about the
13 trial preparation of Mr. Sims that he didn't quite know that
14 that evidence was coming in and he's still operating under
15 the thought that he could keep it out which was a thought
16 that's not realistic based on the law.

17 And so, then we have this evidentiary hearing at
18 which Mr. Sims testifies, Mr. Bloom testifies and Mr. Bloom
19 provided the court with a very specific account of his two
20 conversations with Mr. Sims and it's not surprising that he
21 recalled that this is a rare and entirely unique situation
22 as far as I know in South Carolina and anywhere else where
23 somebody prosecutes someone and then represents them at a
24 capital trial and which that same case is then the leadoff
25 penalty phase presentation. Mr. Sims for his part simply

1 said, I just don't recall the conversation. It was ten --
2 it's been over ten years. That's was the sum total of the
3 testimony. Then we -- we, leave the hearing and we exchange
4 post-hearing beliefs and then Mr. Zelenka sends the court a
5 -- an unsolicited proposed order and in that order there are
6 two footnotes. And the footnotes read a little odd to
7 Mr. Weyble and I because they -- they seemed to suggest --
8 there was actual a conflict in the testimony of Mr. Sims and
9 Mr. Bloom and they seemed to suggest that the court was
10 finding that Mr. Bloom's testimony was incorrect. And so we
11 filed a Rule 59 and simply said, We are worried about how
12 the footnote is worded. Mind you, there was nothing in the
13 body of this proposed order, but after the court signed the
14 order we alerted the court to these two footnotes and the
15 Rule 59 Motion and said, We're worried that these are going
16 to be used down the road to suggest that Mr. Bloom's story
17 was fabricated, basically that it was perjury that he lied
18 about his conversations with Mr. Sims and that this footnote
19 would be used to suggest that Mr. Sims's lack of memory
20 equated to a denial that the conversation happened. And
21 after we filed the Rule 59 Motion expressing those concerns
22 Mr. Zelenka filed a response and in this response confirmed
23 our concerns. He says there was a stark difference in the
24 testimony between Mr. Bloom and Mr. Sims. He goes on to say
25 that, you, the Court had assessed the demeanor of these two

1 witnesses and actually made a credibility determination and
2 at the end of the day that you had decided that Mr. Sims was
3 correct and therefor, Mr. Bloom was incorrect and there are
4 a couple of problems with that. First of all, there's
5 nothing in the order that you signed that assesses their
6 demeanor or their credibility but we now know how those two
7 footnotes that Mr. Zelenka put in there, footnotes eight and
8 ten, in the order. We now know how the state intends to use
9 those somewhat ambiguously phrased footnotes from here on
10 out. They intend to use them to suggest that you found that
11 Mr. Bloom lied when he described those two conversations.
12 But the other problem and it is that defining that Mr. Sims
13 testimony is correct is not unusually exclusive with
14 Mr. Bloom testimony being correct. All Mr. Sims said is, I
15 can't remember. So saying that he is correct doesn't
16 advance any bulk to any location. If he's correct, he
17 doesn't remember, that's fine. But it doesn't mean that
18 Mr. Bloom lied when he described the conversations to the
19 court. And, you know, this is always the concern when one
20 side is drafting proposed orders and it's, you know, I -- to
21 put these the two footnotes and not address it in the body
22 stoke out to us. We now know how it's going to be used down
23 the road. This I think is why the State Supreme Court is
24 discouraged to use the proposed orders and increasingly
25 courts are starting to recognize that using proposed orders

1 in this manner can create problems jus like this. And we
2 happen to spot it. We weren't sure exactly what those
3 footnotes mean. We certainly knew what they suggested to us
4 and it turns out we were right. And I think at the very
5 least, the suggestion that Mr. Bloom lied under oath about
6 these two conversations needs to be removed from any order
7 and at the very least the suggesting -- there was a conflict
8 between the testimony of Mr. Sims and Mr. Bloom needs to be
9 omitted. There simply wasn't the conflict.

10 THE COURT: All right.

11 MR. LOMINACK: There's nothing in the transcript
12 to suggest that and I think at the very least that should
13 happen; however, I think that just the fact that this found
14 its way into the order as written by the state should give
15 the court pause about the rest of the order and I think Mr.
16 Weyble is going to cover the conflict of issue of legal
17 claim.

18 THE COURT: All right. Thank you, sir.

19 Mr --

20 MR. WEYBLE: Your Honor, I didn't know whether you
21 want Mr. Zelenka to address that first or.

22 THE COURT: It doesn't matter to me.

23 MR. WEYBLE: Either way.

24 MR. ZELENKA: Well, I can address it.

25 THE COURT: All right.

1 MR. ZELENKA: Well, Judge Manning, the way we
2 viewed the testimony or I viewed the testimony at the time
3 it was given, there is a conflict in the testimony. If you
4 may recall, at the time of the post-conviction relief
5 hearing, it's allowed under state law Thomas Sims was
6 sought and was the only witness the defense sought to be
7 sequestered. He was sequestered during the testimony of
8 Mr. Bloom and he did hear that testimony. So it wasn't a
9 direct pitting. Mr. Sims had been sitting in the courtroom
10 hearing what Mr. Bloom was saying about a conversation. He
11 hasn't heard that conversation from -- that occurred in the
12 courtroom.

13 When Mr. Sims was called at around page 57 through
14 58, specify inquiry was made of him as to whether he and
15 Mr. Bloom had had any conversation about conflicts of
16 interest, none. Do you recall a telephone call? No. I
17 have no recollection of that. I don't know what Mr. Sims
18 could have said other than I don't have a recollection of
19 something that I don't have a recollection of. Clearly that
20 wasn't supported that that conversation had actually
21 occurred. In the drafting of the order and the drafting of
22 our post-hearing memorandum based upon what was presented in
23 court and what I ethically thought I could discuss with the
24 court based upon subsequent conversations with Mr. Sims. I
25 argued that Mr. Sims testimony was credibility based upon

1 the record that have before the court. When I submitted the
2 proposed order to you clearly you had not at that particular
3 time asked for a proposed order but I noted that in the
4 information that I sent to you about the order. I noted at
5 that time I thought you were acting under a specific Supreme
6 Court order delay, I mean, requirement that you issue an
7 order of a certain date that I wasn't going to be available
8 after that date if you were going to seek to have an order
9 from us. I noted that in the materials that I sent to you.

10 The reason both in my memorandum and in the order
11 that I placed the thing in footnotes was absolutely contrary
12 what they're trying to assert that position was to the
13 extent it wasn't contrary because I was trying to may sure
14 that those matters stood out to the court rather being
15 bended within the 45 page order. Footnote eight at page 32
16 and footnote ten at page 35 specifically addressed those
17 particular issues. A summery of Mr. Sim testimony related
18 to his interactions with Mr. Bloom and a summery of
19 Mr. Bloom's testimony related to those interactions. The
20 reason why he didn't continue to assist in the case, if you
21 recall the reason Mr. Sims thought that Mr. Bloom wasn't
22 assisting in the case was because he had a trial conflict at
23 that particular time in Aiken County where it is Mr. Bloom
24 said essentially the reason I'm not going to continue to
25 assist in the case is because I don't -- I think you --

1 you're treating this what I perceive to be a serious issue
2 somewhat -- and I don't want to be associated with that.
3 But that's a fairly stark difference and it's a difference
4 that I would submit had Mr. Sims been aware of its
5 existence, he certainly would have recalled that. He didn't
6 recall it. And the finding that we submitted to the court
7 should make with respect of that is that Mr. Sims was
8 credible in his statement that I have no recollection of
9 that conversation ever occurring with Mr. Bloom. And I
10 think there's support on the record Mr. Sims testimony
11 transcript page 57 through 58 I think supports that.
12 However, I also noted, if that's not your finding, if that's
13 not your conclusion, then it should be changed. I think
14 there's a reasonable basis for those particular findings but
15 again you are the fact finder. I wasn't trying to place
16 something in front of you to sneak anything in. In fact, I
17 was trying to set it in there so it would stand out
18 different from the other 4 pages of the order.

19 THE COURT: Thank you, Mr. Zelenka.

20 MR. LOMINACK: Can I just clear up two points,
21 Judge?

22 THE COURT: Sure.

23 MR. LOMINACK: That mr. Bloom did not testify that
24 he told Mr. Sims that he would not work on the case because
25 Mr. Sims did not understand the nature of the conflict.

1 That was one of the reasons that Mr. Bloom was not going to
2 continue to work on a case but he never testified that he
3 told Mr. Sims that.

4 Mr. Sims had every opportunity to say this
5 conversation didn't happen and it's interesting that he
6 didn't say that. He just said I couldn't recall, in fact,
7 I -- when I cross examined him I said, You're not saying it
8 didn't happen. You're just saying you can't recall it?

9 Exactly what I'm saying, sir. He had a chance to
10 say it didn't happen. That's not what he said. So I don't
11 think that these two attorneys testimony is in conflict in
12 the way that Mr. Zelenka has tried to present them.

13 THE COURT: All right. Thank you, sir.

14 Anything further on this point?

15 (There was no response.)

16 All right, Mr. Weyble.

17 MR. WEYBLE: Well, so in addition to the matter
18 that Mr. Lominack just discussed our Rule 59 Motion
19 identifies as an example of what we perceive to be or what
20 we believe to be another problem with the use of proposed
21 orders in these cases and it's happened historically. And
22 we mentioned this at the beginning or at the end of the PCR
23 hearing what we were discussing how we would proceed. The
24 motion, of course, Rule 59 Motions one of its uses is to
25 identify and to seek relief from an order that overlooks or

1 misapprehends important matters of law in fact. It's our
2 position that here we have, in fact, both of those with
3 respect to the conflict of interest claim. Mr. Lominack
4 just sort of briefly summarized the nature of the issue, the
5 nature of the facts, and as we lay out -- as we've layed out
6 in the past, in our written submission that these facts,
7 this set of circumstances, gives rise to two legal
8 questions. Number one is, was there, in fact, a conflict of
9 interest. Did Mr. Sims status as someone who at one time
10 prosecuted Mr. Stokes for a crime and then later defended
11 him in the capital case at which that crime became the
12 prosecution's lead evidence at the penalty phase. Did that
13 constitute an actual conflict of interest for the purpose of
14 the Sixth Amendment Right to Counsel. Then the second case
15 is, if it did, did Mr. Stokes validly waive it. And we
16 believe strongly that the order that was prepared by the --
17 was ultimately adopted by the court overlooks key matters on
18 both of those questions and I've sort of outlined them for
19 you. On the first question whether or not there was a
20 conflict. The order treats this question as if it is
21 controlled by the South Carolina Supreme Court's decision in
22 *Chillers versus State* which stands for the simple
23 proposition that we do not challenge and never have that
24 mere participation first as a prosecutor of a particular
25 individual and later as defense counsel for that individual

1 does not create a perse conflict of interest. That's the
2 rule and we don't -- we don't have any qarrel with that
3 rule but that's only one piece of what is a two-part
4 doctrine. The other side of it which makes no appearance in
5 the order and is not acknowledged or sort of accounted for
6 in anyway is that where the representation that the
7 successive representation versus prosecutor and then as
8 defense counsel involves a related matter. It's a different
9 story at that point the consensus among the, I admit not
10 large number of courts who have had to deal with this, but
11 the consensus is in that situation where the matter is
12 related, there is a conflict. We -- we identify the cases
13 in our post-hearing memo and I think we do so as well in our
14 Rule 59 Motion. But the -- the failure to account at all
15 for this whole other side of the doctrine which is, in fact,
16 where this case falls, this is not simply Mr. Sims
17 prosecuting Mr. Stokes at one and then later appointed the
18 defendant in a completely unrelated case. When the Audrey
19 Smith the -- the 1991 prosecution and conviction became part
20 of the 1999 capital sentencing those cases became related
21 and Mr. Sims was the link between those two cases. And so
22 the order as prepared by the state simply doesn't
23 acknowledge that and that's -- our position is that it's one
24 cannot accurately analyze this issue without acknowledging
25 and accounting for this -- this entirely different and much

1 more applicable, much more relevant legal question which is,
2 was the relationship? The answer I think here clearly is,
3 yes.

4 The order also doesn't deal with is a factual
5 matter that, in fact, when Audrey Smith became involved in
6 this case that in the '99 case that made the '99 case and
7 the '91 case related which triggers the applicability of
8 this additional piece of the conflict of interest doctrine.

9 Now, with respect to waiver, the -- again the
10 order prepared by the state defines that even if there of a
11 conflict of interest here it was waived by Mr. Stokes. And
12 our position throughout and including today is that that is
13 simply unsupportable as a matter of law and on the record
14 that has been developed in this case.

15 The right to conflict free counsel is, of course,
16 a fundamental piece of the fundamental Sixth Amendment Right
17 to counsel at a criminal trial. As a result of that, it is
18 subject to certain requirements before a waiver can possibly
19 be found. And among other things, a review in court is
20 required to indulge every reasonable presumption against a
21 finding of waiver. If it's going to be a waiver then there
22 has to be a record showing that the person whose right it is
23 to waive actually understands the circumstances. I mean,
24 you, the Court, I'm sure is well aware of this. You take
25 guilty pleas all the time and the, you know, the test there

1 under Boykin is not very much different from what we're
2 talking about here. Its has to be true, knowing, voluntary
3 an intelligent acquiescences of a known legal right and here
4 the record just doesn't support that. What we know and the
5 testimony this information comes from Mr. Sims, Mr. Johnson
6 who was his cocounsel and from Mr. Stokes himself in the
7 form of an affidavit. They all agree on this. What
8 Mr. Stokes was told was that Mr. Sims had prosecuted him and
9 that he had put him in prison and then he was simply asked,
10 Do you have problem with that? That's it. That's the --
11 that's the -- that's the agreed upon set of relevant facts
12 from all -- from everyone who was in a position to know.
13 And that doesn't get you there certainly it cannot get you
14 anywhere near the constitutional waiver standard here
15 because what it leaves out is that any information that
16 would cause Mr. Stokes to believe that the -- that Audrey
17 Smith was going to be showing up at the capital phase of his
18 -- or the penalty phase of his 1999 capital trial. That she
19 was going to be getting on the stand. That she was going to
20 be telling the same story she told to the jury back in 1991
21 when she was Mr. Sim's witness and then that Mr. Sims
22 himself was going to be the person to stand up and be
23 obligated to attempt the challenge her on that same story
24 that had had enlisted and defended back in 1991. There's --
25 there's nothing in this record anywhere that suggest

1 Mr. Stokes was advised of any of that nor was he ever told
2 that he would again, based on the testimony of Mr. Sims and
3 Mr. Johnson, that he would be given the opportunity to
4 consult with a different lawyer about this if he needed to.
5 None of that information is present. I think without the
6 information the order's finding that somehow Mr. Stokes
7 validly waived his right to conflictory counsel simply has
8 no basis. It has no basis in the law which requires more
9 than that. It has no basis in the record because the
10 information that would be necessary simply isn't there from
11 all of the relevant players.

12 THE COURT: All right. Thank you, sir.

13 Yes, sir, Mr. Zelenka.

14 MR. ZELENKA: Your Honor, I think that the
15 original position taken in your order is correct. There is
16 some evidence in the record to support both that this was
17 not an actual conflict of interest the adversely effect the
18 presentation in the case and that the information that
19 Mr. Stokes had at the time reflected that he was validly
20 waiving his right to have someone other than Thomas Sims
21 representing him and that he was aware that the information
22 about the prior conviction was going to come in. Now, that
23 testimony didn't come from both lawyers completely but it
24 came from a combination of what both lawyers testified.
25 Richard Johnson had a specific recollection and testified

1 about the fact that that prior conviction was going to come
2 in and that was at PCR page 104 and PCR page 103 that it
3 would possibly be presented at the trial. There's no
4 evidence in the record that Mr. Stokes at any time during
5 the process desired to Mr. Sims remove from the case.

6 Now, Mr. Stokes was aware, in fact, that Mr. Sims
7 was the prosecutor at the time of the trial. You had before
8 you at the time of the hearing, the March 12th, 1999 -- '91
9 record, where Mr -- both Mr. Sims, the counsel that was
10 representing Mr. Stokes and Mr. Stokes appeared in the
11 beginning of that particular case together in a courtroom as
12 Mr. Sims being the prosecutor dispute the fact that
13 subsequent to that period of time Mr. Stokes did remove
14 himself from the courtroom but there was a period of time
15 that the defendant could clearly have identified Mr. Sims
16 not a unique, excuse me, unique-looking individual to say
17 the least, someone that folks would recognize and an
18 individual that subsequently actually was the prosecutor
19 within the area of the solicitor of that particular time.

20 The evidence is also clear that both Mr. Sims and
21 Mr. Johnson had their meetings with the defendant,
22 identified to the defendant that Mr. Sims had previously
23 represented him at the first trial and that he could have a
24 different counsel if he choose to do so and he did not want
25 to do so than and not only then, he did not want to do so

1 after the trial. After, in fact, he had sat with Mr. Sims
2 during the trial. After, in fact, Audrey Smith had
3 testified in that particular trial and after he had been
4 convicted of these crimes he made an indicating and, in
5 fact, Mr. Sims continued to represent him in a subsequent
6 case.

7 Now, the judge, at some point was clearly aware of
8 think because in the record I believe it's around transcript
9 page 1636 and it's reflected in the testimony at page 88
10 they remove Mr. Sims name from the indictment that went to
11 the jury room concerning the 1991 conviction. The question
12 is whether those knowing and intelligent waiver of the right
13 to be represented by another individual and I think that is
14 clear. Was he made aware of every piece of evidence in the
15 manner that every piece of evidence would come in in the
16 penalty phase of the trial? Probable not but was he aware
17 that the conviction was going to come in according to --
18 Johnson? He was and still wanted to have Mr. Sims as his
19 lawyer in the case. When Mr. Sims testified he essentially
20 complied with South Carolina law. He was of the opinion
21 that that prior representation as a prosecutor in the case
22 wasn't going to impact in the manner that he handled he
23 handled this particular case. He maintained that then. He
24 maintains that now. We would submit if there was an actual
25 conflict of interest that that conflict of interest was

1 waived. We think the order adequately reflects that.

2 THE COURT: All right.

3 Yes, sir.

4 MR. WEYBLE: Your Honor, just briefly, on the
5 matter of whether Mr. Stokes knew enough to know that there
6 was a conflict or and there for to possibly be in a position
7 to waive it. The question is not -- it's important I think
8 to focus in on the nature of the conflict and when this
9 conflict was likely to ripen and how it was likely to
10 manifest itself. Sure Mr. Stokes knew that Sims had been
11 the prosecutor and, maybe, Mr. Stokes could visually
12 recognize him and from the brief encounter they had in the
13 1991 trial. Don't forget Mr. Stokes was absent from the
14 courtroom for the entire 1991 trial. So he never got to
15 observe Mr. Sims acting as the advocate and the sponsor of
16 the testimony and of the story of Audrey Smith who later
17 became the prosecutor witness in the '99 trial. So
18 Mr. Stokes didn't come into the '99 trial retaining that
19 information because he never had it to begin with.

20 So it's important to focus in on what this
21 conflict is, I mean, and what the right is. What Mr -- what
22 the Sixth Amendment grantees to someone in Mr. Stokes's
23 position in 1990 is the right to have un-conflicted counsel
24 or challenge or be in a position to challenge every aspect
25 of the prosecution's case. And here, Mr. Zelenka

1 characterizes -- characterizes the Audrey Smith matter in
2 the 1999 trial as whether the conviction was going to come
3 in. This is more than the conviction coming in. This is
4 more than a certified copy of a judgment of conviction being
5 submitted to the jury. This is the actual witness, the
6 victim, coming in to testify and tell her story as the
7 victim and someone -- she provided opportunity. Her
8 testimony included opportunities for cross-examination.
9 There were a number of inconsistencies that we've identified
10 in the pleadings. Someone -- Mr. Stokes had the Sixth
11 Amendment Right to have someone stand up to be in a position
12 situation to exploit or to at least point out those
13 inconsistencies and the person who stood up was Mr. Sims.
14 The very same person who eight years earlier had been
15 eliciting that same story from her. The comparison between
16 what Mr. Sims did in '99 and what defense counsel did in '91
17 Mr. Sims did -- or Mr. Stokes defense counsel in '91 is
18 fairly obvious and plain to see so I won't belabor to court
19 with that. But to suggest that it's enough the Mr. Stokes
20 knew that he had been a prosecutor, knew he sent him to
21 prison that's all it takes to inform a constitutional valid
22 waiver to of the right to conflicted counsel again I think
23 is simply not reconcilable with Supreme Court law that's
24 been settled for a very long time. The order again simply
25 does not, you know, acknowledge or account for that or

1 attempt to explain how, in fact, the federal constitution
2 standard governing waiver and the right to counsel are
3 satisfied it sort of just glosses over those problems.

4 THE COURT: All right. Thank you, sir.

5 Anything further, Mr -- anything further?

6 MR. ZELENKA: Just the reflection on Hall V. Cato
7 which I thought was their initial approach in the motion to
8 alter amend. What Hall V. Cato held was they encouraged ged
9 the state courts to draft their own orders in death penalty
10 cases but they recognized in Hall V. Cato that there was, in
11 fact, a time of consideration reflected in that order by
12 the -- by the particular hearing judge. I would submit that
13 that record shows that happened here. The hearing itself
14 occurred early on. There was post-hearing memorandum
15 submitted with the court in February of 2010. The proposed
16 orders were submitted to you initially in August and then
17 the defense submitted a proposed order October first. And
18 your order was issued and entered on October 21 reflects to
19 us that you considered each of the orders in making your
20 determination to which order you would signed and whether
21 you would have any changes made in that particular order.
22 And as far as the I'm not aware of a requirement that a
23 post-conviction relief, Judge, in a death penalty case
24 create an individual and separate document independent of
25 whatever proposed ordered are submitted to them but I would

1 submit that the record reflects consideration was given by
2 this court before such an order was entered which complies
3 with the suggestion set forth in Hall.

4 THE COURT: All right.

5 Yes, sir.

6 MR. WEYBLE: Once again just briefly, regardless
7 of the timeline in which various items were submitted and
8 what, you know, what may or may not be extrapolated by Mr.
9 Zelenka or any other observer. The bottom line for our
10 purpose is is that we put into this record and into issue in
11 this case several very important legal questions that are --
12 that must be considered --

13 THE COURT: That were not adequately addressed in
14 the orders.

15 MR. WEYBLE: The --

16 THE COURT: That were not adequately addressed in
17 the order.

18 MR. WEYBLE: Right. They were not adequately
19 addressed. So we feel that for -- not only because we think
20 they dictate a different outcome but also because practice
21 in this state requires at the very least that if we see
22 omissions like that from a PCR order we have to bring them
23 to the court's attention.

24 THE COURT: Of course.

25 MR. WEYBLE: Or we've waived them for later

1 review.

2 THE COURT: Yeah.

3 MR. WEYBLE: And our position here is that these
4 things were not adequately dealt with.

5 THE COURT: Okay.

6 MR. WEYBLE: -- in the order.

7 THE COURT: Thank you. Anything furtherer?

8 (There was no response.)

9 Thank you both for your very keen presentations.

10 Logistically, how do y'all want to handle this? Whatever is
11 done -- order has got to reflect everything that was
12 observed here today, you understand that?

13 (Counsel nods heads.)

14 All right. So how much time do y'all want?

15 MR. WEYBLE: For -- what are you asking from us so
16 I can give you an idea of --

17 THE COURT: Well, this is your 59(e) Motion.

18 MR. WEYBLE: Right.

19 THE COURT: You need to prepare an order
20 reflecting your arguments here today. Tom needs to prepare
21 and order and I'll make a decision based on everything I've
22 heard here today.

23 MR. WEYBLE: Okay. Just so either side --

24 THE COURT: Okay.

25 MR. WEYBLE: Spends its wheels and ends up

1 delivering something that you weren't -- weren't; really
2 asking for, would you prefer that this take the form of sort
3 of a replacement order resolving the merits of the PCR
4 action or would this be something that would --

5 THE COURT: Strictly regarding the 59(e) Motion --
6 or I'll tell you what, y'all can submit memos. I'll do it
7 myself this time. How is that? Is that good enough?

8 MR. WEYBLE: That's fine with us, Your Honor. 60
9 days to submit something to you --

10 THE COURT: Whatever seems to -- look whatever is
11 easy. Look nobody -- of course, I might be dead. I just
12 turned 61 yesterday. But the bottom line is, you know, I've
13 always taken the position whatever is convenient for the
14 lawyers. The issues are too important to rush it. It
15 doesn't matter to me. The defense always ask for more time
16 the state always ask for less time let's do 50 days. Is
17 that good enough?

18 MR. ZELENKA: Did you say 50?

19 THE COURT: Yeah.

20 MR. ZELENKA: Okay.

21 THE COURT: Now, as long as those people up at the
22 old post office don't jump on my back I don't think they
23 will but they have to a certain extent, that's one reason
24 why Mr. Zelenka sent the order in, if I remember anyway.

25 MR. ZELENKA: That's correct, Your Honor.

1 THE COURT: All right. Just proposed memos.

2 MR. WEYBLE: Thank you, Your Honor.

3 THE COURT: I'll craft it myself.

4 Good luck to you as always.

5 MR. WEYBLE: All right. Thank you, sir.

6 END OF PROCEEDINGS

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1 COUNTY OF RICHLAND)

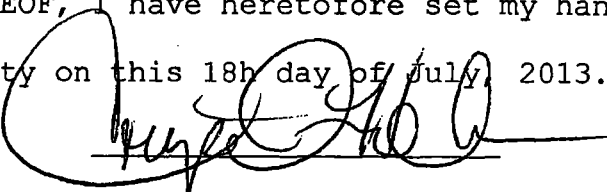
2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Sammie Louis Stokes Vs. State of
5 SC, Case No. 2001-CP-38-1240, at the Richland County
6 Courthouse, December 8, 2011.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 26 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 18th day of July, 2013.

15 
16 Crystal Holmes, Court Reporter
17 and Notary Public for the
18 State of South Carolina my
Commission Expires:
April 21 2014

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2234

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF Orangeburg)1st JUDICIAL CIRCUIT)CASE NO.: 2001 -CP- 38 - 1240)Sammie Louis Stokes)**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

Jon Ozmint, SC Dep't of Corrections)

Defendant.)

Plaintiff's Attorney: <u>Robert Lominack</u> , Bar No. <u>68802</u> Address: <u>PO Box 5508</u> Phone: <u>803-351-0436</u> Fax <u>803-937-1707</u> E-mail: <u>robert@lominacklaw.com</u>	Defendant's Attorney: <u>Don Zelenka</u> , Bar No. _____ Address: <u>PO Box 11549</u> Phone: <u>803-734-3601</u> Fax _____ E-mail: _____ Other: _____

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ DefendantDate submitted 1-27, 2012**SECTION III: Motion Fee**☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☒ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____ATTORNEY GENERAL'S OFFICE
1-30-12**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____JUDGE CODE ADMINISTRATIVE INSTRUCTIONSDate: 3/12 FILE 20 OPEN 20 END**CLERK'S VERIFICATION** HAVE _____ COPIES MADE

Collected by: _____

Date Filed: _____

ROUTE TO _____

ORDER: 20 TRANSFER

PEN RECORDS _____ CLERK RECORDS _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
Jon Ozmint, Commissioner,	)	
South Carolina Dept. of Corrections	)	
<i>Respondent.</i>	)	
	)	

**SUPPLEMENTAL POST-HEARING MEMORANDUM IN SUPPORT OF
AMENDED APPLICATION FOR POST-CONVICTION RELIEF**

Applicant, Sammie Louis Stokes, submits this memorandum pursuant to the Court's instructions at the conclusion of the December 8, 2012 hearing on his Motion to Alter or Amend the Judgment, which Mr. Stokes filed after the Court signed the Respondent's proposed order denying relief. At the close of the hearing, the Court granted Mr. Stokes's motion and requested further briefing for the purpose of informing the formulation of a new order resolving the claims asserted in Stokes' Amended Application for Post-Conviction Relief. Below Mr. Stokes sets out a brief description of the relevant procedural history, followed by a discussion of the facts and legal principles that require a grant of post-conviction relief, and the material defects in the order denying relief previously signed by the Court.

I. RELEVANT PROCEDURAL HISTORY.

Stokes was found guilty of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy, and sentenced to death by an Orangeburg County jury on October 31, 1999. The South Carolina Supreme Court affirmed his convictions and sentence on May 29, 2001. *State*

v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001). On October 17, 2001, Stokes filed an application for post-conviction relief. On March 11, 2002, this Court appointed undersigned counsel to represent Stokes in connection with his post-conviction relief proceedings. Stokes, through counsel, amended his application for post-conviction relief on May 2, 2002, and again on August 6, 2004. After a delay in the proceedings to facilitate a determination of whether Stokes had mental retardation, this Court convened an evidentiary hearing on August 5, 2009. At that hearing, Stokes presented evidence relevant to Grounds 9(b), 9(c) and (9(d) of the amended application. In early 2010, the parties filed post-hearing memoranda in support of their positions. On August 29, 2010, counsel for Respondent submitted an unsolicited proposed order denying Stokes' application in all respects, which the Court adopted without modification on October 21, 2010. Stokes thereafter filed a timely Motion to Alter or Amend, which was heard on December 8, 2011.

II. GROUNDS FOR RELIEF.¹

9(d) Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.

A. Relevant facts.

1. Crimes, arrest, and appointment of counsel.

In early 1998, Stokes was finishing a ten year prison sentence for aggravated assault and battery when his cellmate, Roy Toothe, approached him about a plan to murder Toothe's girlfriend,

¹As previously indicated, Stokes has elected not to proceed on Claims 9(a), 9(e), and 9(f) of his amended application. Additionally, Respondent previously argued that this Court should dismiss Claim 9(g) – the lethal injection claim – because it was not cognizable within the Uniform State Post-Conviction Act. Undersigned counsel agree with the Respondent's argument, and for the purposes of these proceedings withdraw this claim; they do, however, reserve the right to litigate the lethal injection issues at a later date and in a different procedural posture.

Connie Snipes. At the time, Snipes was living with Toothe's mother, Pattie Syphrette. Syphrette wanted Snipes killed because of her belief that Snipes had been unfaithful to Toothe, and because she disapproved of Snipes' treatment of her children, who were Syphrette's grandchildren; DSS had already taken custody of one child, and its investigation was ongoing. ROA 1658-59. Stokes agreed to the plan.

Stokes was released from prison in early May, 1998. ROA 782; 1660. Shortly thereafter, DSS ordered Syphrette to evict Snipes from her home or risk losing another grandchild to removal by DSS. 1661-62. Unwilling to have another grandchild taken, Syphrette contacted Stokes and set her plan in motion. As a ploy to lure Snipes to a secluded area, Syphrette asked her to assist in the murder of one Doug Ferguson. Snipes agreed. ROA 1662. Stokes and Syphrette then picked up Snipes and another man, Norris Martin, and drove to a wooded area, ostensibly for the purpose of killing Ferguson. After Stokes, Martin, and Snipes walked some distance into the woods, the true purpose of the venture was revealed to Snipes. Martin had sex with Snipes, and she was then shot to death. ROA 888-92; 1663.

Approximately five days later, a farmer happened across Snipes' decomposing corpse and notified authorities. ROA 810-13. At the crime scene investigators found items known to belong to Norris Martin, including a state-issued identification card. ROA 819, 821-22. After interviewing Martin and obtaining other information linking Syphrette to the crime, the police made their way to her house. As it happened, Syphrette was then in the process of actually carrying out the Ferguson murder.² Just before the police arrived, Syphrette and Stokes wrapped Ferguson with duct tape; the

²Syphrette wanted Ferguson dead because he knew too much about the Snipes homicide. Syphrette had originally approached him about taking part in killing Snipes, but he had refused and Syphrette feared he would go to the police and implicate her.

tape covered his mouth and nose, and he suffocated. ROA 1206. Stokes and Syphrette were arrested a short time later.³

Orangeburg County attorneys Thomas Sims and Virgin Johnson were appointed to defend Stokes. The trial court held a formal appointment hearing at which attorneys Sims and Johnson placed their qualifications on the record. Describing his criminal law experience, Sims emphasized his handling of "major criminal prosecutions" in the First Circuit Solicitor's office from 1982 until 1993, but said nothing about any individual cases he took part in as a prosecutor. ROA 1502-03. Satisfied with counsel's qualifications, and unaware of any countervailing circumstances, the trial court designated Sims as lead counsel.

2. Sims' 1991 prosecution of Stokes.

Just over seven years before his appointment as Stokes' lead defense counsel for the Snipes capital murder trial, Sims, then an assistant solicitor, signed an indictment against Stokes for assault and battery with intent to kill. The victim was Stokes' ex-wife, Audrey Smith. On March 12, 1991, Sims appeared at the trial on that indictment as the only representative for the State; he presented all of the evidence, which consisted primarily of testimony from Audrey Smith; he made all of the arguments to the judge and jury; and he secured a conviction for aggravated assault and battery. Stokes himself appeared in the courtroom only briefly, before the trial began. After the trial judge denied his request for time to locate and hire a private attorney, Stokes declined to be present for the actual trial proceedings, and therefore observed none of the prosecution's case against him, and none of Sims' activities as the prosecutor. 1991 Tr. 14-15, 33-34. Stokes also declined to be present for

³Stokes pled guilty to the Ferguson murder and was sentenced to life in prison without the possibility of parole.

the reading of the verdict or for sentencing.⁴ 1991 Tr. 138-39.

The 1991 prosecution arose out of a December 1990 domestic violence incident. In testimony elicited by Sims, Audrey Smith claimed that she and Stokes had sex in a schoolyard, then walked to a nearby field where Stokes choked her until she lost consciousness. 1991 Tr. 42-46. Some time later, Smith, still lying in the field, woke up, walked to a nearby house, and called 9-1-1. 1991 Tr. 46. Smith also claimed that before they walked to the field, Stokes had her read a letter in which he expressed an intent to kill her, and that Stokes then told her he had changed his mind. 1991 Tr. 44.

In a cross-examination spanning approximately twenty pages, defense counsel raised doubts about Smith's claims by establishing a series of inconsistencies between the testimony she had given at a preliminary hearing and the story she told at trial. *See* 1991 Tr. 48-67. Additionally, defense counsel called two other witnesses who saw Stokes and Smith just before the alleged assault and described the couple as having appeared normal. 1991 Tr. 97-99; 103-05. Sims responded to this challenge to Audrey Smith's credibility by focusing much of his closing argument on an effort to convince the jury that she had been truthful, and that her version of events was accurate. 1991 Tr. 124. As shown by the jury's guilty verdict, Sims' advocacy on behalf of Audrey Smith's veracity were successful.

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

It is undisputed that neither Sims nor anyone else ever informed the 1999 trial court that Sims had personally prosecuted Stokes in 1991, and the record of pre-trial and trial proceedings associated

⁴It was during the resulting ten year prison term that Stokes became acquainted with Roy Toothe and Patty Syphrette.

with the Snipes case contains no mention of the issue. With no knowledge of his own about the possibility that lead defense counsel was (or could be) burdened by a conflict of interest, the trial judge made no inquiry, conducted no colloquy, and secured no waiver.

Sims' casual approach to the issue was also reflected in the advice he gave to Stokes. According to Sims, his co-counsel Johnson, and Stokes himself, Sims did little more than remind Stokes in broad terms that he had been a prosecutor, and that he had once prosecuted Stokes.⁵ While Sims and Johnson both recalled these communications to Stokes, neither of them had any recollection of informing Stokes of any of the ways in which Sims' work as the prosecutor at the Audrey Smith ABWIK trial could affect his representation if Smith were to appear as a prosecution witness at the Snipes capital murder trial.⁶ Stokes, whose absence from the 1991 trial left him with no independent knowledge of Sims' work or Smith's testimony at that proceeding, likewise recalls

⁵ See PCR Tr. 55 (Sims: "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him."); *id.* at 56 (Sims, explaining his rationale for reminding Stokes of who he was: "For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes."); *id.* at 84 (Sims' advice to Stokes about 1991 prosecution was limited to reminder that Sims had prosecuted Stokes, and that Stokes had gone to prison as a result); *id.* at 88 (Sims: "Let me put it this way, [Stokes] knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that?"); *id.* at 102 (Johnson: "Only thing I can remember is ... [Sims] said ... you know I put you in jail or I prosecuted you and [Stokes] said yes. And it went through the questions of do you have a problem with me representing you ... do you want somebody else and he said no."); Affidavit of Sammie Stokes at para. 2 ("After they were appointed to my case, Mr. Sims and Mr. Johnson mentioned that Mr. Sims had prosecuted me in 1991 for assaulting my wife. Mr. Sims told me that if I had a problem with this fact, I could ask for another attorney. Neither Mr. Sims nor Mr. Johnson said anything else about this issue.").

⁶ PCR Tr. at 95-96 (Lominack: "You don't have any recollection about talking to Mr. Stokes about Audrey Smith taking the witness stand and you cross-examining her?" Sims: "No, I don't."); *id.* at 105 (Johnson generally recalled advising Stokes about types of evidence prosecution might present).

that neither Sims nor Johnson discussed these matters with him.⁷ Consistent with Stokes' account, Sims also had no recollection of advising Stokes that Smith would testify and Sims would cross-examine her.⁸ Sims further admitted that he never arranged to make another attorney available to Stokes for the purpose of advising him on the conflict of interest issue. PCR Tr. 85.

4. Sims' lack of appreciation for the gravity of the issue.

Sims' failure to alert the trial court to his apparent conflict of interest came in the face of explicit advice to the contrary from a seasoned capital defense attorney. When Jeff Bloom, whom Sims had attempted to enlist as a jury selection expert,⁹ learned of Sims' role in the 1991 prosecution, he immediately recognized it as a "very substantial and serious issue." PCR Tr. 43. At the PCR hearing Bloom testified that he "tr[ie]d to impress upon Mr. Sims that if he had previously prosecuted Mr. Stokes that that prior conviction would be an issue at a capital sentencing proceeding."¹⁰ *Id.* Sims, however, did not "fully underst[an]d how or why that would be." *Id.*

⁷Affidavit of Sammie Stokes at para. 4-5 ("Neither Mr. Sims nor anyone else ever told me that my prior convictions would be used against me at my death penalty trial. I also was never told that Audrey Smith would be allowed to testify about the prior crime at my death penalty trial. Because I was not present for my 1991 trial and did not see Audrey Smith testify, I did not know enough about her testimony to know whether or not Mr. Sims could, or did, do a good job cross-examining her.").

⁸PCR Tr. at 96 (Lominack: "But you wouldn't have told [Stokes] that Audrey Smith was going to testify and you were going to cross-examine her, because you did not think she was going to testify, right?" Sims: "I have no recollection that I either did or did not.").

⁹Bloom is an experienced criminal defense attorney, having worked as a public defender for fourteen years, including seven years as head of the Richland County Public Defender Office. PCR Tr. 40. Bloom also has significant experience in handling capital cases. *Id.*

¹⁰Bloom was unquestionably correct. The admissibility of character and prior bad acts evidence in a capital sentencing proceeding was firmly established long before Stokes' trial:

Information as to a defendant's record of previous criminal

Bloom nevertheless urged him to, "at a minimum[,] ... request a hearing in front of the assigned circuit judge ..., request in writing that it be an *ex parte* hearing ..., and let the circuit judge be aware of it, and let the circuit judge conduct a hearing where that issue could be played out and fully discussed." *Id.* at 44. When Sims responded that there was nothing to "worry about" because Stokes had "waived that," Bloom tried again: "I said, well ... it may be one thing for you to sit in the jail with Mr. Stokes and he verbally tells you he doesn't have a problem with it, but there may be some other consequences there affects [sic] from there." *Id.*

During a subsequent phone call with Sims, Bloom made yet another effort to awaken him to the conflict he was facing, but Sims "still didn't seem[] concerned about it." PCR Tr. 45. Bloom pressed: "I told him that really needed to be something that was settled on the record long before trial. I again emphasized to him that it seemed to me to be the type of conflict of interest issue that was fluid" *Id.* Once again, Sims "didn't seem at all to appreciate the gravity of the conflict of interest issue." *Id.* Unable to get through to Sims, Bloom "concluded that [he] just needed to sever any professional relationship to the case because ... [he] didn't want to work with an attorney who failed to appreciate the gravity of that issue." *Id.* at 46.

Bloom's suspicion that Sims did not appreciate the likelihood that he would actually come face to face with Audrey Smith was confirmed by Sims' conduct at the trial, and by his testimony

convictions has always been deemed relevant to the process of imposing sentence upon a plea or verdict of guilt. So fundamental is this proposition that it requires no citation of authority We ... hold that information concerning prior criminal convictions shall be admissible as additional evidence during the sentencing or resentencing phase of a capital trial under our statute.

State v. Plath, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984).

at the PCR hearing, both of which made clear his erroneous belief that evidence of a defendant's character or prior convictions is inadmissible at the penalty phase of a capital trial.¹¹ At the time of Stokes' trial, Sims conducted extensive research and prepared written and oral arguments that the 1991 conviction was inadmissible under Rules 404(b), 608, and 609, SCRE. ROA 1088-89, 1607, 1737-38; PCR Tr. 68-69. He filed a pretrial "Motion to Prevent Use of Prior Bad Act," in which he argued that evidence of a defendant's prior bad acts was admissible only to impeach a defendant who chose to testify, and that the "facts underlying such convictions, not to mention facts which have been alleged but never proven, have been excluded from evidence." Motion to Prevent Use of Prior Bad Act, ¶ 1, filed September 20, 1999. At the hearing on his motion Sims further suggested that Stokes' prior conviction might not be admissible because it may not have met the felony requirement of Rule 609, SCRE.¹² Sims also argued that even if Rule 609's requirement's were met, Rule 404(b) and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), precluded admission of the 1991 conviction. ROA 1607. Neither the trial judge nor the Solicitor were persuaded by these arguments. ROA 1638.

Undeterred, Sims continued to make sweeping statements about the inadmissibility of prior convictions at a capital sentencing trial. In fact, his misapprehension of the scope of a capital penalty

¹¹That Sims' lack of concern over the conflict rested on his belief that he could avoid confronting Smith, rather than on a belief that actually having to confront her would not give rise to a conflict, is illustrated by his response to the prosecution's request to admit the 1991 indictment. Rather than objecting to its admission, Sims merely expressed concern that the jury not see his name on it, and added – as if to suggest his signature on the indictment was merely *pro forma* – that, "back when I was prosecuting, I would sign all of the indictments." ROA 1636. Sims' desire to prevent the jury from seeing his signature indicates that he understood, on some level, the impropriety of acting (or at least being seen) as prosecutor and then as defense counsel. His failure to seize the opportunity to alert the court to the rest of the story, however, is strong evidence of his mistaken belief that he had seen the last of Audrey Smith.

¹²Rule 609, SCRE, entitled Impeachment by Evidence of Conviction of Crime, sets out the requirements which must be met before a witness may be confronted with a prior conviction.

phase remained apparent until just moments before Audrey Smith took the stand for the prosecution. Relying on two non-capital cases, *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998), and *State v. Brooks*, 335 S.C. 140, 515 S.E.2d 764 (Ct. App. 1999), Sims articulated the general rule that in order to admit evidence of prior crimes, there must be some connection to the charged crime. ROA 1088. But as Solicitor Bailey correctly pointed out, the general rule invoked by Sims did not apply at the penalty phase of a capital trial, and the law had consistently allowed the admission of evidence of a defendant's character and propensity for violence in such a proceeding. ROA 1089-90.

Sims' PCR testimony further illustrated his belief that there was a plausible legal basis for preventing Audrey Smith from testifying about the facts underlying Stokes' 1991 conviction. PCR Tr. 81.¹³ In that testimony Sims admitted having been confident during trial that he could preclude the state from introducing evidence of the prior conviction, PCR Tr. 81, and he agreed that he would have expressed this confidence to his client, PCR Tr. 95. Sims was also confident that the trial court would prevent Audrey Smith from taking the stand and testifying about the incident underlying the 1991 conviction. Indeed, even at the PCR hearing nearly a decade later, Sims adhered to his belief that the prior conviction and the evidence supporting it were inadmissible. *See, e.g.*, PCR Tr. 92 (reiterating view that classification of prior conviction as felony is relevant to admissibility at penalty phase of a capital trial).

¹³Elsewhere in his PCR testimony, Sims responded to questions from Mr. Zelenka by suggesting that he had anticipated that the trial court would admit the evidence of Stokes' prior conviction, and that Smith would be permitted to testify about the underlying facts of that conviction. PCR Tr. 60, 98. These suggestions contradict other portions of his PCR testimony cited in the text, and cannot be squared with his consistent course of conduct prior to and during the trial itself. Furthermore, if Sims actually *did* expect Smith to appear and testify, then his failure to recognize and deal with the manifest conflict of interest that loomed ahead was even less defensible.

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

As dictated by settled law, the trial judge rejected Sims' arguments against admission of the 1991 conviction and Audrey Smith's story supporting it. ROA 1090. Moments later, the concerns expressed months earlier by Jeff Bloom were realized as the prosecution called Smith as its lead-off penalty phase witness. ROA 1111. On the witness stand, Smith gave approximately sixteen pages of direct testimony detailing two assaults she claimed to have suffered at the hands of Stokes, one of which was the 1990 incident for which Sims had been the prosecutor. While Smith's story generally followed the version Sims had elicited from her at the 1991 trial, there were material differences in the details. For example:

- ◆ On cross-examination at the 1991 trial, Smith was forced to concede that she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. 1991 Tr. 65-67. This fact was not mentioned at the 1999 trial.
- ◆ At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. 1991 Tr. 44, 54. In her 1999 testimony, Smith made no mention of Stokes changing his mind. ROA 1120-21.
- ◆ At the 1991 trial, Smith was confronted with an inconsistency between her preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. 1991 Tr. 55. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 trial.
- ◆ At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." 1991 Tr. 45. At the 1999 trial, Smith claimed Stokes had actually been looking for guns. ROA 1123.
- ◆ At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." In 1999, Smith simply said that "he put it around my neck and I passed out." ROA 1124.

In contrast to the twenty-page cross-examination of Smith conducted by Stokes' public

defender at the 1991 trial, Sims' cross-examination at the capital trial covered a mere two pages of the transcript. While Smith had provided Sims with multiple opportunities to challenge the details of her claims, and in so doing to raise at least some questions about her portrayal of what had transpired between she and Stokes, Sims made use of none of them. He did not expose Smith's own role in reinitiating contact with Stokes; he did not highlight the changes in her testimony (all of which favored the prosecution); and he did not confront her with the fact that she had been forced to deny the accuracy of a court transcript in an effort to defend testimony Sims himself had elicited from her at the 1991 trial. Instead, Sims merely asked Smith to confirm that she had not heard from Stokes since his release from prison in 1998, that it had been some time since Stokes had written to her, and that Stokes had been jealous and possessive. ROA 1139-40. Sims then sat down, putting a quick end to his unexpected and awkward confrontation with the woman whose story he had himself convinced a jury to accept eight years earlier.

B. Relevant legal principles and discussion.

1. The law governing conflicts of interest.

The Sixth Amendment guarantees that the accused in a criminal case be afforded counsel whose ability to act on his client's behalf is unimpaired by a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Wood v. Georgia*, 450 U.S. 261 (1981). Our justice system presumes that counsel will act as an accused's advocate, *Anders v. California*, 386 U.S. 738 (1967), and the Supreme Court has emphasized that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422

U.S. 853, 862 (1975)); *see also* *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Nowhere is the fundamental safeguard of conflict-free counsel more essential to ensure the proper functioning of our adversarial system, and to maintain the public confidence through the appearance of impartiality, than in the trial of a capital case. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Conflicts of interest can take a variety of forms. As a general matter, “an actual conflict of interest occurs[] ‘... when a defense attorney places himself in a situation inherently conducive to divided loyalties’” *State v. Gregory*, 364 S.C.150, 153, 612 S.E.2d 449, 450 (2005) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)); *see also, e.g., Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). To establish entitlement to relief, “a defendant need not demonstrate prejudice if there is an actual conflict of interest.” *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450 (citing *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) *citing* *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (where counsel’s representation is adversely affected by conflict of interest, there is no need “to indulge in nice calculations as to the amount of prejudice arising from [the] denial [of the right to conflict-free counsel]”); *see also Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (a prisoner alleging a conflict of interest must ordinarily show an “actual conflict” “adversely affected his counsel’s performance”); *id.* at 172 n.5 (quoting *Holloway*, 435 U.S. at 482) (“‘[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.”); *Holloway v. Arkansas*, 435 U.S. at 489

("representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing") (emphasis added); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).

Successive engagement as prosecutor and then defense lawyer carries inherent risks which, depending upon the circumstances, can ripen into actual conflict. While it is ordinarily permissible for counsel who prosecuted an individual to later represent that same individual in a different, wholly unrelated proceeding,¹⁴ counsel's representation of an individual he previously prosecuted in the same matter or, as is the case here, in a different but related matter, is universally prohibited.¹⁵ *United States v. Ziegenhagen*, 890 F.2d 937, 940 (7th Cir. 1989) ("[G]overnment employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper."); *People v. Martin*, 564 N.Y.S.2d 503, 506 (N.Y.App.Div. 1990) ("The fact that [counsel] had previously prosecuted defendant should have alone ... been sufficient to establish a conflict of interest"); *see also State v. Wareham*, 143 P.3d 302, 306-07 (Utah Ct. App. 2007) ("defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client"); *Worthen v. State*, 715 P.2d 81, 81 (Okla. Crim. App. 1986) (same); *People v. Hoskins*, 392 N.E.2d 405, 408 (Ill. App.

¹⁴See, e.g., *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2006); *Hendricks v. State*, 128 P.3d 1017, 1021-22 (Mo. 2006); *State v. Cobbs*, 584 N.W.2d 709, 710 (Wis. Ct. App. 1998); *Smart v. Maass*, 939 P.2d 1184 (Or. Ct. App. 1997) (defense counsel prosecuted defendant on a burglary charge 13 years prior to his representation of defendant on statutory rape charges); *Maiden v. Bunnell*, 35 F.3d 477, 481-82 (9th Cir. 1994).

¹⁵Because the conflicts they generate are so acute, and the need to avoid them is so obvious, such cases arise very infrequently and the number of reported decisions addressing them is small. While Stokes' research yielded no published decisions from the South Carolina appellate courts, this memorandum identifies the relevant cases from elsewhere in the country, all of which condemn the type of successive representation present in this case.

Ct. 1979).¹⁶

The consensus among courts that have addressed these circumstances is that a conflict of interest exists – and a new trial is therefore required – where an attorney serving as defense counsel previously prosecuted his client in a different but related case, and counsel’s participation in the earlier prosecution was substantial and personal. Cases are considered “related” when the prior conviction is used in the subsequent case as evidence against the defendant. *Wareham*, 143 P.3d at 307 (attorney prosecuted defendant on matter used to enhance sentence in later proceeding at which same attorney served as defense counsel); *Ziegenhagen*, 890 F.2d at 940-41 (7th Cir. 1989) (attorney appeared for prosecution to recommend sentence length for two convictions used to enhance punishment for subsequent conviction rendered with same attorney then acting as defense counsel); *Worthen*, 715 P.2d at 81 (attorney prosecuted defendant twice and both resulting convictions were used to enhance punishment for later offense as to which same attorney served as defense counsel); *Hoskins*, 392 N.E.2d at 742 (attorney prosecuted defendant and secured probationary sentence, which was later revoked for conduct as to which same attorney represented defendant).

Counsel’s participation in a “related” prior prosecution is regarded as sufficiently personal and substantial to generate an impermissible conflict if he appeared on behalf of the government in the earlier proceeding, and would be required to challenge the conviction rendered at the earlier

¹⁶See also *United States v. Sheppard*, 121 Fed. Appx. 508, 510 (4th Cir. 2005) (defendant’s appellate counsel initially appeared on behalf of the prosecution in the same matter); *Skelton v. State*, 672 P.2d 671 (Okla. 1983) (defendant’s trial counsel originally appeared on behalf of the state at arraignment and preliminary hearing in same matter); *People v. Kester*, 261 N.E.2d 569, 570 (Sup. Ct. Ill. 1977) (same).

proceeding in his new capacity as defense counsel.¹⁷ This is so because the close relationship between proceedings places counsel in the impossible position of having to attack his own work product and the credibility of a former client or complainant. See *Wareham*, 143 P.3d at 307 (“defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client”); *Ziegenhagen*, 890 F.2d at 940 (conflict arose where “defense attorney was required to make a choice of advancing his own interests to the detriment of his client’s interests”); see also *United States v. Sheppard*, 121 Fed. Appx. 508, 511 (4th Cir. 2005) (observing that court of appeals knew of no “instance where counsel were permitted to appear before a court as counsel of record, argue on the record, and then successfully argue that the words and arguments were not attributable to them”); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (conflict of interest can “exist between an attorney’s own personal interest and those of the client”); *United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991) (counsel’s circumstances must not cause him to “harbor substantial personal interests which conflict with the clear objective of his representation of the client.”). Counsel in such circumstances also confront the choice of having to inappropriately rely upon or ignore confidences obtained while serving in their former capacity. See, e.g., *United States v. Nicholson*, 475 F.3d 241, 250-52 (4th Cir. 2007); *Pinkney v. United States*, 851 A.2d 479, 488 (D.C. 2004); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991).

Personal and substantial participation as prosecutor and then defense counsel in related cases is so intolerable both because of the influence, tangible and intangible, that counsel’s successive

¹⁷By contrast, there is no substantial or personal relationship between proceedings if counsel merely served as a prosecutor in the relevant government agency at the time that the defendant was prosecuted. *Hernandez v. Johnson*, 108 F.3d 55, 560 (5th Cir. 1997).

roles have on the representation, and because of the unseemly shadow such representation casts across the integrity of a criminal proceeding. *See State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (005) (even the possibility that counsel may be tempted “to dampen the ardor of his defense” is sufficient to prove an actual conflict of interest requiring relief); *Kester*, 361 N.E.2d at 572 (under such conditions counsel is “subject to subtle influence which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner,” and this influence can be expected to generate a “subliminal reluctance” to attack prior work); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980) (“Both the fact and the appearance of total professional commitment are endangered by adverse representation in related cases.”). Impermissible successive representation is especially disturbing and erosive of public confidence when it occurs in a capital case. *See, e.g., Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (“It . . . is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”); *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (acknowledging “the notion, deeply rooted in the common law, that ‘justice must satisfy the appearance of justice’”); *Howerton v. State*, 640 P.2d 566 (Okla.Crim.App. 1982) (“The public has a right to absolute confidence in the integrity and impartiality of the administration of justice”).

2. Thomas Sims labored under a conflict of interest.

Sims’ successive engagement, first as the prosecutor at Stokes’ 1991 trial for ABWIK against Audrey Smith, and later as defense counsel tasked with confronting Smith at Stokes’ 1999 capital trial, created a clear and manifestly impermissible conflict of interest. Sims’ participation in the 1991 prosecution was unquestionably both personal and substantial; as described *supra*, he not only signed the indictment against Stokes, he also appeared as the sole representative of the prosecution

at the jury trial, and fought hard for Smith's credibility when it was attacked by Stokes' public defender. It is equally clear that the two proceedings became related when the prosecution made the 1991 judgment and the live testimony of Audrey Smith a featured component of its case for a death sentence at the 1999 trial. Under the decisions discussed above, these facts alone are sufficient to dictate a finding that Sims' representation violated the Sixth Amendment, and that a new trial must be ordered. *See, e.g., Gregory, supra; Ziegenhagen, supra; Wareham, supra; Worthen, supra.*

That Sims' role as prosecutor and advocate for Audrey Smith in 1991 was irreconcilable with his duty as lead defense counsel for Stokes in 1999 is confirmed by his handling of the issues relating to the 1991 case at the 1999 capital trial. While he managed to avoid alerting the trial judge to the full measure of his involvement in the 1991 case, Sims' ill-conceived arguments based on *Lyle*, *Cutro*, *Brooks* and the Rules of Evidence could not shield him from a confrontation with the conviction he secured at the 1991 trial, or with the live testimony of Audrey Smith. And when that confrontation occurred, Sims reacted in precisely the manner a conflicted lawyer would: by pulling his punches in the cross-examination of Audrey Smith.¹⁸ In so yielding to the urge "to dampen the ardor of his defense," *Gregory*, 364 S.C. at 153, 612 S.E.2d at 450, and by making the "choice of advancing his own interests to the detriment of his client's interests," *Ziegenhagen*, 890 F.2d at 940, Sims cemented the conflict Jeff Bloom had warned him about months earlier.

Finally, it must be emphasized that this case differs from the other cases cited herein in an

¹⁸Sims' failure to use what was available to him in the cross-examination of Audrey Smith, *see supra* at 10-11 (describing points of vulnerability in Smith's story), stands in sharp contrast to his handling of the Norris Martin cross-examination, where Sims appeared to regard no detail as too small or trivial to warrant inquiry. *See* ROA 903-29 (guilt phase); 1167-83 (penalty phase). The source of the disparity in Sims' approaches is self-evident: he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination.

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

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

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

Schneekloth v. Bustamonte, 412 U.S. 218, 238-40 (1973); *United States v. Wade*, 388 U.S. 218, 237 (1967)) (“This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.”).

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

None of the essential elements of a valid waiver are present in this case. To begin with, the trial record contains no mention of Sims’ 1991 prosecution of Stokes, let alone a discussion or

colloquy with Stokes about the effects of Sims' prior engagement on his representation in connection with the 1999 capital trial.¹⁹ See PCR Tr. 14 (Conceding this point at the outset of the evidentiary hearing, Mr. Zelenka stated, "I cannot find in the record that there was any reference specifically to Mr. Sims prosecuting Mr. Stokes previously.").

Furthermore, Sims did not understand or appreciate the nature of his conflict, and therefore could not have provided Stokes with the advice necessary to make an informed waiver. As demonstrated by his statements at trial and his testimony at the PCR hearing, Sims steadfastly believed that Stokes' 1991 conviction and the evidence supporting it were inadmissible at the penalty phase of the 1999 capital trial. Operating on this firmly held yet hopelessly misguided belief, it would have been impossible for Sims to have provided Stokes with an accurate or frank assessment of the nature and possible effects of his conflict.²⁰

Sims' and Johnson's PCR hearing testimony confirms that no such assessment was ever made available to Stokes. As described *supra* at 5, Sims and Johnson testified consistently that their advice to Stokes about Sims' past consisted of nothing more than a reminder that he had been a prosecutor, and had once prosecuted Stokes, and an inquiry about whether Stokes had a "problem" with that. PCR Tr. at 88; 102. Neither attorney had any recollection of specifically informing Stokes that the 1991 conviction was likely to be admitted, that Audrey Smith was likely to testify for the

¹⁹Sims did disclose on the record that he personally signed Stokes' 1991 indictment. Tr. 26-127. However, this disclosure was made only in response to the introduction of the indictment as evidence, and Sims' ensuing failure to reveal his additional role as the trial prosecutor in the 1991 case was misleading.

²⁰Sims' failure to appreciate the nature or seriousness of the conflict is corroborated by the testimony of Jeff Bloom, who observed that Sims never "fully understood how or why" the conflict was problematic, and "didn't seem at all to appreciate the gravity of the conflict of interest issue." PCR Tr. at 43, 45.

prosecution, or that Sims would face an obvious conflict if called upon to challenge Smith's story on Stokes' behalf.

These omissions by 1999 trial counsel were especially significant in this case because Stokes himself had been absent from virtually all of the 1991 trial, and therefore had no independent knowledge of how Audrey Smith had testified, how her story had been challenged by his public defender, or how then-Assistant Solicitor Sims had conducted himself at the 1991 proceeding. And like his attorneys, Stokes also had no knowledge that either the 1991 conviction or, more importantly, the testimony upon which it rested, would be admitted at the 1999 trial. In short, by everyone's account – Sims', Johnson's and Stokes' – Stokes was not told of, and did not otherwise know of, most of the information that would have been essential to a valid waiver of Sims' conflict of interest. Had Stokes been properly informed, he would not have waived the conflict. Stokes Affidavit ¶ 6. Because he was not so informed, the record in this case cannot possibly support a finding of a "knowing, intelligent" waiver "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

- C. **The analysis contained in the order written by Respondent fails to account for the record evidence or settled law, and invites the Court to accept a set of conclusions that would be both unprecedented and indefensible.**

1. **Lead trial counsel's conflict of interest.**

Respondent's contentions with regard to the existence of a conflict of interest consist of intermingled assertions that there was no "*per se* conflict," *see* Resp. Ord. 35,²¹ and several conclusory assertions that there could have been no actual conflict because there was no relationship

²¹"Resp. Ord." refers to the proposed order submitted by Respondent and later signed by the Court.

between the 1991 and 1999 proceedings, and because Thomas Sims failed to raise the issue with the trial court, and Stokes failed to take it upon himself to request new counsel, *see* Resp. Ord. 36-38. These assertions fail to address both the actual circumstances presented by this case, and the legal conclusions those circumstances dictate.

a. Respondent's "per se conflict" argument is irrelevant.

Respondent's primary position is that, pursuant to *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), *People v. Abar*, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y. App. Div. 2002), and *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (Wis. Ct. App. 1998), the appointment as defense counsel of an attorney who previously prosecuted the defendant does not give rise to a *per se* conflict of interest. *See* Resp. Ord. 35-38. Stokes has never sought to challenge that well established legal proposition, but it has nothing to do with the issue in this case.

Childers, *Abar* and *Cobbs* all involved defendants represented by lawyers who had previously prosecuted them, but none of the prior prosecutions had any relationship to the subsequent cases in which the former prosecutors served as defense counsel. *See Childers*, 373 S.C. at 372, 645 S.E.2d at 235; *Abar*, 290 A.D.2d at 593, 736 N.Y.S.2d at 156-57; *Cobbs*, 221 Wis.2d at 107, 584 N.W.2d at 711. Because no such relationship existed in those cases, the defendants could only have prevailed under a *per se* rule categorically barring any lawyer from defending someone he or she had previously prosecuted, regardless of whether the prior prosecution could have had any effect on the later defense.

This case occupies a much smaller and more unique category. Here the issue is not merely whether Sims' status as a former prosecutor automatically generated a *per se* conflict of interest.

Instead, it is whether Sims' participation on *both sides* of the Audrey Smith ABWIK – as trial prosecutor in 1991 and as 1999 defense counsel tasked with confronting Smith and the evidence from the 1991 trial – gave rise to an actual conflict. Neither *Childers*, *Abar* nor *Cobbs* speak to that issue, but the decisions cited and discussed *supra* at 14-17 do, and they all make clear that this sort of successive participation in related cases is impermissible.

b. Respondent wilfully ignores the relationship between the 1991 and 1999 proceedings.

Respondent's order asserts that "there was no connection between the former offense and the instant case." Resp. Ord. 38. Rather, according to Respondent, "[t]he only matter was the existence of the conviction – a proven fact – as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction." *Id.* On their face, these two statements are irreconcilable. When the prosecution made the "fact[s]" of the 1991 conviction, and Audrey Smith's testimony detailing the circumstances underlying that conviction, a prominent feature of its 1999 case for death, it necessarily established a "connection" between the two proceedings. And when Sims came face to face with Audrey Smith – who appeared at the 1999 trial to tell a version of the very story Sims himself had elicited from her and vouched for in 1991 – the relationship between the two cases became undeniable. Respondent's assertions to the contrary are so conclusory because they have to be; one cannot discuss the actual circumstances of Sims' roles in the two proceedings without acknowledging the predicament in which he found himself. Respondent has chosen to ignore the indisputable evidence; this Court, however, is obligated to recognize what the record makes plain: a real and tangible connection existed between the 1991 and 1999 proceedings, and that connection gave rise to an actual conflict of interest under settled law.

2. Respondent's waiver arguments.

The remainder of the discussion put forth by Respondent is devoted to promoting the general proposition that Stokes somehow waived his right to conflict-free counsel.²² See Resp. Ord. 39-40. As with its treatment of the existence *vel non* of the conflict, however, Respondent has left the important parts out.

a. Respondent's order never acknowledges the standard for establishing a valid waiver.

Respondent encourages this Court to reject Stokes' claim on the ground that "there was a knowing waiver of a conflict of interest." Resp. Ord. 39. Yet nowhere does its proposed order acknowledge either the legal standard for finding a waiver, or that Respondent itself bears the burden of proving that standard was satisfied.²³ In fact, the closest Respondent comes to suggesting a waiver standard is its reference to several sources discussing circumstances under which conflicts may or may *not* be waived. See Resp. Ord. 39-40. On balance, however, those sources do Respondent at least as much harm as good.

For example, Respondent's order quotes the Comment to SCACR, Rule 407, Rule 1.7, as providing that, "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." In this case, a disinterested lawyer

²²The final four and a half pages of text in Respondent's order contains a sustained effort to distinguish this case from a Second Circuit decision in *United States v. Schwarz*, for which a full citation is never provided. Stokes has neither cited nor relied upon any *Schwarz* opinion, and Respondent's extended discussion appears to be leftover content copied from a pleading in some other case.

²³The governing legal standard and authority placing the burden on the state are detailed *supra* at 19-20.

would so conclude; indeed, Jeff Bloom did so more than once in his pre-trial communications with Sims.²⁴ By this authority – cited in Respondent’s own submission – Sims had no business even “ask[ing] for” Stokes’ consent to the representation.

The considerations Respondent draws from *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir, 1991), and the A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), likewise undercut the proposition that a valid waiver occurred. The record before this Court provides no basis for concluding that Stokes was “in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation.” *United Sewerage Agency* (quoted in Resp. Ord. 40). The record similarly gives no indication of “appropriate client consent” to Sims’ “cross examination [Audrey Smith as] an adverse witness” A.B.A. Formal Ethics Opinion (also quoted in Resp. Ord. 40). On the contrary, the most powerful message emanating from the record in this case is that neither Sims nor Johnson nor Stokes understood or appreciated the nature, extent or seriousness of the conflict at a time when a valid waiver could theoretically have been made.²⁵

²⁴ After detailing the testimony of Sims and Johnson, Respondent order relegates Mr. Bloom’s testimony to a single footnote, *see* Resp. Ord. 35, n. 10, and encourages this Court to find that the conversations between Mr. Bloom and Sims might not have occurred. *See* Resp. Ord. 32, n. 8 (Sims’ recollection was “different that [sic]” Bloom’s), 33 (Sims “had no recollection” of a discussion about the potential conflict of interest), and 35, n. 10 (“Sims did not recall any discussion with Bloom” regarding the conflict of interest issue). While this recitation of the testimony is literally accurate, the implication – that Mr. Bloom never had a discussion with Sims about the clear conflict of interest – is not. On cross examination Sims clarified that he was not testifying that he and Mr. Bloom never spoke about the conflict of interest; rather, he simply could not, ten years later, recall the conversation. PCR Tr. at 84. Indeed, it is likely that the conversation about the conflict did not stand out in Sims’ mind because, as Mr. Bloom suggested, Sims simply did not seem to grasp the gravity of the conflict or the logic of Mr. Bloom’s advice.

²⁵ In a footnote on the last page of its proposed order, Respondent asks this Court to hold that Stokes’ affidavit should be excluded from consideration because the “record was closed” before it was submitted, and because the affidavit purportedly “contradict[s] the testimony of counsel Sims and Johnson.” Resp. Ord. 45, n. 11. That invitation must be rejected. Stokes’ affidavit was submitted

b. No valid waiver occurred in this case.

The reason that Respondent order fails to acknowledge or articulate the settled standard for waiver of a guarantee like the Sixth Amendment right to conflict-free counsel becomes clear after a review of the circumstances upon which Respondent asks this Court to find a waiver in this case. According to Respondent, Stokes waived his fundamental constitutional right – silently, and off-the-record – simply by failing to affirmatively request new counsel after being informed that Sims had been a prosecutor, and had once sent Stokes to prison. By implication, Respondent treats as irrelevant Stokes’ undisputed ignorance of (a) the fact that Audrey Smith would testify for the prosecution; (b) the fact that Sims would cross-examine Smith when she testified; (c) how Sims had conducted himself as the prosecution’s advocate for Smith and her story at the 1991 trial; (d) whether Sims’ successive roles would impair his advocacy, consciously or unconsciously; (e) what Stokes’ own rights were under state and federal law; and so on. As authorities cited in Respondent’s own proposed order make clear, that is simply not how waiver law works. *See Cobbs*, 221 Wis.2d at 105, 584 N.W.2d at 711 (cited at Resp. Ord. 37) (“The waiver [of a conflict] must be knowing and

on August 18, 2009, less than two weeks after the evidentiary hearing, and was accompanied by a Motion to Supplement the Record which acknowledged Respondent’s right to cross-examine Stokes, and pledged cooperation should Respondent elect to exercise that right. Respondent gave no indication of a desire to do so; in fact, it was not until some three months later that Respondent – in an email – raised the two objections repeated in footnote 11 of its proposed order. Under these circumstances, Respondent’s observation that the record had been closed cannot justify exclusion of Stokes’ affidavit. Respondent’s characterization of the affidavit as an attempt “to contradict the testimony of both Sims and Johnson” is also wrong. Respondent does not identify any *actual* contradictions between the affidavit and trial counsel’s testimony, and the record makes quite clear that no such contradictions exist. On the contrary, Stokes’ affidavit *corroborates* the relevant portions of Sims’ and Johnson’s testimony by confirming that they did little more than remind Stokes of Sims’ prior prosecution, they did not explain to Stokes that his prior convictions would be admitted against him at the penalty phase of his trial, and they did not warn him that Audrey Smith would be permitted to testify or that Sims would be tasked with her cross-examination.

voluntary.”); *id.* (“The judge should ensure that the defendants *understand the potential conflicts and determine whether they want separate counsel....* [T]his determination [to allow representation] *should not be made unless it is clear the defendants have made a voluntary and knowing waiver* of their right to separate counsel.”) (modifications by the court) (citation omitted) (emphasis added); *United States v. Perez*, 325 F.3d 115, 127 (2nd Cir. 2003) (cited at Resp. Ord. 44) (“Although [a waivable] conflict might require a defendant to abandon a particular defense or line of questioning, he can be *advised as to what he must forgo*; he “can then seek the *legal advice of independent counsel* and *make an informed judgment* that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel.”) (quoting *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir.1993)) (emphasis added).

In the end, Respondent’s suggestion that relief be denied on the ground that Stokes waived Sims’ conflict is equivalent to urging acceptance of a guilty plea based only on a lawyer’s assurance that he told his client the name of the charged offense, asked him, “Do you want to plead guilty?,” and received “Yes” as an answer. No court familiar with the waiver rules laid down in *Boykin v. Alabama*, 395 U.S. 238 (1969), would even consider such a request.²⁶ The very same principles apply to waivers of the right to conflict-free counsel. *See, e.g., Glasser v. United States*, 315 U.S. 60, 70 (1942) (insisting that “we indulge every reasonable presumption against the waiver of fundamental rights,” and refusing to find that defendant, himself an “experienced attorney,” “tacitly

²⁶*See Boykin*, 395 U.S. at 243 (“We cannot presume a waiver of these three important federal rights from a silent record”); *id.* at 243 n.5 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (to be valid, waiver of constitutional right “must be ‘an intentional relinquishment or abandonment of a known right or privilege’”); *id.* at 243-44 (“What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”)

acquiesced" to conflicted counsel's representation by failing to timely object). Respondent's suggestion that the record in this case somehow shows a valid waiver is unworthy of serious consideration – let alone *adoption* – by this Court.

For all of the foregoing reasons, Stokes' Sixth Amendment right to representation by counsel unencumbered by conflict of interest was violated, and this Court should prepare an order granting post-conviction relief from his death sentence.

9(b) and (c) Appellate counsel failed to raise on direct appeal the trial court's related failures to: (1) conduct an independent assessment of the evidence to determine which statutory mitigators were supported by the evidence and (2) instruct the jury on a mitigator for which there was evidentiary support.

Under *Strickland v. Washington*, 466 U.S. 688 (1984), Mr. Stokes must establish that his attorney's representation "fell below an objective standard of reasonableness." *id.* At 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The same standards apply to review of appellate counsel's performance. *Evitts v. Lucey*, 469 U.S. 387 (1985). To prove that deficient performance of appellate counsel was prejudicial, Mr. Stokes must prove that, but for counsel's errors, there is a reasonable probability that the claim not raised would have prevailed on appeal.

A. Relevant Facts

Right up until the moment she was killed, Connie Snipes, who believed she was accompanying Stokes and Syphrette to murder another man, willingly participated in the events preceding her death. There was evidence to support that:

- Snipes located Martin and asked him to go with her and Stokes. ROA 878-79.
- Snipes voluntarily got in the car with Stokes, Martin, and Syphrette. ROA 882.

- When they arrived at the designated location, Snipes voluntarily accompanied Martin and Stokes into the woods. ROA 888-89, 920.
- Snipes voluntarily had sex with Martin and Stokes once in the woods. ROA 922, 971-72; 1169.

Indeed, even the solicitor conceded that there was evidence from which the jury could infer that Snipes had accompanied Stokes and Martin voluntarily and that she had sex with them voluntarily. ROA 989-90.

These facts formed the basis of the defense theory that Snipes voluntarily participated in at least some of Stokes's conduct and thus, there was evidence to support the statutory mitigator relating to a victim's participation. *See* S.C. Code § 16-3-20(C)(b)(3) ("The victim was a participant in the defendant's conduct or consented to the act."). Just before the penalty phase began, Sims, in response to the court's question, indicated that the defense intended to establish that Snipes' conduct satisfied the victim participation statutory mitigator. ROA 1082-83. While the court indicated some skepticism about the evidentiary support for this mitigator, ROA 1084-85, it never revisited the issue. Moreover, there is no evidence that the court ever conducted the statutorily-required assessment of the evidence at the conclusion of the penalty phase. Of course, this failure on the trial court's part also prevented the defendant from lodging an objection to the trial court's evaluation of the evidence. Ultimately the court did not include this factor in its instructions to the jury. ROA 1479-80.

On direct appeal Stokes's lawyer, Joseph Savitz, failed to raise as an issue either the trial court's failure to conduct the statutorily-required evidentiary review or the trial court's failure to instruct the jury on a mitigating factor that was supported by the evidence. In his testimony at the PCR evidentiary hearing Savitz was unable to recall a strategic reason for these failures. PCR Tr. 24-

25. To the contrary, Savitz testified that before and after the Stokes appeal he had pressed these very issues because he believed they had merit. *Id.*

B. The trial court's failure to independently assess the mitigation evidence.

The Eighth Amendment requires that a jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Any impediment to a juror's consideration of relevant mitigating factor is unconstitutional. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury's consideration of penalty phase evidence); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation). To that end South Carolina's death penalty statute obligates the trial court to conduct its own independent review of the penalty phase evidence in order to determine which statutory mitigating factors are supported. Indeed, absent a waiver from the defense the court is required to submit to the jury any mitigating circumstance with evidentiary support. S.C. Code § 16-3-20(C). To ensure compliance with this statutory requirement, the Supreme Court set out a specific procedure for trial courts.

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

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

In the years following *Victor* the supreme court has consistently approved this approach. More importantly, it has never suggested a deviation from the statutory requirement. See *State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Rogers*, 338 S.C. 435, 438, 527 S.E.2d 101, 103 (2000); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997). Therefore, for at least 10 years prior to Stokes's trial the law was settled that the trial court had an obligation to assess the penalty phase evidence to determine which statutory mitigators were supported by the evidence.

Such an evaluation never occurred at Stokes's trial. The trial court simply did not conduct the required analysis and never engaged in the procedure set out in *Victor*. To be sure, subsequent cases have clarified defense counsel's duty to object to the trial court's initial determination at the "Victor conference." See e.g., *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1997). But these cases are grounded in the assumption that a *Victor* conference actually occurs. Here, the trial court never engaged in its own review of the evidence and, therefore, contrary to the cases cited *supra*, the defense was never presented with an opportunity to object to the trial court's determination. Given the trial court's rather clear failure to satisfy the statutorily-required evaluation of evidence, appellate counsel's failure to raise this issue on direct appeal represented ineffective assistance of counsel.

C. Trial court's obligation to instruct the jury on all mitigators that are supported by the evidence.

As discussed *supra*, ample evidence presented at both phases of Stokes's trial established that Snipes at the very least participated the Stokes' conduct. The state supreme court acknowledged as much. *State v. Stokes*, 345 S.C. 368, 374, 548 S.E.2d 202, 205 (2001) (noting evidence that Snipes voluntarily accompanied Stokes into the woods). Based on the evidence that had already been presented, trial counsel alerted the court to its reliance on this statutory mitigating factor at the outset

of the penalty phase. ROA 1084. The trial court ultimately did not charge the jury on this or any other statutory mitigating circumstance. This failure was error.

The trial judge “shall include in his instructions to the jury for it to consider ... the following ... mitigating circumstances which may be supported by the evidence.” S.C. Code § 16-3-20(C). That statute imposes an obligation, which existed at the time of Stokes’s trial, on the trial court to instruct the jury on any mitigating factor that was supported by the evidence. *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Bowman*, 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005) (acknowledging duty of trial court to instruct on mitigating factor supported by evidence), *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006); *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002) (trial court was required to instruct the jury on a statutory mitigator raised by evidence of intoxication); *State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991) (same). When assessing mitigating evidence, a trial court should not narrowly construe what is relevant and what is not. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001) (jurors must be provided an opportunity to give full consideration and full effect to evidence in mitigation); *Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms so as not to restrict the jury’s consideration of penalty phase evidence). In fact, the trial court must instruct on every mitigating factor for which there is any evidence without regard to the weight of the evidence. *Pierce*, 289 S.C. at 435, 346 S.E.2d at 711.

The trial court’s premature refusal to charge the jury on an instruction both supported by the evidence and requested by trial counsel seems to have rested on the court’s guilt phase assessment of this evidence. “The victim having participated in the act situation, if that goes back to what was

not allowed [in the guilt phase] because of the way the letter came in and all, you're not going to be able to do it. . ." ROA 1084 (trial court's response to request to charge victim participation mitigator). The court may well have been correct in its assessment that evidence of Snipes's conduct was irrelevant to the defendant's guilt and was, therefore, inadmissible at the guilt phase of the trial. But this guilt phase evidentiary ruling should not have governed the evidentiary analysis at the penalty phase given the very different issues to be decided by the jury at that point in the trial.

Appellate counsel failed to include this claim on direct appeal and had no strategic reason for this failure. PCR Tr. 24-25. There exists a reasonable probability that the result of applicant's appeal would have been different had appellate counsel properly raised this claim. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

III. CONCLUSION.

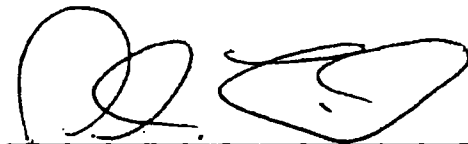
For the foregoing reasons this Court should prepare a new Order vacating Stokes' sentence and remand the case to the Orangeburg County Court of General Sessions for a new sentencing trial.

Respectfully submitted,

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January 27, 2012


 Counsel for Mr. Stokes

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Sammie Louis Stokes,

Applicant,

v.

Jon Ozmint, Commissioner,
South Carolina Dept. of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS

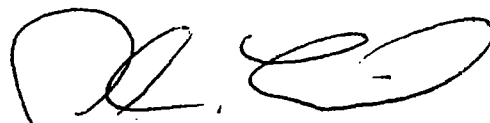
Case No.: 01-CP-38-1240

Certificate of Service

I hereby certify that a copy of Applicant's Supplemental Post Hearing Memorandum in Support of Amended Application for Post-Conviction Relief has been served upon the Respondent, via U.S. mail, first-class, postage prepaid, at the following address:

Donald J. Zelenka
Deputy Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

This the 27th day of January, 2012.



Robert Lominack

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

RESPONDENT'S POST-HEARING ON
 RULE 59 MOTION MEMORANDUM

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

FILED FOR RECORD
 WINNIE A. CLARK
 CLERK OF COURT
 ORANGEBURG, SC

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The Respondent, above-named, hereby makes a Memorandum, as requested by the Court to the Rule 59 Hearing held on December 7, 2011. At the hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order.

This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Applicant, through counsel made a "Motion to Alter or Amend the Judgment" dated November 15, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011. The Respondent would show this Court the following:

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the hearing judge erred in signing a proffered proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been requested by the Court. The record reveals that the Supreme Court of South Carolina initially gave the hearing judge a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided the hearing judge with a proposed order of dismissal by email.¹ The basis for

¹In the August 29, 2010 email to the Court, counsel for Respondent stated:

"To: Honorable L Casey Manning
CC: Robert Lominack, Keir Weyble

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

the State providing the unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Respondent later learned that opposing counsel on Applicant's behalf had subsequently provided a proposed order to the court on October 1, 2010, at the Court's request. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent. It appears that he relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Court did not preclude requesting proposed orders and confirming them after review, but stated:

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#3-
Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by the hearing judge 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 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.

Order, p. 25. (emphasis added).

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#4.
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.**

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

The hearing judge further relied upon SCACR Rule 407, Rule 1.7 (b). The hearing court specifically found: "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. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that the hearing

judge was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

MS
HS.
Further, it is clear that Judge Manning performed acceptable procedures under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicants order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant

submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant 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 Court.

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#6 . The Applicant acknowledges that the affidavit was submitted two weeks after the hearing concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion 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 Applicant the concerning the averments made in the belated affidavit. The Applicant 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 Applicant stated that the submission was made because "immediately after the 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 . . . ” Applicant’s Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). The Applicant correctly stated below-signed counsel’s response when asked what I 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 Applicant’s failure to testify at the hearing. More accurately though, it was evident to all that the Applicant had not presented any evidence to contradict the representations made by either the record or counsel 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 Applicant.

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#7.
This Court should find that the Applicant’s affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was properly rejected by the Court under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11. Under § 17-27-80, the Act states that “the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing.” *Id.* It does not require this Court or any Court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests. Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant’s case in chief, counsel Lominack stated: “that concludes our testimony portion of the case.” 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, the hearing judge offered the opportunity to have the Applicant called at that hearing when he asked counsel if they wanted “anything further” and the response by the counsel was “nothing further.” 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 Applicant to not present testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

Ms #8
The Applicant 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 and what it purports to do. In the affidavit at paragraph six, Stokes states: "If 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). To the contrary, the broadly worded affidavit does attempt to contradict the testimony of Virgin Johnson and Mr. Sims concerning the substance of the discussions and his decision and desire to be continually represented by Mr. Sims. 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." PCR Tr.p. 55, l. 15-19. In complete contradiction of the 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. PCR Tr.p. 56, l. 23-p. 57, l. 9.

However, this one-sided and limited affidavit presentation did more - it prevented the State from cross-examining Stokes in an already closed record about the discussions that both his counsel had with him - matters that were uncontradicted at the time of the hearing, about whether his prior convictions could be used against him at trial, about whom the prosecutor was at his initial trial. It also did not include the 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 contradicts the affidavit of Stokes. Further, counsel Sims stated that he and Stokes talked about evidence of the Audrey Smith incident and that Sims knew it would come in. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15- p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes 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. Tr.p. 102, l. 1-24. ("I know he wanted Thomas back."). Counsel Johnson also testified that they had discussions about the evidence of the prior conviction could be presented at the trial and that Stokes did not request then for Sims to be removed. 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 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 the Applicant was present, but refused to come into the courtroom although he did enter the courtroom at the outset of the trial proceedings and present when then Solicitor Sims provided the judge with the indictment while Stokes made a personal plea for a continuance. March 12, 1991 Tr.p. 6-14. This was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. The hearing judge had made available the 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.

Simply put the credibility of the Applicant, 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 Hearing Judge 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 Applicant would have opened himself up to impeachment and further testimony concerning the issues. Respondent's Post-Hearing Memorandum, p. 44, n. 11.²

In the Order of Dismissal, Judge Manning addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, the hearing judge stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in their case in chief and on reply. Contrary to the assertions and characterization of counsel, it does seek to contradict the combined testimony of Mr. Sims and Mr. Johnson about their discussions and the knowledge of Stokes concerning Sims prior prosecution and Stokes desire with the knowledge of the prior involvement to have Sims continue as defense counsel.

M #11. Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that the hearing judge reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that the

hearing judge mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - claimed that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also. *Order of Dismissal*, p. 32, footnote 8.

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#12.
While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at capital sentencing, and he did not seem as concerned. Bloom asserted that he stressed in his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney

client issue. Bloom reported that Sims kept saying don't worry that Stokes had already waived it, but Bloom stated that the hearing was necessary because of the other consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up with Mr. Sims at some point during a telephone call that also involved jury profiling. Bloom stated :

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I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. And I concluded that I just needed to sever any professional relationship to the case because -and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.

PCR Tr.p. 45, l. 15- p. 46, l. 12. On cross-examination Mr. Bloom thought the discussion had occurred after April 15 and could have been May or June and the telephone call happed within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

The Court was faced with making a credibility determination where the issue was seen as one of substance - not one of memory. The Court recognized this during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the communication he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I --

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I *may* have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

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#14- PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that the Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims testified that in the early stages he had a discussion with Mr. Bloom about doing jury work and that he provided him with some rudimentary information, but that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict of interest based upon your prior prosecution?

A. I don't.

Q. You don't have any recollection?

A. I don't have any recollection of that.

Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

A. I - -I- - This has been over ten years ago, ands I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

A. Yes, That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, Judge Manning was able to assess the particular credibility of the witnesses, the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of its substance prior to his own testimony, and Mr. Sims' credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what did not occur] between two lawyers. In making the assessment, the Court concluded:

In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, *Order*, p.32, n. 8.

Respondent submit that there was a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. If this is consistent with the Hearing Judge's conclusions - the motion to alter should be denied.

IV.

CONFLICT OF INTEREST AND WAIVER

During the motion hearing, counsel for Stokes additionally argued that the fact that counsel Sims had researched an argument to keep out 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. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. 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. 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 then 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 which the trial court agreed. ROA Tr.p. 1088-1090].³ Sims's argument 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 Rule 609 and impeachment use of convictions. 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 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. PCR Tr.p. 89-90. He stated that he had researched the matter and felt that they could probably try to keep it, mainly because it was beyond the 10 year limit. However, he stated that he did not think that they would be kept out, but he wanted them kept out. PCR Tr.p. 93, l. 4-9. Mr. Sims denied that he would have told

³At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA tr.p. 1637-1638.

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. 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. 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 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 name was on the indictments and wanted to have them corrected to remove his name from them before they would be introduced. Contrary to the claim suggested by Applicant, Sims was not ignoring the potential admissibility of the evidence or Audrey Smith testifying about it and additionally the letters that Stokes had sent to her. He had notice and anticipated the introduction.

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.

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." *Order of Dismissal*, p. 30-31. There is evidence at the PCR hearing to support this finding. 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. PCR Tr.p. 102. In its order, the Court found 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 and never requested to have Sims removed. *Order of Dismissal*, p. 31, Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105.⁴

V.

WHEREFORE, having made a Post-hearing on Rule 59 Memorandum and Response to the Motion to Alter or Amend, Respondent respectfully requests that the Rule 59 motion be denied.

Respectfully submitted,

ALAN WILSON

Attorney General

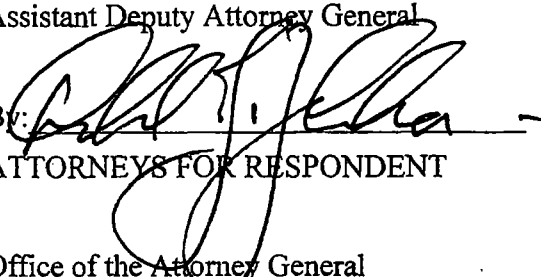
JOHN W. McINTOSH

Chief Deputy Attorney General

⁴ Respondent would note that recent decisions may also support the Court's earlier rejection that Mr. Sims prior prosecution of Stokes on the unrelated matter of the assault conviction did not create a per se conflict of interest requiring removal. In State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011), the Georgia court held that the 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.

DONALD J. ZELENKA

Assistant Deputy Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General

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Columbia, South Carolina 29211

Telephone: (803) 734-6305

Columbia, South Carolina

January 27, 2012.

(4)
#20

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

SAMMIE LOUIS STOKES, #5069)

C/A No. 01-CP-38-1240

Applicant,)

CERTIFICATE OF SERVICE

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

I **Donald J. Zelenka**, hereby certify that I have served the *Respondent's Post-Hearing on Rule 59 Motion Memorandum* in the foregoing case by depositing copies of same in the United States mail, postage prepaid, to the following:

Keir M. Weyble, Esquire
900 Elmwood Avenue, Ste. 101
Columbia, SC 29201

Robert E. Lominack, Esquire
P. O. Box 5508
Columbia, SC 29250

This 27th day of January, 2012.


DONALD J. ZELENA
Senior Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF ORANGEBURG)

FIRST JUDICIAL CIRCUIT)

CASE NO.: 2001-CP-38-1240)

SAMMIE LOUIS STOKES, #5069)**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

Plaintiff's Attorney:

Robert E. Lominick, Bar No. 68802

Address:

PO Box 5508

Columbia, S.C. 29250

Phone: 803-771-7271 Fax 803-937-1707

E-mail: robert@lominacklaw.com Other: _____

Defendant's Attorney:

Donald J. Zelenka, Bar No. 5758

Address:

PO Box 11549

Columbia, S.C. 29211

Phone: 803-734-3601 Fax 803-734-4035

E-mail: agdzelenka@scag.gov Other: _____

☐ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)☒ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO**SECTION II: Motion/Order Type**☐ Written motion attached☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

March 28, 2012

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES, #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	ORDER DENYING
	)	RULE 59 MOTION
vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before this Court pursuant to a October 21, 2010 Motion to Alter or Amend filed by Applicant. A hearing on the motion was held in Richland County on December 7, 2011. At the hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were court-appointed counsel Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order. The memorandums were timely submitted. On February 28, 2012, this Court held a brief status conference with Applicant's counsel Robert Lominack and Respondent's counsel Donald J. Zelenka. At the conference, Respondent's counsel was asked by the Court to provide the Court and opposing counsel with a proposed order denying the Rule 59 motion. The Court allowed opposing counsel 10 days to provide objections to the proposed order

Respondent's counsel provided this Court and opposing counsel a proposed order on March 27, 2012. This Order follows and denies the Rule 59 motion.

This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Applicant, through counsel made a "Motion to Alter or Amend the Judgment" dated November 15, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011.

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the Court erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been specifically requested by the Court. The Supreme Court of South Carolina initially gave this Court a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided this Court (and opposing counsel) with a proposed order of dismissal by email.¹ The basis for the State providing the

¹In the August 29, 2010 email to this court, counsel for Respondent stated:
 -To: Honorable L Casey Manning
 CC: Robert Lominack, Keir Weyble

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent

unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Court subsequently requested opposing counsel on Applicant's behalf to also provide a proposed order to the Court which was done on October 1, 2010. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's initial broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent and ruled against their position. Applicant relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Supreme Court did not preclude a PCR hearing court's from requesting proposed orders from counsel and confirming them after review, but stated:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a

made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by this Court 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.

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.**

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

This Court 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 Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that this Court was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that this Court performed acceptable procedures in preparation of the order under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicants order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant 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 Court.

The Applicant acknowledges that the affidavit was submitted two weeks after the hearing concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion 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 Applicant concerning the averments made in the belated affidavit. The Applicant 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

Applicant stated that the submission was made because “immediately after the 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 . . .” Applicant’s Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent’s counsel confirmed in an earlier pleading that the Applicant 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 Applicant’s failure to testify at the hearing. This Court had found that it was evident at that time that the Applicant 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 Applicant.

This Court finds that the Applicant’s affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was properly rejected under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11. Under § 17-27-80, the Act states that “the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing.” *Id.* It does not require this Court or any court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests. Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant’s case in chief, counsel Lominack

stated: "that concludes our testimony portion of the case." 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 Applicant called at that hearing when he asked counsel if they wanted "anything further" and the response by the counsel was "nothing further." 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 Applicant to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

The Applicant 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). 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." 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. PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony

repudiates the substance of Stokes' later averments.

This Court finds 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 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. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15-p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes 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. 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. 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 Applicant 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. March 12, 1991 Tr.p. 6-14.

This Court is constrained to conclude that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. This 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.

Simply put the credibility of the Applicant, 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 this 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 Applicant would have opened himself up to impeachment and further testimony concerning the issues. *Respondent's Post-Hearing Memorandum*, p. 44, n. 11.² This Court must agree with that assessment.

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

In the Order of Dismissal, this Court addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, this Court stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in their case in chief and on reply. Contrary to the assertions and characterization of counsel, he does 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.

Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the

hearing. The fact that this Court reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that this Court mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - testified that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also *Order of Dismissal*, p. 32, footnote 8. These differences in the testimony of each witness

were significant on the critical points.

While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at the capital sentencing proceeding, and he did not seem as concerned about the conflict issue." PCR Tr.p. 43, l. 19 - p. 44, l. 1. Bloom testified that he stressed to Sims from his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney client issue. However, Bloom reported that Sims kept saying don't worry about it and that Stokes had already waived it. Bloom testified that he stated that the hearing was necessary because of the other consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information to Sims, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up about his demand for a motion hearing to Mr. Sims at a later time during a telephone call that

also involved jury profiling. Bloom stated :

I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. *And I concluded that I just needed to sever any professional relationship to the case because —and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.*

PCR Tr.p. 45, l. 15- p. 46, l. 12 (*emphasis added*). On cross-examination, Mr. Bloom thought the discussion had occurred after April 15 and could have been either in May or June and the telephone call happened within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

This Court was faced with making a credibility determination concerning the existence of a discussion between counsel Sims and Mr. Bloom about a conflict hearing and waiver issue which was seen as one of substance - not one of memory. The Court recognized this factual dispute during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the two communications he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I—

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I

may have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired of Applicant's counsel about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that this Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims recollections concerning his conversations with Mr. Bloom was different in a number of significant aspects. Sims testified that in the early stages of his representation that he had a discussion with Mr. Bloom about doing jury work for the defense and that Mr. Bloom provided him with some rudimentary information. Sims testified that his understanding was that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

- Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict of interest based upon your prior prosecution?
- A. I don't.
- Q. You don't have any recollection?
- A. I don't have any recollection of that.
- Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

- A. I - I - This has been over ten years ago, and I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

- Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

- A. Yes. That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, this Court was able to assess the particular credibility of the witnesses, including the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of its substance prior to his own testimony, and Mr. Sims' credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what did not occur] between two lawyers. In making the assessment, the Court concluded:

In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his

professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, *Order*, p.32, n. 8.

This Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. The motion to alter should be denied.

IV.

CONFLICT OF INTEREST AND WAIVER

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. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. 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. 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. ROA Tr.p. 1088-

1090].³ 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. 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. 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. 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. 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. PCR Tr.p. 98, l. 3-12.

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

³At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA 1637-1638.

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.

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.

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." *Order of Dismissal*, p. 30-31.

There is evidence at the PCR hearing to support this finding. 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. 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. *Order of Dismissal*, p. 31. Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105. 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).

The motion to alter and amend should be denied.

CONCLUSION

For all the foregoing reasons, the Rule 59 motion to alter and/or amend is denied in its entirety.

AND IT IS SO ORDERED this ____ day of _____, 2012.

L. CASEY MANNING
Presiding Judge

_____, South Carolina.

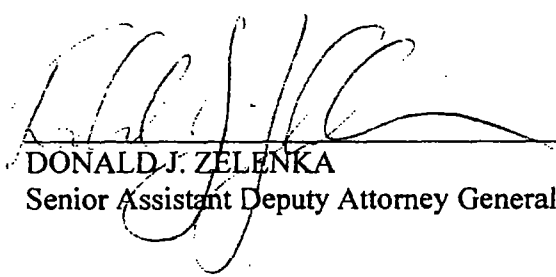
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the proposed *Order Denying Rule 59 Motion* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Robert E. Lominack, Esquire
P. O. Box 5508
Columbia, SC 29520

Keir M. Weyble, Esquire
Blume, Weyble & Norris, LLC
900 Elmwood Avenue, Ste. 101
Columbia, SC 29201

This 28th day of March, 2012.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 01-CP-38-1240
COUNTY OF ORANGEBURG	)	
	)	
Sammie Louis Stokes,	)	
	)	
<i>Applicant,</i>	)	
	)	
v.	)	
	)	
State of South Carolina,	)	
<i>Respondent.</i>	)	

**APPLICANT'S OBJECTION TO ADOPTION OF PROPOSED
ORDER, AND MOTION FOR APPOINTMENT OF NEW
COUNSEL IN LIGHT OF MARTINEZ V. RYAN**

Applicant, Sammie Louis Stokes, by and through undersigned counsel, submits this objection and motion in light of the Court's April 9, 2012 e-mail announcement of its intent to sign the proposed order denying relief submitted by respondent. The bases for applicant's objection and request for appointment of new counsel are set forth below.

I. Relevant background.¹

On November 15, 2010, Stokes, through current counsel, filed a timely motion to alter or amend the judgment entered when this Court signed respondent's proposed order denying post-conviction relief. Respondent opposed that motion in a submission filed on November 29, 2010. Stokes, in turn, responded by letter on December 6, 2010, and requested oral argument on his motion. On December 8, 2011, the Court heard oral argument on the motion to alter or amend the judgment. The hearing concluded with the Court announcing its intent to draft its own order

¹This section assumes familiarity with the developments and circumstances that preceded the Court's adoption of respondent's original proposed order denying post-conviction relief on October 22, 2010.

disposing of the case, and requesting further briefs from the parties, which were filed on January 27, 2012.

Subsequently, the Court called counsel for the parties to an in-chambers status conference on February 28, 2012.² At the status conference, the Court announced its intent to deny relief, and made clear its belief that undersigned counsel had badly mishandled Mr. Stokes' case by failing to call him to testify in support of his claim that trial counsel, Thomas Sims, had been encumbered by a conflict of interest. The Court directed counsel for respondent to prepare an order denying relief within 30 days, and afforded undersigned counsel ten days within which to prepare and file objections.

On March 28, 2012, counsel for respondent circulated by email a proposed Order Denying Rule 59 Motion. On March 30, 2012, Mr. Lominack responded by email, expressing undersigned counsel's uncertainty whether the document circulated by respondent was responsive to the Court's instructions, requesting clarification, and indicating that counsel would await that clarification before moving forward with the preparation of objections pursuant to the previously imposed schedule. On April 9, 2012, this Court, through a law clerk, responded by email as follows:

Judge Manning has indicated that he will sign the order that Mr. Zelenka e-mailed on March 28th. However, if you would like to put anything on the record before he signs the order, please let us know. Additionally, he said that if you have any further objections, you may appeal the order once he signs it

April 9, 2012 email from Manning, L. Casey Law Clerk to Robert Lominack, Don Zelenka and Keir

²Because the status conference was convened on less than twenty-four hours' notice, Mr. Stokes was represented there only by Mr. Lominack. Respondent was represented at the hearing by Donald Zelenka.

Weyble.

II. Objections to adoption of respondent's proposed order.

Stokes' November 15, 2010 Motion to Alter or Amend the Judgment includes a detailed set of objections to the adoption of proposed orders prepared by partisan advocates in general, and to the content of the proposed order submitted by respondent in particular. Because the Court's April 9, 2012 email indicates that the adoption of respondent's submission is already imminent, and because that submission contains many of the same defects found in the proposed order previously signed by the Court, Stokes hereby reiterates (and incorporates by reference) the arguments set forth in his November 15, 2010 motion.

III. Motion for appointment of new counsel in light of *Martinez v. Ryan*.

On March 20, 2012, the Supreme Court of the United States announced its decision in *Martinez v. Ryan*, ___ S.Ct. ___, 2012 WL 912950 (Mar. 20, 2012). In *Martinez*, the Court recognized the existence of an equitable right to effective assistance of counsel in connection with an "initial-review collateral proceeding," *i.e.*, a post-conviction relief proceeding, like this one, which represents a prisoner's first opportunity under state procedure to challenge the fitness or performance of his trial counsel.³ The Court further explained that, because the rule it announced is based in equity rather than the Constitution, states are afforded a choice: if they furnish prisoners

³The majority opinion in *Martinez* spoke in terms of "ineffective assistance of trial counsel." *Martinez*, 2102 WL 912950 at *5. As the dissent stressed, however, "no one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state [post-conviction] will be the first opportunity for a particular claim to be raised[.]" *Id.* at *12 (Scalia, J., dissenting).

in initial-review collateral proceedings with effective counsel, they will remain eligible to invoke procedural default rules in any subsequent federal habeas corpus proceeding; on the other hand, if the state chooses not to provide a prisoner with effective post-conviction counsel, then the ineffectiveness of the prisoner's counsel will constitute "cause" to overcome a default occurring during state post-conviction proceedings. *See Martinez*, 2012 WL 912950 at *10.

While the South Carolina Supreme Court has not yet announced how it intends to proceed in light of *Martinez*, either of the routes marked by that decision will affect this case. As reflected in the order adopted on October 22, 2010, the proposed order that is about to be adopted now, and the Court's remarks during the February 28, 2012 in-chambers status conference, undersigned counsel's failure to call Mr. Stokes to testify at the PCR hearing has been judged by this Court to have been a grievous error.⁴ Under *Martinez*, Stokes must not be required to bear the consequences of that error; instead, he must be afforded an opportunity to overcome any default that may have occurred when he was not called to testify by demonstrating that undersigned counsel provided him with ineffective assistance. Because undersigned counsel are in no position to develop, formulate and present such allegations on Stokes' behalf, *Martinez* necessitates that they be relieved of their appointment and replaced with qualified counsel capable of competently safeguarding Stokes' right to a full, fair and informed resolution of his claims for post-conviction relief.⁵

⁴While respondent's most recent proposed order characterizes that failure as "strategic," it is well settled that even strategic decisions are not beyond scrutiny when they fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Martinez*, 2012 WL 912950 at *8 (adopting *Strickland* as standard for assessing effectiveness of post-conviction counsel).

⁵Importantly the possibility of an appeal from this Court's decision to deny post-conviction relief via adoption of respondent's March 28, 2012 proposed order is no substitute for the appointment of new counsel now. This is so because only the current proceeding before this Court

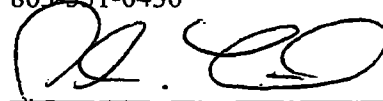
IV. Conclusion

WHEREFORE, for the foregoing reasons, this Court should not sign the proposed order recently submitted by respondent, and should enter an order relieving undersigned counsel of their appointment, and appointing new counsel to assist Stokes consistent with the rule laid down in *Matinez v. Ryan*.

Respectfully submitted,

Keir Weyble
Blume, Weyble & Norris, LLC
900 Elmwood Avenue
Columbia, SC 29201
803-765-1044

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-351-0436



Counsel for Mr. Stokes

April 10, 2012

(as opposed to a discretionary appeal to the South Carolina Supreme Court) would appear to qualify as "initial-review" as that term is used in *Martinez*. Thus, absent the provision of competent post-conviction counsel now, the equitable right guaranteed to Stokes by *Martinez* would be violated.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

Case No.: 01-CP-38-1240

Sammie Louis Stokes,)

Applicant,)

v.)

Certificate of Service

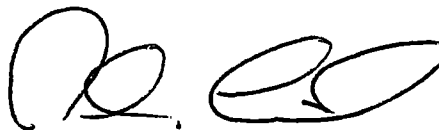
State of South Carolina,)

Respondent.)

I hereby certify that a copy of Applicant's Objections to Adoption of Proposed Order and Motion for Appointment of Substitute Counsel has been served upon the Respondent, via U.S. mail, first-class, postage prepaid, at the following address:

Donald J. Zelenka
Deputy Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

This the 10th day of April, 2012.



Robert Lominack

FILED
CLERK
COURT
CLERK
COURT

2012 APR 12 AM 11:53

2319

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.351.0436
Fax. 803.937.1707
robert@lominacklaw.com

April 10, 2012

Winnifa Brown-Clark
Clerk of Court
190 Gibson Street
Orangeburg, SC 29116

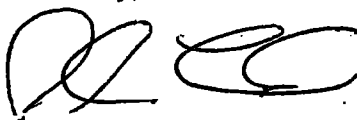
Re: *Sammie Louis Stokes v. Ozmint*
Case No. 01-CP-38-1240

Dear Ms. Brown-Clark,

Please find enclosed for filing Mr. Stokes' Objections to Adoption of Proposed Order and Motion for Appointment of Substitute Counsel.

Should you have any questions or need further information, please do not hesitate to contact me.

Sincerely,



Robert Lominack

cc: Honorable L. Casey Manning (w/ encl.)
Donald J. Zelenka (w/ encl.)

2012 APR 12 AM 11:53
CLERK
COURT
ORANGEBURG, SC

2320

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)Sammie Louis Stokes)

Plaintiff,)

vs.)

State of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUITCASE NO.: 2001 -CP-38 - 1240**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Robert Lominack, Bar No. 68802

Address:

PO Box 5508, Columbia, SC 29250Phone: 803-351-0436 Fax 803-937-1707E-mail: robert@lominacklaw.com

Defendant's Attorney:

Donald Zelenka, Bar No. _____

Address:

PO Box 11549, Columbia, SC 29211Phone: 803-734-3601 Fax _____

E-mail: _____ Other: _____

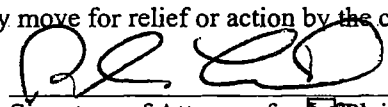
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ DefendantApril 10

Date submitted

2012 APR 12

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☒ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____, 20____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____, 20____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

Don Zelenka - Sammie Stokes - Orangeburg 2001-CP-38-1240 - State's Revised Proposed Order Denying Rule 59 Motion

From: Don Zelenka
To: cmanningj@sccourts.org
Date: 4/19/2012 12:08 PM
Subject: Sammie Stokes - Orangeburg 2001-CP-38-1240 - State's Revised Proposed Order Denying Rule 59 Motion
CC: cmanninglc@sccourts.org; keir@blumelaw.com; robertlominack@mac.com
Attachments: Stokes - Revised Proposed Order Rule 59 Form.docx; Stokes, Sammie - Respondent's Revised Proposed Rule 59 Denial.pdf; Stokes, Sammie - Respondent's Revised Proposed Rule 59 Denial.doc

Judge Manning -

Attached is a copy of the Respondent's revised proposed order denying the Rule 59 motion and the motion to appoint new PCR counsel as you requested in light of Stokes April 12, 2012 pleading.

The changes from the earlier order are set out in the procedural history at pages one through three and the denial of the motion to appoint new counsel at pages 21 through the end.

I am simultaneously providing the proposed revised order to counsel Weyble and Lominack.

Of course, if there are any other matters that would request to be revised, I would be happy to assist and make revisions or corrections as needed.

I am submitting the matter to the Orangeburg clerk this date by mail with the proper form motion attached and copying the court and counsel with the same material.

Copies of the proposed order in Word and adobe pdf are attached.

Sincerely,

Don Zelenka

RECEIVED

APR 23 2012

CLERK OF
COURT

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

SAMMIE LOUIS STOKES, #5069)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

CASE NO.: 2001-CP-38-1240

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET****Plaintiff's Attorney:**

Robert E. Lominick, Bar No. 68802

Address:

PO Box 5508

Columbia, S.C. 29250

Phone: 803-771-7271 Fax 803-937-1707

E-mail: robert@lominacklaw.com Other: _____

Defendant's Attorney:

Donald J. Zelenka, Bar No. 5758

Address:

PO Box 11549

Columbia, S.C. 29211

Phone: 803-734-3601 Fax 803-734-4035

E-mail: agdzelenka@scag.gov Other: _____

☐ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)☒ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES / ☐ NO**SECTION II: Motion/Order Type**☐ Written motion attached☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

April 19, 2012

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES. #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	ORDER DENYING
	)	RULE 59 MOTION AND DENYING
vs.	)	MOTION TO APPOINT NEW COUNSEL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

This matter comes before this Court pursuant to a November 15, 2010 Motion to Alter or Amend filed by Applicant. This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011. A hearing on the motion was held in Richland County on December 8, 2011. At the December 8, 2011 hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were court-appointed counsel Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order. The memorandums were timely submitted by both parties..

After thoroughly reviewing the memorandum and pleadings submitted by both parties, on

February 28, 2012, this Court held a brief status conference in chambers with Applicant's counsel Robert Lominack and Respondent's counsel Donald J. Zelenka. During the conference, this Court noted that he had concerns about the fact that the Applicant had not been called at the PCR hearing as a witness and then after the hearing an attempt was made to submit the Applicant's affidavit after the evidentiary record was complete. This Court stated that he intended to deny the consideration of the submitted affidavit when Stokes could have been called as a witness. At the status conference, Respondent's counsel was asked by the Court to provide the Court and opposing counsel with a proposed order denying the Rule 59 motion. The Court allowed opposing counsel 10 days to provide objections to the proposed order. Respondent's counsel provided this Court and opposing counsel an initial proposed order denying the Rule 59 motion on March 27, 2012.

On March 30, 2012, Applicant's counsel expressed by an email a concern whether the proposed order was responsive to the Court's intent from the chambers conference. On April 9, 2012, this Court, in an email through his law clerk, advised counsel of his intent to sign the March 28, 2012 proposed order and gave counsel further opportunity to place objections in the record.

On April 12, 2012, counsel for the Applicant filed objections to the adoption of the proposed order and an additional request to appoint counsel due to the recent decision in Martinez v. Ryan, _ U.S. __, 2012 Westlaw 912950 (March 20, 2012) in a pleading dated April 10, 2012. In the April 12, 2012 objections, the Applicant incorporates his earlier assertions in the November 15, 2010 pleading. In addition, he contends that appointment of new counsel is necessary because current PCR counsel erred in failing to call Applicant Stokes at the time of the

evidentiary hearing and belatedly attempting to supplement the record with an affidavit which the Court rejected. He contends that an intervening decision in the U.S. Supreme Court, Martinez v. Ryan, _ U.S. _, 2012 Westlaw 912950 (March 20, 2012), should allow for the replacement of current counsel at this stage to investigate and formulate whether current PCR counsel was ineffective in their unsuccessful strategic decision in failing to call Stokes as a witness.

After reviewing the recent pleadings, including the April 10, 2012 objections to the adoption of the proposed order, this Court then requested the counsel for the Respondent to submit a revised proposed order supplementing it with the additional case history and a denial of the objections and motion to appoint new counsel. On April 19, 2012, the Respondent submitted a revised proposed order. This Order follows and denies the Rule 59 motion in its entirety and the motion to appoint new PCR counsel.

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the Court erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been specifically requested by the Court. The Supreme Court of South Carolina initially gave this Court a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided this Court (and opposing counsel) with a proposed order of dismissal by email.¹ The basis for the State providing the

¹In the August 29, 2010 email to this court, counsel for Respondent stated:
 -To: Honorable L Casey Manning
 CC: Robert Lominack, Keir Weyble

unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Court subsequently requested opposing counsel on Applicant's behalf to also provide a proposed order to the Court which was done on October 1, 2010. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's initial broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent and ruled against their position. Applicant relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Supreme Court did not preclude a PCR hearing court's from requesting proposed orders from counsel and confirming them after review, but stated:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by this Court 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.

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.

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

This Court 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 Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that this Court was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that this Court performed acceptable procedures in preparation of the order under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme

Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicant's order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant 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 Court.

The Applicant acknowledges that the affidavit was submitted two weeks after the hearing

concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion 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 Applicant concerning the averments made in the belated affidavit. The Applicant 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 Applicant stated that the submission was made because "immediately after the 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 . . ." Applicant's Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent's counsel confirmed in an earlier pleading that the Applicant 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 Applicant's failure to testify at the hearing. This Court had found that it was evident at that time that the Applicant 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 Applicant.

This Court finds that the Applicant's affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was

properly rejected under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11. Under § 17-27-80, the Act states that "the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing." *Id.* It does not require this Court or any court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests. Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant's case in chief, counsel Lominack stated: "that concludes our testimony portion of the case." 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 Applicant called at that hearing when he asked counsel if they wanted "anything further" and the response by the counsel was "nothing further." 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 Applicant to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

The Applicant 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). 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." 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. PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony repudiates the substance of Stokes' later averments.

This Court finds 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 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. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15-p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes 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. 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. 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 Applicant 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. March 12, 1991 Tr.p. 6-14.

This Court is constrained to conclude that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. This 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.

Simply put the credibility of the Applicant, 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 this 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 Applicant would have opened himself up to impeachment and further testimony concerning the

issues. *Respondent's Post-Hearing Memorandum*, p. 44, n. 11.² This Court must agree with that assessment.

In the Order of Dismissal, this Court addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, this Court stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

their case in chief and on reply. Contrary to the assertions and characterization of counsel, he does 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.

Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that this Court reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that this Court mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and

specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - testified that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also *Order of Dismissal*, p. 32, footnote 8. These differences in the testimony of each witness were significant on the critical points.

While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at the capital sentencing proceeding, and he did not seem as concerned about the conflict issue." PCR Tr.p. 43, l. 19 - p. 44, l. 1. Bloom testified that he stressed to Sims from his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney client issue. However, Bloom reported that Sims kept saying don't worry about it and that Stokes had already waived it. Bloom testified that he stated that the hearing was necessary because of the other

consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information to Sims, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up about his demand for a motion hearing to Mr. Sims at a later time during a telephone call that also involved jury profiling. Bloom stated :

I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. *And I concluded that I just needed to sever any professional relationship to the case because -and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.*

PCR Tr.p. 45, l. 15- p. 46, l. 12 (*emphasis added*). On cross-examination, Mr. Bloom thought the discussion had occurred after April 15 and could have been either in May or June and the telephone call happened within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

This Court was faced with making a credibility determination concerning the existence of a discussion between counsel Sims and Mr. Bloom about a conflict hearing and waiver issue which was seen as one of substance - not one of memory. The Court recognized this factual dispute during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the two communications he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I—

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I *may* have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired of Applicant's counsel about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that this Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims recollections concerning his conversations with Mr. Bloom was different in a number of significant aspects. Sims testified that in the early stages of his representation that he had a discussion with Mr. Bloom about doing jury work for the defense and that Mr. Bloom provided him with some rudimentary information. Sims testified that his understanding was that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict

of interest based upon your prior prosecution?

A. I don't.

Q. You don't have any recollection?

A. I don't have any recollection of that.

Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

A. I - I - This has been over ten years ago, and I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

A. Yes, That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, this Court was able to assess the particular credibility of the witnesses, including the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of its substance prior to his own testimony, and Mr. Sims' credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what

did not occur] between two lawyers. In making the assessment, the Court concluded:

In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, *Order*, p.32, n. 8.

This Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. The motion to alter should be denied.

IV.

CONFLICT OF INTEREST AND WAIVER

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. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. 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. 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. ROA Tr.p. 1088-1090].³ 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. 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. 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

³At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA 1637-1638.

evidence would be kept out, but he wanted it kept out. 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. 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. PCR Tr.p. 98, l. 3-12.

The Applicant's present argument to alter and amend 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.

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.

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." *Order of Dismissal*, p. 30-31.

There is evidence at the PCR hearing to support this finding. 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. 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. *Order of Dismissal*, p. 31. Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105. 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).

The motion to alter and amend should be denied.

DENIAL OF MOTION TO APPOINT NEW PCR COUNSEL.

In his April 10, 2012 pleading, current appointed PCR counsel Keir Weyble and Robert Lominack seek an order relieving their appointment at this time and allow for appointment of new counsel. Current PCR counsel contend that the recent decision in Martinez v. Ryan, __ U.S. __, 2012 Westlaw 912950 (March 20, 2012) supports them being relieved as counsel in this setting

to allow for newly appointed counsel to investigate whether current PCR counsel was ineffective, particularly related to their decision to not call Stokes to testify at the PCR hearing. This Court has considered whether Martinez requires this new appointment within a state PCR action brought pursuant to S.C. Code Ann. §17-27-10, 160. Stokes current counsel seem to assert that the recent decision of the United States Supreme Court in Martinez, creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts PCR system. While the decision in Martinez does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance [trial] claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at *3. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. See id. at *16 (Scalia, J., dissenting) (noting that the reframing of the issue “avoid[ed] the Court’s need to confront the established rule that there is no right to counsel in collateral proceedings”). It appears that Martinez is only directed toward federal habeas proceedings brought pursuant to 28 U.S.C. § 2254 and is designed and intended to address issues that arise in that context. Further, it does not overrule the precedent of the South Carolina Supreme Court in Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding that an allegation that prior PCR counsel was ineffective is not per se a sufficient reason allowing for a successive PCR application). See e.g., Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the

constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal); Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996) (granting PCR where the defendant alleged ineffective assistance of PCR counsel due to so many procedural irregularities).

More importantly, Martinez does not require any state to hold a collateral PCR action within a PCR action with a double appointment of PCR counsel. This Court, under the discrete circumstances presented after the initial judgment was already entered, denies this extraordinary request to relieve current appointed PCR counsel and appoint new counsel.

CONCLUSION

For all the foregoing reasons, it is ORDERED

1. The Rule 59 motion to alter and/or amend is denied in its entirety.
2. The Motion to Relieve Current PCR counsel is DENIED.
3. The Motion to Appoint New PCR counsel is denied.

AND IT IS SO ORDERED this ____ day of _____, 2012.

L. CASEY MANNING
Presiding Judge

_____, South Carolina.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

COUNTY OF ORANGEBURG)

CASE NO.: 2001-CP-38-1240

SAMMIE LOUIS STOKES, #5069)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

Plaintiff's Attorney:

Robert E. Lominick, Bar No. 68802

Address:

PO Box 5508

Columbia, S.C. 29250

Phone: 803-771-7271 Fax 803-937-1707

E-mail: robert@lominacklaw.com Other: _____

Defendant's Attorney:

Donald J. Zelenka, Bar No. 5758

Address:

PO Box 11549

Columbia, S.C. 29211

Phone: 803-734-3601 Fax 803-734-4035

E-mail: agdzelenka@scag.gov Other: _____

☐ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)☒ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO**SECTION II: Motion/Order Type**☐ Written motion attached☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

April 19, 2012

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES, #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	ORDER DENYING
	)	RULE 59 MOTION AND DENYING
vs.	)	MOTION TO APPOINT NEW COUNSEL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before this Court pursuant to a November 15, 2010 Motion to Alter or Amend filed by Applicant. This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011. A hearing on the motion was held in Richland County on December 8, 2011. At the December 8, 2011 hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were court-appointed counsel Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order. The memorandums were timely submitted by both parties..

After thoroughly reviewing the memorandum and pleadings submitted by both parties, on

February 28, 2012, this Court held a brief status conference in chambers with Applicant's counsel Robert Lominack and Respondent's counsel Donald J. Zelenka. During the conference, this Court noted that he had concerns about the fact that the Applicant had not been called at the PCR hearing as a witness and then after the hearing an attempt was made to submit the Applicant's affidavit after the evidentiary record was complete. This Court stated that he intended to deny the consideration of the submitted affidavit when Stokes could have been called as a witness. At the status conference, Respondent's counsel was asked by the Court to provide the Court and opposing counsel with a proposed order denying the Rule 59 motion. The Court allowed opposing counsel 10 days to provide objections to the proposed order. Respondent's counsel provided this Court and opposing counsel an initial proposed order denying the Rule 59 motion on March 27, 2012.

On March 30, 2012, Applicant's counsel expressed by an email a concern whether the proposed order was responsive to the Court's intent from the chambers conference. On April 9, 2012, this Court, in an email through his law clerk, advised counsel of his intent to sign the March 28, 2012 proposed order and gave counsel further opportunity to place objections in the record.

On April 12, 2012, counsel for the Applicant filed objections to the adoption of the proposed order and an additional request to appoint counsel due to the recent decision in Martinez v. Ryan, __ U.S __, 2012 Westlaw 912950 (March 20, 2012) in a pleading dated April 10, 2012. In the April 12, 2012 objections, the Applicant incorporates his earlier assertions in the November 15, 2010 pleading. In addition, he contends that appointment of new counsel is necessary because current PCR counsel erred in failing to call Applicant Stokes at the time of the

evidentiary hearing and belatedly attempting to supplement the record with an affidavit which the Court rejected. He contends that an intervening decision in the U.S. Supreme Court, Martinez v. Ryan, _ U.S. __, 2012 Westlaw 912950 (March 20, 2012), should allow for the replacement of current counsel at this stage to investigate and formulate whether current PCR counsel was ineffective in their unsuccessful strategic decision in failing to call Stokes as a witness.

After reviewing the recent pleadings, including the April 10, 2012 objections to the adoption of the proposed order, this Court then requested the counsel for the Respondent to submit a revised proposed order supplementing it with the additional case history and a denial of the objections and motion to appoint new counsel. On April 19, 2012, the Respondent submitted a revised proposed order. This Order follows and denies the Rule 59 motion in its entirety and the motion to appoint new PCR counsel.

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the Court erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been specifically requested by the Court. The Supreme Court of South Carolina initially gave this Court a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided this Court (and opposing counsel) with a proposed order of dismissal by email.¹ The basis for the State providing the

¹In the August 29, 2010 email to this court, counsel for Respondent stated:
-To: Honorable L Casey Manning
CC: Robert Lominack, Keir Weyble

unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Court subsequently requested opposing counsel on Applicant's behalf to also provide a proposed order to the Court which was done on October 1, 2010. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's initial broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent and ruled against their position. Applicant relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Supreme Court did not preclude a PCR hearing court's from requesting proposed orders from counsel and confirming them after review, but stated:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by this Court 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.

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.

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

This Court 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 Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that this Court was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that this Court performed acceptable procedures in preparation of the order under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme

Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicants order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant 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 Court.

The Applicant acknowledges that the affidavit was submitted two weeks after the hearing

concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion 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 Applicant concerning the averments made in the belated affidavit. The Applicant 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 Applicant stated that the submission was made because "immediately after the 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 . . ." Applicant's Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent's counsel confirmed in an earlier pleading that the Applicant 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 Applicant's failure to testify at the hearing. This Court had found that it was evident at that time that the Applicant 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 Applicant.

This Court finds that the Applicant's affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was

properly rejected under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11. Under § 17-27-80, the Act states that “the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing.” *Id.* It does not require this Court or any court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests. Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant’s case in chief, counsel Lominack stated: “that concludes our testimony portion of the case.” 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 Applicant called at that hearing when he asked counsel if they wanted “anything further” and the response by the counsel was “nothing further.” 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 Applicant to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

The Applicant 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). 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." 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. PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony repudiates the substance of Stokes' later averments.

This Court finds 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 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. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15-p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes 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. 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. 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 Applicant 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. March 12, 1991 Tr.p. 6-14.

This Court is constrained to conclude that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. This 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.

Simply put the credibility of the Applicant, 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 this 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 Applicant would have opened himself up to impeachment and further testimony concerning the

issues. *Respondent's Post-Hearing Memorandum*, p. 44, n. 11.² This Court must agree with that assessment.

In the Order of Dismissal, this Court addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, this Court stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

their case in chief and on reply. Contrary to the assertions and characterization of counsel, he does 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.

Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that this Court reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that this Court mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and

specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - testified that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also *Order of Dismissal*, p. 32, footnote 8. These differences in the testimony of each witness were significant on the critical points.

While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at the capital sentencing proceeding, and he did not seem as concerned about the conflict issue." PCR Tr.p. 43, l. 19 - p. 44, l. 1. Bloom testified that he stressed to Sims from his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney client issue. However, Bloom reported that Sims kept saying don't worry about it and that Stokes had already waived it. Bloom testified that he stated that the hearing was necessary because of the other

consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information to Sims, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up about his demand for a motion hearing to Mr. Sims at a later time during a telephone call that also involved jury profiling. Bloom stated :

I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. *And I concluded that I just needed to sever any professional relationship to the case because -and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.*

PCR Tr.p. 45, l. 15- p. 46, l. 12 (*emphasis added*). On cross-examination, Mr. Bloom thought the discussion had occurred after April 15 and could have been either in May or June and the telephone call happened within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

This Court was faced with making a credibility determination concerning the existence of a discussion between counsel Sims and Mr. Bloom about a conflict hearing and waiver issue which was seen as one of substance - not one of memory. The Court recognized this factual dispute during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the two communications he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I –

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I *may* have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired of Applicant's counsel about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that this Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims recollections concerning his conversations with Mr. Bloom was different in a number of significant aspects. Sims testified that in the early stages of his representation that he had a discussion with Mr. Bloom about doing jury work for the defense and that Mr. Bloom provided him with some rudimentary information. Sims testified that his understanding was that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict

of interest based upon your prior prosecution?

A. I don't.

Q. You don't have any recollection?

A. I don't have any recollection of that.

Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

A. I - I- - This has been over ten years ago, and I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

A. Yes, That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, this Court was able to assess the particular credibility of the witnesses, including the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of its substance prior to his own testimony, and Mr. Sims credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what

did not occur] between two lawyers. In making the assessment, the Court concluded:

In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, *Order*, p.32, n. 8.

This Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. The motion to alter should be denied.

IV.

CONFLICT OF INTEREST AND WAIVER

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. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. 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. 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. ROA Tr.p. 1088-1090].³ 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. 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. 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

³At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA 1637-1638.

evidence would be kept out, but he wanted it kept out. 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. 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. PCR Tr.p. 98, l. 3-12.

The Applicant's present argument to alter and amend 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.

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.

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." *Order of Dismissal*, p. 30-31.

There is evidence at the PCR hearing to support this finding. 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. 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. *Order of Dismissal*, p. 31. Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105. 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).

The motion to alter and amend should be denied.

DENIAL OF MOTION TO APPOINT NEW PCR COUNSEL.

In his April 10, 2012 pleading, current appointed PCR counsel Keir Weyble and Robert Lominack seek an order relieving their appointment at this time and allow for appointment of new counsel. Current PCR counsel contend that the recent decision in Martinez v. Ryan, __ U.S __, 2012 Westlaw 912950 (March 20, 2012) supports them being relieved as counsel in this setting

to allow for newly appointed counsel to investigate whether current PCR counsel was ineffective, particularly related to their decision to not call Stokes to testify at the PCR hearing. This Court has considered whether Martinez requires this new appointment within a state PCR action brought pursuant to S.C. Code Ann. §17-27-10, 160. Stokes current counsel seem to assert that the recent decision of the United States Supreme Court in Martinez, creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts PCR system. While the decision in Martinez does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance [trial] claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at *3. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. See *id.* at *16 (Scalia, J., dissenting) (noting that the reframing of the issue “avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings”). It appears that Martinez is only directed toward federal habeas proceedings brought pursuant to 28 U.S.C. § 2254 and is designed and intended to address issues that arise in that context. Further, it does not overrule the precedent of the South Carolina Supreme Court in Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding that an allegation that prior PCR counsel was ineffective is not per se a sufficient reason allowing for a successive PCR application). See e.g., Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the

constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal); Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996) (granting PCR where the defendant alleged ineffective assistance of PCR counsel due to so many procedural irregularities).

More importantly, Martinez does not require any state to hold a collateral PCR action within a PCR action with a double appointment of PCR counsel. This Court, under the discrete circumstances presented after the initial judgment was already entered, denies this extraordinary request to relieve current appointed PCR counsel and appoint new counsel.

CONCLUSION

For all the foregoing reasons, it is ORDERED

1. The Rule 59 motion to alter and/or amend is denied in its entirety.
2. The Motion to Relieve Current PCR counsel is DENIED.
3. The Motion to Appoint New PCR counsel is denied.

AND IT IS SO ORDERED this ____ day of _____, 2012.

L. CASEY MANNING
Presiding Judge

_____, South Carolina.

THE CIRCUIT COURT OF SOUTH CAROLINA
FIFTH JUDICIAL CIRCUIT
1701 Main Street, Richland County Judicial Center
Columbia, South Carolina 29201

L. Casey Manning
Resident Judge
(803) 576-1773
(803) 576-1744 Fax

Reply to :
P.O. Box 192
Columbia, S.C. 29202



February 13, 2013

Winnifa B. Clark
Orangeburg County Clerk of Court
PO Box 9000
Orangeburg, SC 29116

FILED FOR RECORD
MAR 13 10 00 AM
CLERK OF COURT
ORANGEBURG, SC
2013 FEB 19 PM 12:49

Re: Filing

Dear Clerk:

Please find enclosed an Order signed by Judge Manning. Please file this Order Denying Rule 59 Motion.
Thank you.

Sincerely,

Adam Ribock
Law Clerk
Judge L. Casey Manning

2372

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

COUNTY OF ORANGEBURG)

CASE NO.: 2001-CP-38-1240

SAMMIE LOUIS STOKES, #5069)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

Plaintiff's Attorney:

Robert E. Lominick, Bar No. 68802

Address:

PO Box 5508

Columbia, S.C. 29250

Phone: 803-771-7271 Fax 803-937-1707

E-mail: robert@lominacklaw.com Other: _____

Defendant's Attorney:

Donald J. Zelenka, Bar No. 5758

Address:

PO Box 11549

Columbia, S.C. 29211

Phone: 803-734-3601 Fax 803-734-4035

E-mail: agdzelenka@scag.gov Other: _____

- ☐ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☒ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☐ NO**SECTION II: Motion/Order Type**

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ DefendantApril 19, 2012
Date submitted**SECTION III: Motion Fee**

- ☐ PAID - AMOUNT: \$ _____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
SAMMIE LOUIS STOKES, #5069	)	C/A No. 01-CP-38-1240
	)	
Applicant,	)	ORDER DENYING
	)	RULE 59 MOTION AND DENYING
vs.	)	MOTION TO APPOINT NEW COUNSEL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

FILED FOR RECORD
 2011 FEB 12 PM 12:53
 CLERK OF COURT
 ORANGEBURG COUNTY

This matter comes before this Court pursuant to a November 15, 2010 Motion to Alter or Amend filed by Applicant. This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011. A hearing on the motion was held in Richland County on December 8, 2011. At the December 8, 2011 hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were court-appointed counsel Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order. The memorandums were timely submitted by both parties..

After thoroughly reviewing the memorandum and pleadings submitted by both parties, on

February 28, 2012, this Court held a brief status conference in chambers with Applicant's counsel Robert Lominack and Respondent's counsel Donald J. Zelenka. During the conference, this Court noted that he had concerns about the fact that the Applicant had not been called at the PCR hearing as a witness and then after the hearing an attempt was made to submit the Applicant's affidavit after the evidentiary record was complete. This Court stated that he intended to deny the consideration of the submitted affidavit when Stokes could have been called as a witness. At the status conference, Respondent's counsel was asked by the Court to provide the Court and opposing counsel with a proposed order denying the Rule 59 motion. The Court allowed opposing counsel 10 days to provide objections to the proposed order. Respondent's counsel provided this Court and opposing counsel an initial proposed order denying the Rule 59 motion on March 27, 2012.

On March 30, 2012, Applicant's counsel expressed by an email a concern whether the proposed order was responsive to the Court's intent from the chambers conference. On April 9, 2012, this Court, in an email through his law clerk, advised counsel of his intent to sign the March 28, 2012 proposed order and gave counsel further opportunity to place objections in the record.

On April 12, 2012, counsel for the Applicant filed objections to the adoption of the proposed order and an additional request to appoint counsel due to the recent decision in Martinez v. Ryan, _ U.S. __, 2012 Westlaw 912950 (March 20, 2012) in a pleading dated April 10, 2012. In the April 12, 2012 objections, the Applicant incorporates his earlier assertions in the November 15, 2010 pleading. In addition, he contends that appointment of new counsel is necessary because current PCR counsel erred in failing to call Applicant Stokes at the time of the

evidentiary hearing and belatedly attempting to supplement the record with an affidavit which the Court rejected. He contends that an intervening decision in the U.S. Supreme Court, Martinez v. Ryan, _ U.S. _, 2012 Westlaw 912950 (March 20, 2012), should allow for the replacement of current counsel at this stage to investigate and formulate whether current PCR counsel was ineffective in their unsuccessful strategic decision in failing to call Stokes as a witness.

After reviewing the recent pleadings, including the April 10, 2012 objections to the adoption of the proposed order, this Court then requested the counsel for the Respondent to submit a revised proposed order supplementing it with the additional case history and a denial of the objections and motion to appoint new counsel. On April 19, 2012, the Respondent submitted a revised proposed order. This Order follows and denies the Rule 59 motion in its entirety and the motion to appoint new PCR counsel.

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the Court erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been specifically requested by the Court. The Supreme Court of South Carolina initially gave this Court a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided this Court (and opposing counsel) with a proposed order of dismissal by email.¹ The basis for the State providing the

¹In the August 29, 2010 email to this court, counsel for Respondent stated:
"To: Honorable L Casey Manning
CC: Robert Lominack, Keir Weyble

unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Court subsequently requested opposing counsel on Applicant's behalf to also provide a proposed order to the Court which was done on October 1, 2010. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's initial broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent and ruled against their position. Applicant relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Supreme Court did not preclude a PCR hearing court's from requesting proposed orders from counsel and confirming them after review, but stated:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the 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). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by this Court 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.

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.

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

This Court 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 Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that this Court was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that this Court performed acceptable procedures in preparation of the order under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing.

Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme

Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicants order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant 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 Court.

The Applicant acknowledges that the affidavit was submitted two weeks after the hearing

concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion 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 Applicant concerning the averments made in the belated affidavit. The Applicant 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 Applicant stated that the submission was made because "immediately after the 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 . . . " Applicant's Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent's counsel confirmed in an earlier pleading that the Applicant 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 Applicant's failure to testify at the hearing. This Court had found that it was evident at that time that the Applicant 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 Applicant.

This Court finds that the Applicant's affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was

properly rejected under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft.

11. Under § 17-27-80, the Act states that “the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing.” *Id.* It does not require this Court or any court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests.

Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant’s case in chief, counsel Lominack stated: “that concludes our testimony portion of the case.” 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 Applicant called at that hearing when he asked counsel if they wanted “anything further” and the response by the counsel was “nothing further.” 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 Applicant to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

The Applicant 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). 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." 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. PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony repudiates the substance of Stokes' later averments.

This Court finds 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 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. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15-p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes 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. 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. 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 Applicant 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. March 12, 1991 Tr.p. 6-14.

This Court is constrained to conclude that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. This 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.

Simply put the credibility of the Applicant, 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 this 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 Applicant would have opened himself up to impeachment and further testimony concerning the

issues. *Respondent's Post-Hearing Memorandum*, p. 44, n. 11.² This Court must agree with that assessment.

In the Order of Dismissal, this Court addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, this Court stated:

This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Order of Dismissal, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in

²In the State's Posthearing memorandum, the Respondent asserted:

"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."

their case in chief and on reply. Contrary to the assertions and characterization of counsel, he does 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.

Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that this Court reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that this Court mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and

specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - testified that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also *Order of Dismissal*, p. 32, footnote 8. These differences in the testimony of each witness were significant on the critical points.

While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at the capital sentencing proceeding, and he did not seem as concerned about the conflict issue." PCR Tr.p. 43, l. 19 - p. 44, l. 1. Bloom testified that he stressed to Sims from his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney client issue. However, Bloom reported that Sims kept saying don't worry about it and that Stokes had already waived it. Bloom testified that he stated that the hearing was necessary because of the other

consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information to Sims, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up about his demand for a motion hearing to Mr. Sims at a later time during a telephone call that also involved jury profiling. Bloom stated :

I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. *And I concluded that I just needed to sever any professional relationship to the case because —and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.*

PCR Tr.p. 45, l. 15- p. 46, l. 12 (*emphasis added*). On cross-examination, Mr. Bloom thought the discussion had occurred after April 15 and could have been either in May or June and the telephone call happened within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

This Court was faced with making a credibility determination concerning the existence of a discussion between counsel Sims and Mr. Bloom about a conflict hearing and waiver issue which was seen as one of substance - not one of memory. The Court recognized this factual dispute during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the two communications he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I -

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I *may* have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired of Applicant's counsel about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that this Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims recollections concerning his conversations with Mr. Bloom was different in a number of significant aspects. Sims testified that in the early stages of his representation that he had a discussion with Mr. Bloom about doing jury work for the defense and that Mr. Bloom provided him with some rudimentary information. Sims testified that his understanding was that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict

of interest based upon your prior prosecution?

A. I don't.

Q. You don't have any recollection?

A. I don't have any recollection of that.

Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

A. I - -I - - This has been over ten years ago, and I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

A. Yes, That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, this Court was able to assess the particular credibility of the witnesses, including the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of its substance prior to his own testimony, and Mr. Sims' credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what

did not occur] between two lawyers. In making the assessment, the Court concluded:

In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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. 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 at 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

Order of Dismissal, p. 35, n.10. (Emphasis added). See also, *Order*, p.32, n. 8.

This Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. The motion to alter should be denied.

IV.

CONFLICT OF INTEREST AND WAIVER

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. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. 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. 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. ROA Tr.p. 1088-1090].³ 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. 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. 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

³At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA 1637-1638.

evidence would be kept out, but he wanted it kept out. 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. 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. PCR Tr.p. 98, l. 3-12.

The Applicant's present argument to alter and amend 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.

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.

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." *Order of Dismissal*, p. 30-31.

There is evidence at the PCR hearing to support this finding. 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. 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. *Order of Dismissal*, p. 31. Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105. 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).

The motion to alter and amend should be denied.

DENIAL OF MOTION TO APPOINT NEW PCR COUNSEL.

In his April 10, 2012 pleading, current appointed PCR counsel Keir Weyble and Robert Lominack seek an order relieving their appointment at this time and allow for appointment of new counsel. Current PCR counsel contend that the recent decision in Martinez v. Ryan, __ U.S __, 2012 Westlaw 912950 (March 20, 2012) supports them being relieved as counsel in this setting

to allow for newly appointed counsel to investigate whether current PCR counsel was ineffective, particularly related to their decision to not call Stokes to testify at the PCR hearing. This Court has considered whether Martinez requires this new appointment within a state PCR action brought pursuant to S.C. Code Ann. §17-27-10, 160. Stokes current counsel seem to assert that the recent decision of the United States Supreme Court in Martinez, creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts PCR system. While the decision in Martinez does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance [trial] claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at *3. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. See id. at *16 (Scalia, J., dissenting) (noting that the reframing of the issue “avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings”). It appears that Martinez is only directed toward federal habeas proceedings brought pursuant to 28 U.S.C. § 2254 and is designed and intended to address issues that arise in that context. Further, it does not overrule the precedent of the South Carolina Supreme Court in Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding that an allegation that prior PCR counsel was ineffective is not per se a sufficient reason allowing for a successive PCR application). See e.g., Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the

constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal); Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996) (granting PCR where the defendant alleged ineffective assistance of PCR counsel due to so many procedural irregularities).

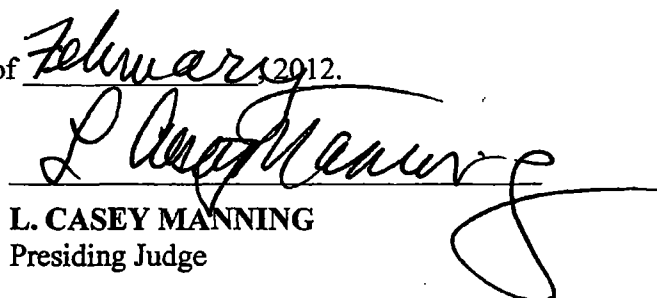
More importantly, Martinez does not require any state to hold a collateral PCR action within a PCR action with a double appointment of PCR counsel. This Court, under the discrete circumstances presented after the initial judgment was already entered, denies this extraordinary request to relieve current appointed PCR counsel and appoint new counsel.

CONCLUSION

For all the foregoing reasons, it is ORDERED

1. The Rule 59 motion to alter and/or amend is denied in its entirety.
2. The Motion to Relieve Current PCR counsel is DENIED.
3. The Motion to Appoint New PCR counsel is denied.

AND IT IS SO ORDERED this 13 day of February 2012.


L. CASEY MANNING
Presiding Judge

Columbia, South Carolina.

COUNTY OF ORANGEBURG.		FIRST JUDICIAL CIRCUIT
THE STATE,	)	CASE NO. 91-GS-38-190
versus	)	
	)	TRANSCRIPT OF RECORD
SAMMIE LEWIS STOKES,	)	TRIAL DATE:
<u>DEFENDANT</u>	)	MARCH 12, 1991

BEFORE:

THE HONORABLE JOHN H. SMITH, PRESIDING JUDGE
AND A JURY.

APPEARANCES:

THOMAS R. SIMS
ASSISTANT SOLICITOR
FOR THE STATE

REDDICK A. BOWMAN
PUBLIC DEFENDER
FOR THE DEFENDANT

HARRY A. WALKER (MRS.)
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1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
3	AUDREY ELAINE SMITH				
4	SOLICITOR SIMS	40		71	
5	MR. BOWMAN		47		
6	THOMASINA MILLER				
7	SOLICITOR SIMS	72			
8	ALLEN OAKLEY				
9	SOLICITOR SIMS	75			
10	MR. BOWMAN		81		
11	MARY MCINTOSH				
12	SOLICITOR SIMS	84			
13	VIRGINIA F. OTT				
14	SOLICITOR SIMS	87			
15	MARY ANN BRADLEY				
16	MR. BOWMAN	91			
17	SOLICITOR SIMS		94		
18	SPENCER UTSEY				
19	MR. BOWMAN	95			
20	SOLICITOR SIMS		100		
21	NELSON GOLDSMITH				
22	MR. BOWMAN	101			
23	SOLICITOR SIMS		105		
24	TERRY R. BENTON (IN CAMERA)				
25	THE COURT	139			

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1 DATE:

2 MARCH 12, 1991

3 THE COURT: Ladies and gentlemen, there's a matter
4 that we have got to put on the record here this morning,
5 and we've got to do that outside of your presence. We
6 need to make sure that everything is recorded properly,
7 and it involves a case in which you may be involved this
8 week, so we need to put it on the record, but we need to
9 do it without your being in here. So the only way I know
10 to do that is to ask that you ladies and gentlemen please
11 step out in the hall for a few minutes. As soon as we
12 complete it we'll call you right back in.

13 (WHEREUPON, THE FOLLOWING
14 TAKES PLACE OUT OF THE
15 PRESENCE OF THE JURY VENIRE.)

16 THE COURT: Would you put the name of this case on
17 the record, please.

18 SOLICITOR SIMS: Your Honor, the matter that we
19 were about to get in is Indictment Number 91-190, "The
20 State vs. Sammie Lewis Stokes." He is represented by Mr.
21 Bowman. The State is prepared to call this man for
22 trial. However, I believe Mr. Bowman has some
23 information that he will present to the Court at this
24 time.

25 THE COURT: All right, then, Mr. Bowman.

1 MR. BOWMAN: Your Honor, in the best interest of my
2 client, I will have to move for a continuance. He tells
3 me that he is not ready -- or indicates that he is not
4 ready for trial today. He also told me that he -- his
5 father was going to take some action to, I guess, get him
6 another lawyer. In addition to that, I would say that I
7 have subpoenaed four witnesses for him. Two of them are
8 here. One of them was -- one of them -- I guess we would
9 call him the third one -- a male was here yesterday and I
10 told him to be back this morning, and I don't see him
11 yet. I have sent my investigator, Mr. Brothers, to round
12 up Witnesses Number Three and Number Four, and I have
13 confidence that he will find them. But the two female
14 witnesses are here.

15 THE COURT: All right, sir. Are you prepared to go
16 forward with the defense of the case?

17 MR. BOWMAN: Yes, sir, but my client expresses a
18 desire not to today.

19 THE COURT: All right. What I would -- the State
20 is ready to go forward and you have your witnesses?

21 SOLICITOR SIMS: Yes, sir.

22 THE COURT: All right, then. How long has this
23 Defendant been in jail?

24 MR. BOWMAN: Since December Fifth.

25 THE COURT: Pardon me?

1 MR. BOWMAN: Since December Fifth.

2 THE COURT: Since December Fifth. Well, the case
3 is ready for trial. The defense counsel has prepared the
4 case and is ready to go forward, as has the State, and
5 the attorneys have told me earlier this morning that the
6 Defendant said he was going to refuse to come into the
7 courtroom. What we need to do, then, Mr. Bowman, is -- I
8 need for you to go and advise your Defendant that the
9 jury is out of the courtroom; that if he has anythings he
10 needs to state in regards to why he does not want to go
11 forward, he will need to come in here and put those on
12 the record. So if you will go and tell him that, and
13 that will be Step One. If he refuses to come in here,
14 then you can also tell him that if he refuses to come in
15 and state his reasons why he does not want to go forward,
16 then the case will proceed in his absence and he will be
17 tried in his absence, but that certainly we want him to
18 be here. It's his trial. If you will confer with him,
19 then, about that. Tell him I need for him to come in and
20 put on the record his reasons for not wanting to go
21 forward. If he has sufficient reasons why he does not
22 want to go forward, then the case will be continued. If
23 he does not, then we are going to proceed with the case,
24 and if he doesn't come in here we're going to proceed
25 with the case. So the case is going to go forward

1 regardless of that if he doesn't state sufficient grounds
2 for a continuance. So if you would please go and advise
3 him of that.

4 MR. BOWMAN: I'd be happy to, Your Honor.
5 (Defendant enters the courtroom.)

6 THE COURT: All right. May I have the indictment,
7 please, Solicitor. All right, then, Mr. Stokes, your
8 attorney has advised us that you do not wish to go
9 forward with the trial of your case today. Is that
10 correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: If you would go ahead and state your
13 reasons for that, please.

14 THE DEFENDANT: I want to change and get me a paid
15 lawyer.

16 THE COURT: All right. Well, do you -- have you
17 made any arrangements to hire a lawyer?

18 THE DEFENDANT: I was planning on doing today
19 before I came in here.

20 THE COURT: You were planning on doing it today.
21 Well, the problem is, of course, that you've been awaiting
22 trial since December the fifth. Your attorney has
23 prepared the defense of the case and subpoenaed
24 witnesses. The prosecution has got its witnesses here.
25 You obviously don't -- I wouldn't think that -- because

1 you've been incarcerated, that you have the money to be
2 able to hire a lawyer. Do you have the money to hire a
3 lawyer?

4 THE DEFENDANT: It's coming along, in progress.

5 THE COURT: Yes. Do you mean you have to depend on
6 other people to come up with the money?

7 THE DEFENDANT: I'm going to have a paid lawyer.

8 THE COURT: Yes. Well, we're going to go ahead and
9 proceed with the trial of your case. Now, let me explain
10 to you what that means. We're going to go ahead and
11 proceed with the trial of the case. We can proceed with
12 the trial of the case in one of two ways. We can do it
13 with your being present here and assisting your attorney,
14 or we can do it with you back in the holding cell back
15 there. That decision, of course, is one that has to be
16 made by you. The Supreme Court has approved either way.
17 If a Defendant refuses to be in the courtroom, then we're
18 not going to make you stay in the courtroom. If you want
19 to go back in the holding cell you can. They say that
20 that's the way we can operate. If you choose to leave
21 the courtroom and refuse to participate, then that's an
22 option that you have. Of course, the problem with doing
23 that is that then you don't know what happened at the
24 trial and you aren't able to assist your attorney at all,
25 and it really puts you at a -- obviously, at a real

1 disadvantage, being out of the courtroom when the trial
2 goes on. But those are your options. Obviously, it
3 would be in your best interest to stay here and
4 participate with your lawyer. If you do leave the
5 courtroom, the Supreme Court says you can leave it, but
6 don't complain to them on appeal. You just get convicted
7 and you go to jail and you don't have any -- you never
8 had a say in it, you see, as far as being in the
9 courtroom. But that's an option and we're not going to
10 chain you to the chair. That's obviously an option that
11 you have. However, the first method to -- obviously, and
12 the preferred method, and what you should do, in my
13 opinion, for your best interest is to be present here in
14 the courtroom during the trial of the case.

15 THE DEFENDANT: So you're making him be my lawyer
16 even if I don't want him to be my lawyer?

17 THE COURT: Pardon me. I didn't hear what you
18 said.

19 THE DEFENDANT: So you're making him be my lawyer
20 even if I don't want him to be my lawyer?

21 THE COURT: Yes. The reason is that the case was
22 scheduled for today and we've got to move forward with
23 the case today. We're not going to be able to put it off
24 to see if you might be able to hire someone else. Are
25 there any specific things that -- in regard to things

1 that you need him to do that he hasn't done that you
2 would like to tell me about?

3 THE DEFENDANT: No, I done discussed that with him.
4 I ain't got nothing else to say.

5 THE COURT: All right. Well, then, that's your
6 decision, but it can't do anything but work to your
7 disadvantage for your not to be here during your trial,
8 because it's sure not going to help you on appeal because
9 you weren't here. The Supreme Court said, as I said
10 before, that the trial can continue whether you are here
11 or not. It's going to make your situation that much
12 worse if you leave the courtroom. But we are getting
13 ready to pick the jury in just a few minutes. Certainly,
14 I would think you would want to have a say with your
15 lawyer in regard to which of these people you want to
16 serve on your jury and which ones you don't want to serve
17 on your jury.

18 THE DEFENDANT: I don't want him for my lawyer. If
19 I got to have him for my lawyer, let him go ahead and run
20 the show.

21 THE COURT: I'm sorry, I didn't hear the last thing
22 you said.

23 THE DEFENDANT: I don't want him for my lawyer.

24 THE COURT: Come here a minute and let me ask you
25 this, now. You're walking out of the courtroom, there,

1 back toward the holding cells. Is it your decision that
2 during the trial of your case that you do not want to be
3 in here to participate in this case?

4 THE DEFENDANT: I would like to have me another
5 lawyer.

6 THE COURT: I understand that, but I said -- under
7 our system you either have paid lawyers or appointed
8 lawyers, and you, so far anyway, have been unable to
9 afford a paid lawyer and ---

10 THE DEFENDANT: I'm working on that if y'all will
11 give me a chance.

12 THE COURT: Well, ---

13 THE DEFENDANT: I'm not going to be in here with
14 him.

15 THE COURT: All right. Well, any -- would you
16 state for the record, then, if you -- why it is that you
17 are dissatisfied with your appointed lawyer?

18 THE DEFENDANT: First of all, he don't never give
19 me a chance for me to talk to him and explain everything
20 to him, and he's suppose to have went and measured off
21 some yards and stuff for me.

22 REPORTER: And he what? I didn't understand the
23 last sentence.

24 THE DEFENDANT: He's suppose to have went and
25 measured off some yards for me from area to the next area.

1 Apparently, he ain't never got around to doing that, and
2 all that's very important, too. So he ain't doing his
3 job, so I ain't got to sit up here and listen ---

4 THE COURT: Apparently, he's contacted all of the
5 witnesses you ---

6 THE DEFENDANT: Yeah.

7 THE COURT: --- have told him about and they've
8 got the witnesses coming. Are there any other things that
9 you know of that he hasn't done?

10 THE DEFENDANT: Every time I get my witnesses to
11 tell him something, from what I was told, my witnesses
12 telling about, what they was telling him last Thursday
13 about, what they say isn't important, you know, so I ain't
14 got to sit up here and they ain't going to change, you
15 know. Y'all go ahead and have your trial.

16 THE COURT: All right, now let me tell you this.
17 You understand, then, you've got a right to be present,
18 and that once you leave ---

19 THE DEFENDANT: I don't want him to be my lawyer.
20 I can get me another lawyer.

21 THE COURT: You've already told me that. Once you
22 leave this courtroom, you understand this trial is going
23 to be continuing without you being in here. Do you
24 understand that?

25 THE DEFENDANT: Yeah, that's up to you all.

1 THE COURT: So as far as you're concerned, then,
2 you are giving up your right to a jury trial when you walk
3 out of this courtroom. do you understand that -- I mean,
4 to be present, and it's going to continue? The witnesses
5 are going to testify and it's obviously going to be to
6 your disadvantage. Do you understand that?

7 THE DEFENDANT: Well, they are.

8 THE COURT: All right.

9 THE DEFENDANT: It don't make no difference ---

10 THE COURT: All right, then. Anything further--
11 just a minute before you go. Anything further, then?

12 MR. BOWMAN: Your Honor, if I could, I'd like to--
13 could I address this issue of somebody telling his
14 witnesses that their testimony is not important?

15 THE COURT: Sure, Uh huh. Go ahead and do that.

16 MR. BOWMAN: Mr. Stokes was telling me that his
17 witnesses were here, they are Nelson Goldsmith and
18 Spencer Utsey, and my understanding of what he said to me
19 was that somebody in the Solicitor's office told them or
20 his female witnesses, Ms. Dixon and Ms. Bradley, that
21 they didn't have to come back and that this meeting took
22 place in some room. I didn't meet with Mr. Goldsmith or
23 Mr. Utsey in a room, and I certainly didn't tell them
24 that their testimony was unimportant. In fact, I told
25 them that I would need them back this week as witnesses.

1 THE COURT: All right. Anything else, then?
2 Anything else that you would like to put on the record,
3 sir?

4 THE DEFENDANT: No.

5 THE COURT: All right, then. You can take him back
6 to the holding cell if he refuses to stay in here.

7 (WHEREUPON, THE DEFENDANT LEFT THE COURTROOM TO RETURN TO
8 HIS HOLDING CELL.)

9 THE COURT: All right, then, we will go ahead and
10 proceed with the trial of the case. Go ahead and bring
11 in our jury panel, please.

12 (WHEREUPON, THE JURY VENIRE
13 RETURNS TO THE COURTROOM.)

14 THE COURT: Ladies and gentlemen of the jury panel,
15 our first case for trial this morning is the case of "The
16 State vs. Sammie L. Stokes." Mr. Stokes is accused in
17 this indictment with the crime of assault and battery
18 with intent to kill. It is alleged that on December the
19 second he committed AN assault and battery with intent to
20 kill in regard to Audrey Smith. Now, I will tell you
21 this, that Mr. Sammie Stokes is not present at this time
22 for the trial of this case. You, ladies and gentlemen,
23 though, need to understand that the fact that a Defendant
24 is not present cannot and must not be considered against
25 him under any circumstances whatsoever. A person does

1 not forfeit their rights to a fair and impartial trial
2 simply because they are not present at the time of that
3 trial. So, then, ladies and gentlemen, you are not to
4 concern yourself at all in regard to why the Defendant is
5 not here. You simply would focus your attention on the
6 evidence in the case and in regard to insuring that he
7 receives a fair and impartial trial.

8 Now, we would first ask if there is any member of
9 the jury panel who is related to or anyone who happens to
10 be acquainted with an individual by the name of Sammie L.
11 Stokes. If so, please stand, if you know someone by that
12 name.

13 (NEGATIVE RESPONSE FROM JURY PANEL.)

14 Next, I would ask Ms. Audrey Smith if you would
15 please stand and turn and face the jury panel. Any member
16 of the jury panel who is acquainted with or related to
17 Audrey Smith. If so, please stand. Does anyone know Ms.
18 Smith?

19 (NEGATIVE RESPONSE FROM JURY PANEL.)

20 You may be seated. All right, Solicitor, please
21 give the names of your prospective witnesses.

22 SOLICITOR SIMS: Mr. Allen Oakley ---

23 THE COURT: If they are in the courtroom, please
24 stand.

25 SOLICITOR SIMS: --- Mary McIntosh, Ms. Virginia

1 Ott, Ms. Thomasina Miller. Those are the witnesses, Your
2 Honor.

3 THE COURT: All right, then. You all may be
4 seated, then. I ask if there is any member of the jury
5 panel who is acquainted with or related to any of those
6 persons whose names were called out. If so, please stand.
7 (NEGATIVE RESPONSE FROM JURY PANEL.)

8 Is there anyone who happens to know anything about
9 this particular case?
10 (NEGATIVE RESPONSE FROM JURY PANEL.)

11 Is there anyone who has expressed or formed any
12 opinion about the case or about the guilt or innocence of
13 the Defendant?
14 (NEGATIVE RESPONSE FROM JURY PANEL.)

15 Is there anyone who has any bias or prejudice in
16 connection with this case because of the nature of this
17 charge, assault and battery with intent to kill, or
18 because of anyone associated with the case?
19 (NEGATIVE RESPONSE FROM JURY PANEL.)

20 Is there anyone who knows of any reason why you
21 could not give a fair and impartial trial to either the
22 State or to the Defendant? If so, please stand.
23 (NEGATIVE RESPONSE FROM JURY PANEL.)

24 Is there any member of the jury panel who is in any
25 way associated with any law enforcement agency or

1 organization, whether it be as a voluntary policeman or a
2 part of what's known as a sheriff's posse, or it may be
3 that you or someone in your family is currently or has
4 previously been employed by any law enforcement agency?
5 If so, please stand.

6 All right, sir, your name, please.

7 JUROR: Johnson. I have a daughter who is in law
8 enforcement in Charleston.

9 THE COURT: All right, then. Thank you very much,
10 sir. You may be seated. Anyone who ---

11 MR. BOWMAN: Was that Mr. Johnson, Your Honor?

12 THE COURT: Yes, uh huh.

13 MR. BOWMAN: Marvin.

14 THE COURT: Anyone else, then?

15 (NEGATIVE RESPONSE FROM JURY PANEL.)

16 THE COURT: Any additional -- well, let me ask you
17 this. Is there any member of the jury panel who has been
18 employed by -- ever been employed by anyone in the
19 Solicitor's office or the Public Defender's office?

20 (NEGATIVE RESPONSE FROM JURY PANEL.)

21 Is there any additional questions on behalf of the
22 State?

23 SOLICITOR SIMS: Not on behalf of the State, Your
24 Honor.

25 THE COURT: All right, on behalf of the Defendant?

1 MR. BOWMAN: Your Honor, just one additional one.
2 If anybody has been a client of Mr. Thomas Sims in his law
3 practice?

4 THE COURT: Yes. Is there anyone who has ever been
5 a client of Mr. Thomas Sims in his law practice? If so,
6 please stand.

7 (NEGATIVE RESPONSE FROM JURY PANEL.)

8 THE COURT: All right, then, if you would, please
9 give us a jury, Mr. Clerk.

10 CLERK: Does the State waive the presebce if the
11 jury boy allow the clerk to draw it?

12 SOLICITOR SIMS: The State does.

13 CLERK: Defense?

14 MR. BOWMAN: The Defense waives.

15 CLERK: Thank you. Juror Number 54, Patricia
16 Martin. Come around, please, ma'am.

17 THE COURT: The strikes will be five and five on
18 this, please.

19 CLERK: I have Juror Number 54, Ms. Martin. What
20 says the State?

21 SOLICITOR SIMS: Present the juror.

22 CLERK: Defense?

23 MR. BOWMAN: Please excuse the juror.

24 CLERK: Excused by the Defense. Juror Number 74,
25 Frank Shaw. Mr. Shaw, come around, please. I have Juror

1 Number 74, Mr. Shaw. What says the State?

2 SOLICITOR SIMS: Present the juror.

3 CLERK: Defense?

4 MR. BOWMAN: Please seat the juror.

5 CLERK: Have a seat in the jury box, please, Mr.
6 Shaw. Juror Number 83, Ada Tennet. Ms. Tennet, come
7 around, please. I have Juror Number 83, Ms. Tennet. What
8 says the State?

9 SOLICITOR SIMS: Present the juror.

10 CLERK: Defense?

11 MR. BOWMAN: Please seat the juror.

12 CLERK: Have a seat in the jury box, please, ma'am.
13 Juror Number 10, Alice Blume Nelson. Ms. Nelson, come
14 around, please. I have Juror Number 10, Ms. Nelson.
15 What says the State?

16 SOLICITOR SIMS: Present the juror.

17 CLERK: Defense?

18 MR. BOWMAN: Please seat the juror.

19 CLERK: Have a seat in the jury box, please, ma'am.
20 Juror Number 84, Dorothy Thomas. Ms. Thomas, come
21 around, please. I have Juror Number 84, Ms. Thomas.
22 What says the State?

23 SOLICITOR SIMS: Present the juror.

24 CLERK: Defense?

25 MR. BOWMAN: Please excuse the juror.

1 CLERK: Excused by the Defense. Please have a seat
2 back in the audience. Juror Number 11, Laconya Boneparte.
3 Ms. Bonaparte, come around, please. I have Juror Number
4 11, Ms. Bonaparte. What says the State?

5 SOLICITOR SIMS: Present the juror.

6 CLERK: Defense?

7 MR. BOWMAN: Please seat the juror.

8 CLERK: Have a seat in the jury box, please, ma'am.
9 Juror Number 80, Kim Smoak. Ms. Smoak, come around,
10 please. I have Juror Number 80, Ms. Smoak. What says
11 the State?

12 SOLICITOR SIMS: Present the juror.

13 CLERK: Defense?

14 MR. BOWMAN: Please excuse the juror.

15 CLERK: Excused by the Defense. Juror Number 21,
16 Julius Davis. Mr. Davis, come around, please. I have
17 Juror Number 21, Mr. Davis. What says the State?

18 SOLICITOR SIMS: Present the juror.

19 CLERK: Defense?

20 MR. BOWMAN: Please seat the juror.

21 CLERK: Have a seat in the jury box, please. Juror
22 Number 87, Martha Thompson. Ms. Thompson, come around,
23 please. I have Juror Number 87, Ms. Thompson. What says
24 the State?

25 SOLICITOR SIMS: Present the juror.

1 CLERK: Defense?

2 MR. BOWMAN: Please seat the juror.

3 CLERK: Have a seat in the jury box, please, ma'am.
4 Juror Number 95, George Zeigler. Mr. Zeigler, come
5 around, please. I have Juror Number 95, George Zeigler.
6 What says the State?

7 SOLICITOR SIMS: Present the juror.

8 CLERK: Defense?

9 MR. BOWMAN: Please seat the juror.

10 CLERK: Have a seat in the jury box, please, Mr.
11 Zeigler. Juror Number 13, Alfunza Brooks. Mr. Brooks,
12 come around, please. I have Juror Number 13, Mr. Brooks.
13 What says the State?

14 SOLICITOR SIMS: Excuse the juror.

15 CLERK: Excused by the State. Have a seat back in
16 the audience, please. Juror Number 27, Emmett Fields, Jr.
17 Mr. Fields, come around, please. I have Juror Number 27,
18 Mr. Fields. What says the State?

19 SOLICITOR SIMS: Present the juror.

20 CLERK: Defense?

21 MR. BOWMAN: Please seat the juror.

22 CLERK: Have a seat in the jury box, sir. Juror
23 Number 7, John Baxter. Mr. Baxter, come around, please.
24 I have Juror Number 7, Mr. Baxter. What says the State?

25 SOLICITOR SIMS: Present the juror.

1 CLERK: Defense?

2 MR. BOWMAN: Please seat the juror.

3 CLERK: Have a seat in the jury box, please. Juror
4 Number 71, Jack Royal, Jr. Mr. Royal, come around,
5 please. I have Juror Number 71, Mr. Royal. What says
6 the State?

7 SOLICITOR SIMS: Present the juror.

8 CLERK: Defense?

9 MR. BOWMAN: Please seat the juror.

10 CLERK: Have a seat in the jury box, please, sir.
11 Juror Number 40, Betty Jamison. Ms. Jamison, come
12 around, please.

13 THE COURT: Ms. Tennet, I'd like for you to serve
14 as my forelady. Would you please come back down here, and
15 they will show you which chair you should sit in.

16 CLERK: I have Juror Number 40, Ms. Jamison. What
17 says the State?

18 SOLICITOR SIMS: Present the juror.

19 CLERK: Defense?

20 MR. BOWMAN: Please seat the juror.

21 CLERK: Have a seat in the jury box, please, ma'am.
22 Juror Number 45, Lula Johnson. Ms. Johnson, come around,
23 please. I have Juror Number 45, Ms. Johnson. What says
24 the State?

25 SOLICITOR SIMS: Present the juror.

1 CLERK: Defense?

2 MR. BOWMAN: Please seat the juror.

3 CLERK: Have a seat in the jury box, Ms. Johnson.

4 THE COURT: Let's have an alternate, too, please,
5 sir.

6 CLERK: Juror Number 56, Jimmy McCollum. Mr.
7 McCollum, come around, please. I have Juror Number 56.
8 What says the State?

9 SOLICITOR SIMS: Present the juror.

10 CLERK: Defense?

11 MR. BOWMAN: Please excuse the juror.

12 CLERK: Excused by the Defense. Juror Number 91,
13 Horace White. Mr. White, come around, please. I have
14 Juror Number 91, Mr. White. What says the State?

15 SOLICITOR SIMS: Present the juror.

16 CLERK: Defense?

17 MR. BOWMAN: Please seat the juror.

18 CLERK: Have a seat in the jury box, please, sir.

19 THE COURT: All right, then. Ladies and gentlemen,
20 those not selected on this case, I will excuse you at
21 this time, but again, I'll need to ask that you come back
22 at two thirty. If we can pick a jury at two thirty we
23 will do it; if not, then we will excuse you at that time.
24 Thank you very much. You are free, then, until two
25 thirty.

1 All right, ladies and gentlemen of the jury panel,
2 we have some preliminary matters that we need to undertake
3 before we get started with the trial of your case, so
4 while we are doing that I'll ask that you please step to
5 your jury room. They'll have some refreshments for you,
6 if you will just follow the bailiff right here behind
7 you, please.

8 (WHEREUPON, THE FOLLOWING
9 TAKES PLACE OUT OF THE
10 PRESENCE OF THE JURY PANEL.)

11 THE COURT: I believe you had some matters that you
12 wanted to put on the record in regards to your
13 representation of the Defendant.

14 MR. BOWMAN: Yes, sir. If it please the Court, I
15 would at this time. My client said -- I think indicated
16 that I had -- he had difficulty talking with me and I
17 would say that my records, which I keep on the outside of
18 my file folders, indicate that I had a conference with him
19 in jail on January the fourth, nineteen ninety-one, and
20 then on the tenth of -- January tenth, nineteen ninety-
21 one, I had another conference in jail with him regarding
22 the progress on a bond reduction. On the seventeenth of
23 January I received a call from him in my office and we
24 talked again for something not less than a tenth of an
25 hour. I keep my records in tenths of an hour. On the

1 eighteenth of January he had another conference with me in
2 the jail when he told me about certain matters concerning
3 the charges, and then on the twenty-fourth of January we
4 were again together when I presented him for a bond -- on
5 a motion for a bond reduction, which was denied. Then on
6 February the fifth, nineteen ninety-one I had another
7 conference in him -- conference with him in the jail, at
8 which time we discussed the preliminary hearing, which was
9 then set for February the twenty-first, nineteen ninety-
10 one. I received another call from him on the day that--
11 on February the twenty-seventh, nineteen ninety-one, which
12 would have been about a week after the preliminary
13 hearing, which we did in Branchville on Thursday, February
14 the twenty-first. I have other notes of other
15 conferences, discussions with him, at which time he told
16 me of his progress on getting the addresses -- address of
17 one of his witnesses, Mary Ann Bradley. I've done the
18 subpoenas for his witnesses there, who are Mary Ann
19 Bradley, Johnicia Dixon, Nelson Goldsmith and Spencer
20 Utsey. With regard to Mr. Stokes', my client's, statement
21 that somebody told his witnesses that what they had to say
22 was not very important, again he indicated that came from
23 -- in some meeting in some room in the court house. I did
24 not have a meeting with them in the court house, and it
25 appeared to me that he was talking about somebody, maybe

1 from the Solicitor's office telling his witnesses that,
2 and really, that -- he said that was oriented towards
3 Johnicia Dixon and Mary Ann Bradley. In addition, Your
4 Honor, I would state for the record that in addition to
5 subpoenaing his witnesses for trial last week, I re-
6 subpoenaed all of his witnesses for this week and have
7 proofs of service by my investigator, showing that he has
8 -- he has served the subpoenas. That fact is bolstered
9 by the fact that one of -- I saw at least one of the
10 witnesses yesterday, Mr. Goldsmith, and I told him that he
11 should leave and return this morning, due to the fact that
12 the trial was set for Tuesday morning. And I have seen
13 two of the female witnesses in the hall this morning, Ms.
14 Dixon and Ms. Bradley.

15 THE COURT: All right, sir, fine. Thank you for
16 putting that on the record. And what I'd like for you to
17 do, Mr. Bowman, and after -- we've got some other
18 preliminary matters, but once those are completed I'd
19 like for you to again go to the -- where the Defendant is
20 located here in his holding cell and tell him that we
21 have selected the jury, the Judge asked you to go and
22 tell him that, and to tell him that once again we
23 encourage him to come into the courtroom and be present
24 during the trial of his case. And what I'd like for you
25 to do as well, during each break in this case I'd like

1 for you go and repeat that to the Defendant, and if in
2 any way he evidences that he would like to come back into
3 the courtroom or would like to ask any questions or
4 confer with you about any part of the trial of the case,
5 I want you to please give him every opportunity to do
6 that. And likewise, if he would like to confer with me
7 about any matters, please tell him that we are free to do
8 so. So if you would please do that at each stage of the
9 case, and then, to come back in and put on the record
10 what his responses were in that regard, please.

11 MR. BOWMAN: Your Honor, I'll be happy to ---

12 THE COURT: Without violating any attorney-client
13 relationship, but just whether he agrees to come into the
14 courtroom or doesn't agree to come in.

15 MR. BOWMAN: I will do that, Your Honor.

16 THE COURT: All right, sir, fine.

17 MR. BOWMAN: At this time, I have some motions.

18 THE COURT: All right, sir, certainly.

19 MR. BOWMAN: The first would be a motion to
20 suppress a note that was provided to me as a part of our
21 discovery process. It is an unsigned note, and if the
22 State intends to use it at trial, I would move to suppress
23 it as hearsay and as -- there being no proof as to where
24 it came from.

25 THE COURT: All right, what about the note, then,

1 Mr. Sims?

2 SOLICITOR SIMS: Your Honor, the letter that he
3 speaks of was a letter that was mailed to my client -- to
4 the victim by the Defendant from the jail, and we have the
5 envelope that it was mailed in with the stamp on the back
6 of the envelope, and it came from the Orangeburg Calhoun
7 Regional Detention Center.

8 THE COURT: Well, do you have anyone who can
9 testify in regard to the authenticity of the handwriting?

10 SOLICITOR SIMS: Ms. Smith has seen his handwriting
11 and says that this is his handwriting.

12 THE COURT: All right. All right, then, well if
13 they lay, of course, the proper foundations for it, then
14 it would be admissible if it's relevant to any of the
15 issues in the case.

16 MR. BOWMAN: Well, Your Honor, aside from the issue
17 of whether Ms. Smith has any special training in
18 handwriting analysis, I don't think there is anything to
19 show that this was not maybe a prank by another detainee
20 at the jail. But, in addition to that, this letter -- I
21 referred to it as a note. It does appear to be a letter.
22 It refers to a prior incident involving my client and we
23 think that it's the Defense's position that under State
24 vs. Peak that this would be inadmissible because it would
25 tend to show that my client is guilty of this crime

1 because of his involvement in a prior incident of assault
2 on the victim.

3 THE COURT: All right, then, what about that, Mr.
4 Sims?

5 SOLICITOR SIMS: Your Honor, there was a prior
6 conviction against the Defendant for assault and battery
7 of a high and aggravated nature wherein he physically
8 stabbed her in this area, and held her at bay in a loft
9 in a house, and the State feels that it is relevant to
10 show, because there is one area in her testimony where
11 there -- she will state that they were in a park and she
12 allowed him to have sexual intercourse with her, and her
13 reason for doing that was because of her fear which he
14 had already at one time perpetuated this gross violence
15 against her, and she felt that she was in that same
16 danger. And then, subsequent to that, the additional
17 acts of violence were perpetuated against her. We feel
18 that it is definitely relevant and comes within that
19 narrow exception in terms of prior bad acts that have
20 been perpetuated by a Defendant against a victim in a
21 case.

22 THE COURT: Well, how long ago was that?

23 SOLICITOR SIMS: In eighty-seven.

24 THE COURT: In eighty-seven?

25 SOLICITOR SIMS: Yes, sir.

1 THE COURT: Well, I think that's going -- I think
2 that is too remote in regard to the issue. Under State v.
3 Lyle you can admit evidence of previous actions in other
4 crimes if it goes to show motive or intent or lack of
5 mistake. As I understand it, this witness is going to
6 testify directly as to matters that she contends that he
7 did in this instance, and that was some three years or so
8 ago, and it has a high -- it is highly prejudicial. I
9 don't -- I would exclude it at this point. It may become
10 relevant later, but it's just too prejudicial at this
11 point to allow in an attack three years previous. What
12 had their relationship been since that time?

13 SOLICITOR SIMS: They have not really had a
14 relationship. He's been away, and then when he came --
15 was released -- he began to get back, or attempt to get
16 back involved with her. That's my understanding of the
17 nature of that relationship.

18 THE COURT: Yes. I think that that would be too
19 remote in time, so I would not be -- you would not be able
20 to put that into evidence. Now, in regard to that note,
21 though, it may be that -- that different portions -- that
22 that part can be deleted, or the document itself not be
23 put in, but she could testify as to other matters, if they
24 are relevant. Again, I haven't read the note and I need
25 to take a look at it. Perhaps I should look at it now.

1 All of that is rele- -- is tied into that. There isn't
2 any admission in here about his having committed any
3 crime. I -- it should be excluded. I don't know how we
4 could separate those matters out.

5 SOLICITOR SIMS: I don't think it could be redacted
6 either.

7 THE COURT: It could be used for possible
8 impeachment if he should testify. It's looks right
9 remote at this time. All right, then, anything further,
10 Mr. Bowman?

11 MR. BOWMAN: Yes, Your Honor, at this time I would
12 also move to suppress any testimony that would amount to a
13 medical opinion as to Ms. Smith's injuries given by
14 people that are not qualified to give such expert
15 testimony.

16 THE COURT: And what -- be more specific about
17 that.

18 MR. BOWMAN: Well, there's testimony about the
19 extent of her injuries, like, describing them in medical
20 terminologies such as third degree burns that would call
21 for a medical opinion or a medical conclusion. Anything
22 of that specific nature we would think would have to be
23 given by a person qualified to give such an opinion.

24 SOLICITOR SIMS: Your Honor, we have three people
25 who are employed -- were employed at the time by the EMS.

1 They definitely can testify as to what they observed and
2 what they treated her for, and what their treatment
3 consisted of during the time of getting her from
4 Branchville and taking her to the hospital.

5 THE COURT: Yes, I would think they have sufficient
6 training. Of course, that would have to be established.

7 SOLICITOR SIMS: The other thing is that, and I
8 believe that the witness, the victim, herself, can testify
9 as to her stay in the hospital and where she was located
10 in the hospital and how long she stayed in the hospital
11 when she was treated.

12 THE COURT: Yes, sir, certainly. Yes, sir.

13 MR. BOWMAN: The State's testimony would not go
14 beyond those things, then? Is that the understanding?

15 THE COURT: Apparently not. All right, anything
16 else?

17 MR. BOWMAN: Yes, sir, one last thing, we filed the
18 usual Rule For Discovery under the Criminal Practice Rule
19 Five and a Brady Motion, and we have not received any
20 information as to whether any of the State's witnesses
21 have prior criminal records.

22 THE COURT: All right, sir.

23 SOLICITOR SIMS: We'll have to get a records check.

24 THE COURT: Yes, just run a rap sheet on them then,
25 please. All right, then.

1 MR. BOWMAN: And if it's convenient, I would like
2 a short break to go and talk to my client and see if he
3 wants to come back in.

4 THE COURT: Yes, I would like for you to do that,
5 then. Anything further, Mr. Sims? Anything you have,
6 sir?

7 SOLICITOR SIMS: Nothing.

8 THE COURT: All right, then, if you would, please
9 go ahead and confer, then.

10 (WHEREON, THE COURT TOOK
11 A SHORT BREAK WHILE MR. BOWMAN
12 CONFERRED WITH THE DEFENDANT.)

13 MR. BOWMAN: Your Honor, my client says that he
14 wanted me to say for him that he still wants the
15 opportunity to hire a paid lawyer.

16 THE COURT: All right, sir. Did you tell him,
17 though, that he certainly has the right to come back in
18 the courtroom and participate?

19 MR. BOWMAN: Yes, sir. I told him that he had the
20 right to come back in, that we had selected a jury, and
21 that you had sent me out there to tell him that you
22 wanted him back in the courtroom, and that he certainly
23 could come back.

24 THE COURT: All right, sir, and he has refused to
25 do that?

1 MR. BOWMAN: Yes, sir. He indicates that.

2 THE COURT: All right, then, we'll go ahead and
3 proceed. Please bring in ---

4 SOLICITOR SIMS: Your Honor, I just wanted to clear
5 up one thing.

6 THE COURT: Yes, sir.

7 SOLICITOR SIMS: There will be testimony about a
8 letter, but it will not be the letter that Mr. Bowman is
9 referring to. My client indicated -- I keep calling her
10 my client. The victim indicated that on the night in
11 question he told her that he had a letter that he wanted
12 her to read, and when she was walking with him and read
13 that letter, the letter indicated that he was going to
14 kill her, and after she read it, he took it from her and
15 said, "I know what you'll do with it, go straight to the
16 police."

17 THE COURT: All right, sir.

18 SOLICITOR SIMS: That's not the same letter. I
19 just wanted to clear that up.

20 THE COURT: Certainly. All right, then, please
21 bring in our jury panel.

22 (WHEREUPON, THE JURY PANEL
23 RETURNS TO THE COURTROOM.)

24 THE COURT: All right, Mr. Clerk, if you would
25 please swear our jury, please.

1 (WHEREUPON, THE JURY PANEL
2 IS DULY SWORN.)

3 THE COURT: All right, please be seated, and we'll
4 begin with our opening statements, Mr. Sims.

5 OPENING STATEMENT BY SOLICITOR SIMS

6 Good morning, Madam Forelady, and ladies and
7 gentlemen of the jury. My name is Thomas Sims and I am
8 the Deputy Solicitor for the First Judicial Circuit. The
9 First Circuit covers Orangeburg, Dorchester and Calhoun
10 Counties.

11 Now, the Judge read you what we call an indictment,
12 and I will tell you at this point that an indictment is
13 not evidence. It is simply the way in which we get our
14 system of jurisprudence moving. The evidence in any
15 criminal trial comes to you from the stand, and this is
16 the stand here. The witnesses are going to be called,
17 they will swear, and they will take an oath, and they will
18 tell you what their involvement in this matter is. Now,
19 the State has charged the Defendant, Sammie Lee Stokes,
20 with assault and battery with intent to kill. We further
21 allege that it happened on December second, nineteen
22 ninety, in Orangeburg County.

23 Now, the State has the burden of proof, and we have
24 to prove all of the evidence of that crime beyond a
25 reasonable doubt. And how do we do that? We do that by

1 presenting witnesses who were involved with the crime
2 when it happened back on December second. Each witness
3 will come to you -- as I stated, will come to you and
4 they will sit in that chair and they will tell you what
5 they did or how they were involved in this crime. Now,
6 Madam Forelady, and ladies and gentlemen of the jury, I
7 want to say at the outset that there is nothing mystical
8 or magical, or fanciful, there's no special requirement
9 that you have to have as a juror to be seated on a jury.
10 The only thing that you have to do is to use your common
11 sense. Use your common sense. Listen to the evidence
12 and make your decision based upon the evidence.

13 I would also say to you that this is not
14 television. This is the real world. This is not L.A.
15 Law, Matlock or Perry Mason. This is the real world, and
16 you are going to be faced with real world situations, and
17 all you have to do in order to determine the guilt or the
18 innocence of the Defendant is to utilize your common
19 sense, and that's all we ask you to do. Whenever I
20 practice before a jury, you have to try to give them some
21 idea in terms of what this stage of the trial is about.
22 And this is like the opening, or the beginning. And, you
23 know, when you go to K-mart or Roses or one of the other
24 stores and you buy one of those puzzles, one of those five
25 hundred piece puzzles, before you even open the box there

1 is a picture of how that puzzle will be once you open the
2 box and put all the pieces together. Well, what we are
3 giving you now is what we call the picture, an overview.
4 And the State has alleged that the Defendant, on December
5 second, nineteen ninety, committed the crime of assault
6 and battery with intent to kill against Audrey Smith.
7 That's the opening, that's the picture. Now, we've got
8 the box open, so we have to put the pieces together, and
9 each one of the witnesses will represent a piece of the
10 puzzle. So Madam Forelady, at the end of the trial, once
11 all of the pieces have been put together I'll stand right
12 here again before you and I'll ask you to return a verdict
13 of guilty against the Defendant. Thank you.

14 THE COURT: All right, then, Mr. Bowman, you may
15 proceed.

16 MR. BOWMAN: Thank you, Your Honor, may it please
17 the Court.

18 THE COURT: Yes, sir.

19 MR. BOWMAN: Mr. Sims.

20 SOLICITOR SIMS: Mr. Bowman.

21 OPENING STATEMENT BY MR. BOWMAN

22 Ladies and gentlemen, my name is Reddick Bowman.
23 I'm the Public Defender for Orangeburg County. My
24 involvement in this case signifies that somebody acting
25 on behalf of the Court has determined that my client,

1 Sammie Stokes, is without sufficient money to hire an
2 attorney either from the local Bar or from any attorney
3 in the State, for that matter, and I've been appointed to
4 be his attorney in this case. It's a fundamental part of
5 our system of criminal law that when a person comes into
6 Court charged with a crime such as my client has that he
7 is entitled to have an attorney -- this is a right
8 guaranteed in the Sixth Amendment to our Constitution and
9 the Bill of Rights. And that's my role, to be his legal
10 representative, to be his advocate, and to assist him in
11 this trial. And that's important, because a criminal
12 trial like the one that we will start today is not
13 something usual that a person goes through. At least, we
14 hope that it's not usual for every day citizens.

15 And as we go into this trial I would like for you
16 to remember certain fundamental principles, first and
17 foremost of which is the fact that my client enjoys a
18 presumption, and that presumption is that he is innocent
19 of this charge that is set forth and contained in the
20 indictment that Mr. Sims referred to. He is presumed to
21 be innocent when he starts this trial. He enjoys that
22 presumption all during the trial, and he will continue to
23 be presumed to be innocent until and if and when you,
24 ladies and gentlemen, in your deliberations decided to
25 change and decide that he is not, in fact, innocent, but

1 he is guilty of the charge brought against him today.

2 And that puts a burden on the State of South
3 Carolina, and that is what they call the burden of proof.
4 And with that burden, that is carried by the Deputy
5 Solicitor here, Mr. Sims, and his witnesses, there is a
6 standard they have to meet, and that is proof beyond all
7 reasonable doubt. And His Honor, Judge Smith, is going to
8 give you a definition of what reasonable doubt means at
9 the end of the trial. That's a part of the law of the
10 case that you're going to have to apply to the facts. But
11 I would tell you that reasonable doubt is just something-
12 - a doubt for which you can give a reason. It's not
13 magic, as Mr. Sims calls it, it's not anything far fetched
14 or whimsical. But reasonable doubt, that standard that
15 the State must met, is the highest one in our system of
16 law. It's higher than a mere preponderance of the law.
17 It's higher than a -- a mere preponderance of the
18 evidence. It's higher than a mere -- higher than clear,
19 cogent and convincing evidence. It is proof beyond all
20 reasonable doubt. And I would ask you to keep that in
21 mind as we go through the trial, because you're going to
22 hear -- a lot of the evidence is going to be in the form
23 of testimony, that which is said by somebody. And you're
24 going to have to determine whether they were in a position
25 to see and to hear and know what they say they know, or to

1 tell whether or not they really know what they're talking
2 about.

3 So this is a very important day in the life of my
4 client, Sammie Stokes, and because it is I ask you to
5 give this trial your strictest attention. Thank you.

6 THE COURT: All right, then , please call your
7 first witness.

8 SOLICITOR SIMS: Your Honor, at this time the State
9 would call Ms. Audrey Smith.

10 AUDREY ELAINE SMITH, being first
11 duly sworn, testifies as follows:

12 DIRECT EXAMINATION

13 BY SOLICITOR SIMS:

14 Q. Ms. Smith, I'm going to ask that you speak up
15 because the last lady over in the jury box has to
16 hear what you have to say, and this lady is going
17 to take down everything you say. So you're going
18 to have to speak up. Okay?

19 A. Yes, sir.

20 Q. Or lean forward a little bit, and let me move the
21 mike around. Now, Ms. Smith, where do you live?

22 A. Right now I live at [REDACTED]
23 [REDACTED] in Branchville.

24 Q. And how long have you lived there?

25 A. I just moved there February the first.

1 Q. Okay. And before moving to your present address,
2 where did you live?

3 A. I was living at my mama's apartment [REDACTED]
4 [REDACTED].

5 Q. Okay. And that's still in Branchville?

6 A. It is.

7 Q. And how long have you lived in Branchville?

8 A. I've been back in Branchville ever since September
9 the first of nineteen ninety.

10 Q. September the first of nineteen ninety?

11 A. Uh huh.

12 Q. And do you work?

13 A. Not at the present time.

14 Q. Were you working when you moved back here?

15 A. No, I wasn't.

16 Q. And I bring your attention back to December second,
17 nineteen ninety, in the early evening hours. Where
18 were you?

19 A. I was home.

20 Q. And home -- where were you at home?

21 A. [REDACTED].

22 Q. And later in the evening, tell us what happened.

23 A. Okay. Sammie Stokes had call me at my mama's house
24 and stated that he wanted -- he had a letter he
25 wanted me to read. He said he'd be there at six.

1 He didn't come at six, so I start making a salad,
2 so he call me about twenty after six and he say "I
3 want you to read this letter. I'll be there at
4 seven." I say "Why won't the letter wait?" He
5 said "No, I don't want the letter to wait. I want
6 you to read it tonight." So he came at seven and I
7 had to make him go in there and speak to my mama,
8 cause he stood to the door. And he went and done
9 that, so we left. We went walking. We wasn't
10 arguing or anything, we was just talking in
11 general.

12 Q. Okay, now where did you go walking?

13 A. We walked to the elementary school.

14 Q. Okay.

15 A. But how we got up there, he stated that somebody
16 was baking him something and he wanted me to walk
17 with him to go up there and pick it up. So as ---

18 Q. The element school, that's in Branchville?

19 A. That's in Branchville also.

20 Q. Okay.

21 A. And we went there, but on the way going there he
22 had say "Well I don't -- she's not baking me
23 nothing. I wanted you to just walk me up there."
24 And he said "If I'd a told you any other way you
25 wouldn't a never walked me." So we was sitting in

1 the swings and that's when two of his friends came
2 in a car, which is another person, but I'd never
3 seen that other person.

4 Q. Okay.

5 A. And we sat there, and so he say "Well, I'm tired of
6 looking in these hags' faces." So that's when we
7 walked to the back of the school yard.

8 Q. Uh huh.

9 A. I never been in that area, cause past there is the
10 exercising equipment. And so he start taking off
11 his clothes, and he said "You're going to have sex
12 with me." I said "I'm not going to have sex with
13 you out here." And he said "Yes, you are." So he
14 start pulling on my coat and unbuttoned it. So I
15 told him "Don't do that." So, anyway, we still
16 engaged in having sex that day, and then we started
17 walking.

18 Q. Let me ask you. Why did you do that?

19 A. Cause I was scared of him.

20 Q. Had you seen the letter at that point?

21 A. No, not at that point I haven't seen the letter.

22 Q. Okay.

23 A. So on the way back we went past the high school and
24 we stopped right there. It use to be a gas tank
25 there, but they done move it now ---

1 Q. Uh huh.

2 A. ---and we stood right there in the light, and he
3 said "Well, I'm going to let you read this letter
4 before I take you home." So I read the letter.
5 The letter stated he was going to ---

6 MR. BOWMAN: Your Honor,---

7 A. --- kill me that night.

8 MR. BOWMAN: Your Honor, I object to her telling
9 about what's in the letter as being hearsay, and move to
10 strike her answer.

11 THE COURT: I overrule the objection.

12 MR. BOWMAN: Thank you, Your Honor.

13 Q. What was in the letter, now?

14 A. The letter stated that he was going to kill me that
15 night. But while I was reading that letter he say
16 "No, I decided to change my mind. I'm not going to
17 do that, but I'm going to take you with me." He
18 said "Give me the letter, cause I know you will
19 take it straight to the policeman." So he put his
20 arms around me and we started walking and a truck
21 passed by, a car passed by, and he say "Well, I
22 want you to go in here with me. I might take you
23 any place." It was something that he had in there
24 that he wanted to get out. I never been in that
25 area ---

- 1 Q. Wait a minute, now. You said "Take you in there."
2 Take you in where?
- 3 A. It was an open corn field.
- 4 Q. Uh huh.
- 5 A. And that corn field, in the back it was a wooded
6 area.
- 7 Q. Okay.
- 8 A. And he looked for this box and couldn't find it.
- 9 Q. Uh huh.
- 10 A. So he say "Come on, you're going with me." So
11 that's when we end up in the wooded area. And he
12 said "Tell me something good. Maybe I won't do
13 this here to you." So I was telling him, well, you
14 know, he was blaming me for leaving Branchville,
15 and he blamed me for have him locked up.
- 16 Q. Okay. Now, let me ask you this. When you got to
17 the corn field what happened -- what did he do to
18 you at the corn field?
- 19 A. Well, he took out this extension cord which -- and
20 I'd seen this extension cord with knots in it
21 before on his stereo.
- 22 Q. Okay. Okay, now, what did he do with the extension
23 cord when you were out there in that corn field?
24 Just tell us that.
- 25 A. Okay. He put it around my neck. He tell me, he

1 say, "Is it tight?" I said, "Yeah." And he made
2 it tight until I was unconscious. When I woke up
3 it was something heavy on my back. I don't know
4 what that was.

5 Q. Uh huh.

6 A. And then, I reached for my shoe, and I did like
7 this here, (witness gestures with hand) and blood
8 came on my hand, and I got up and I run -- I run
9 the wrong way the first time, and then I back track
10 myself and I run and I fall and run -- I knocked on
11 somebody's door.

12 Q. Uh huh.

13 A. I didn't know them people. But nobody answered, so
14 I went to the next -- I seen two cars come to the
15 road. I ducked because I was scared it was him
16 coming back to see whether I was actually dead. So
17 after them cars passed I run to the next person's
18 house and they was the ones that -- who got the
19 rescue squad for me.

20 Q. Now, after he choked you and you lost
21 consciousness, do you know how long you were out
22 there in that field?

23 A. No, I don't know.

24 Q. Okay. And whose house -- do you recall the name of
25 the house that you went to?

- 1 A. The one that got me help?
- 2 Q. Uh huh.
- 3 A. Vernon Miller and Thomasina Miller.
- 4 Q. Okay. And were you taken to the hospital that
- 5 night?
- 6 A. Yes, I was.
- 7 Q. And what were your injuries when you got to the
- 8 hospital?
- 9 A. Well, my throat was bleeding, my nose had bled, my
- 10 face was all swolled up. So I was in bad
- 11 condition.
- 12 Q. Okay, and this was December second. Is that
- 13 correct?
- 14 A. Right, uh huh.
- 15 Q. And how long were you in the hospital?
- 16 A. I was there from December the second til the
- 17 eighth. Then I admitted myself into the Rose Center
- 18 in order to cope with coming back to Branchville.
- 19 Q. And how long were you in the Rose Center?
- 20 A. From the eighth to the nineteenth of December.
- 21 SOLICITOR SIMS: On moment, Your Honor.
- 22 Q. Let me ask you; Ms. Smith, did you try to get away
- 23 from him when you were out there in that corn
- 24 field?
- 25 A. No. I was scared because of my first incident with

1 him.

2 Q. Let me ask you this. You were afraid of him. Is
3 that correct?

4 A. Right.

5 SOLICITOR SIMS: Okay, and -- that's all I have,
6 Your Honor.

7 THE COURT: All right, then, you may examine, sir.

8 CROSS EXAMINATION

9 BY MR. BOWMAN:

10 Q. Ms. Smith, you say that when you got up, or when
11 you woke up from having this cord around your neck
12 ---

13 A. Uh huh.

14 Q. --- you then picked up your shoes and started
15 running?

16 A. Uh huh.

17 Q. Is that right?

18 A. Yeah. I had reach for my shoes and start running.

19 Q. You had grease on your shoes?

20 A. Reached for your shoes.

21 Q. Reached for your shoes. And then you said you saw
22 some automobiles and you ducked the automobiles?

23 A. No, I ducked beside the house that I knocked on
24 first, and I didn't get no answer.

25 Q. But you did say that you ducked when you saw the

1 automobiles?

2 A. Yeah. I seen two automobiles come on the highway.

3 Q. And you did that, you say, because you thought that
4 Sammie Stokes was coming back in an automobile?

5 A. Come -- well, I don't know how he was coming back,
6 but I know he might have come in the automobile to
7 see if I was dead or not.

8 Q. Had you seen him in an automobile that night?

9 A. No, cause we was walking.

10 Q. Does he own an automobile?

11 A. No, he doesn't.

12 Q. So you don't have any reason to think he was in one
13 of those automobiles, do you?

14 A. But he have friends that have automobiles.

15 Q. You have no -- you don't have any reason to
16 believe that he was in an automobile -- one of
17 those automobiles that came down the road, do you?

18 A. Listen, this man had, just as well say, killed me.
19 I don't know how he would come back to see whether
20 he finished the job.

21 Q. And you said that he, that he had told you that he
22 was coming to see you at six o'clock?

23 A. Yeah, and he didn't come at six.

24 Q. What time did he get there?

25 A. Seven.

- 1 Q. Seven o'clock.
- 2 A. Uh huh.
- 3 Q. And then -- so then, where did y'all -- when did
- 4 y'all leave your house?
- 5 A. Seven.
- 6 Q. And that's at the [REDACTED]?
- 7 A. [REDACTED].
- 8 Q. And those are on the south side of Branchville, are
- 9 they not?
- 10 A. Right.
- 11 Q. And there's a big street beside the [REDACTED]
- 12 [REDACTED]?
- 13 A. Yeah, the Highway Twenty-one.
- 14 Q. And so you -- where did y'all -- did you cross the
- 15 highway?
- 16 A. No, we came -- it's a field, and you cut right past
- 17 my mama's window and go across the field ---
- 18 Q. Well, where ---
- 19 A. And then we hit the highway from the field. It's an
- 20 open field. Everybody travels it.
- 21 Q. So you traveled across the field, then you came to
- 22 Highway Twenty-one.
- 23 A. Right.
- 24 Q. Did you cross Highway Twenty-one?
- 25 A. Yeah. You had to cross in order to get to the

- 1 elementary school ---
- 2 Q. And ---
- 3 A. --- and the high school.
- 4 Q. Okay. Now, they're up toward town, are they not?
- 5 A. You don't have to go through town.
- 6 Q. I know, but I'm asking you ---
- 7 A. They are -- you can go through town, and you don't
- 8 have to go through town.
- 9 Q. They're up toward town, aren't they?
- 10 A. Right.
- 11 Q. They're not just right across the street from the
- 12 [REDACTED], are they?
- 13 A. No, they're not. You have to walk down the street.
- 14 Q. So it's a couple of blocks back toward town before
- 15 -- when you go in the direction of the ---
- 16 A. Right.
- 17 Q. --- the elementary school, isn't it?
- 18 A. Yeah. The elementary school is a good little ways,
- 19 though.
- 20 Q. How far is it?
- 21 A. I couldn't tell you. I don't drive either, so
- 22 walking distance will take you about, maybe twenty
- 23 minutes, or something like that.
- 24 Q. About a half a mile?
- 25 A. Probably. I don't know too much about that.

- 1 Q. And then, what time was it when you got up there?
- 2 A. It was about twenty after, or seven thirty.
- 3 Q. Twenty after. Twenty after ---
- 4 A. Seven, or either seven thirty.
- 5 Q. And y'all were what? Were doing what up there?
- 6 A. We had sex up there.
- 7 Q. Well, before that what were you doing?
- 8 A. We were just talking until his friends came, and he
- 9 said "I don't want to look at these hags." So he
- 10 just said "Let's walk." And that's what we did.
- 11 Q. Y'all were talking?
- 12 A. Yeah.
- 13 Q. And y'all were playing on the ---
- 14 A. We was sitting down in the swing. We wasn't
- 15 playing, just sitting down in the swings talking.
- 16 Q. And who was sitting in the swing?
- 17 A. Both of us. There was two swings. He was in one
- 18 and I was in the other.
- 19 Q. But you were sitting in his lap at one point,
- 20 weren't you?
- 21 A. No, I didn't say that. I said he was sitting in
- 22 one and I sit in one.
- 23 Q. But at some point during the time y'all ---
- 24 A. I never sit in his lap.
- 25 Q. You never sat in his lap?

- 1 A. No.
- 2 Q. And then two of his friends came by?
- 3 A. Right.
- 4 Q. What time was that?
- 5 A. It was round about that time, twenty after seven,
- 6 in fact, cause we just had gotten up there when
- 7 they had came.
- 8 Q. And when is it that -- then how long after that
- 9 that y'all had sex?
- 10 A. It was little while after that.
- 11 Q. Well, can you tell me what time it was?
- 12 A. It was about five or ten minutes after that.
- 13 Q. About twenty minutes to eight?
- 14 A. Twenty or twenty-five minutes to, something like
- 15 that. I really wasn't keeping time.
- 16 Q. Well, you're saying that you saw his friends about
- 17 twenty after ---
- 18 A. About twenty -- I said twenty after or either seven
- 19 thirty.
- 20 Q. Or seven thirty ---
- 21 A. So it was a little after that, so it could have
- 22 been twenty-five minutes to eight, you know, or
- 23 twenty minutes to eight, whatever.
- 24 Q. And then, how long after that is it that you say he
- 25 put the cord around your neck?

1 A. I couldn't tell you about how long that was,
2 because it was dark when we went out there, and it
3 was darker when we got where we was at.

4 Q. Well, was it five minutes later, ten minutes later?

5 A. No, it was longer than that, but I can't tell you
6 exactly what time that was because just the watch I
7 had on that night, it don't have a light on it and
8 I don't know what time it was.

9 Q. Well, if it was that dark and you couldn't see your
10 watch, how could you read the note?

11 A. Because at the school yard it has a light. Cause I
12 had more glasses. He took the other glasses. The
13 Rose Center helped me get these. So I had on some
14 more glasses that night, and using the light from
15 the school yard.

16 Q. And while you were up there using the light in the
17 school yard you didn't look at your watch?

18 A. No, I didn't pay attention to my watch, cause he
19 say he would have me back home at eight thirty.

20 Q. And what is it that he -- what is it he said to
21 you about the note?

22 A. He said that he know that I had read the letter
23 several times. What it was stated on the letter,
24 he decided to do something different.

25 Q. But he said -- but he took the note back from you.

- 1 A. Yes, he did.
- 2 Q. That's your testimony?
- 3 A. Yes, he did.
- 4 Q. And he said he was taking it back because he knew-
- 5 --
- 6 A. He knowed that I would take it directly to the
- 7 policeman which, and I would have.
- 8 Q. And you don't have any doubt in your memory that he
- 9 said he -- that you would take it straight to the
- 10 policeman?
- 11 A. Who have any doubt? I doesn't have any doubt,
- 12 because I know what happened.
- 13 Q. Well, you remembered testifying about this in a
- 14 hearing in ---
- 15 A. That's right.
- 16 Q. --- Branchville, didn't you?
- 17 A. That's right.
- 18 Q. And you didn't say anything about him saying that
- 19 he was ---
- 20 A. Yes, I did.
- 21 Q. --- taking the note back because he was going to
- 22 give it straight to the police, did you?
- 23 A. Yes, I did. Yes, I did.
- 24 MR. BOWMAN: May I approach the witness?
- 25 THE COURT: Yes, sir.

- 1 Q. This is a transcript of what you said at the
2 preliminary hearing. This is Page Four. I would
3 ask you to look at Lines three, four and five
4 there, and tell us -- tell the jury what you said
5 then about him saying that he would take the note
6 to the policeman. Could you show that to us?
- 7 A. Line three and four?
- 8 Q. Anywhere on there that you can show that you told--
9 -- that you testified that he would take the note--
10 that he said you would take the note straight to
11 the police.
- 12 A. You don't have everything on here that I said. It
13 says "December second, Sammie took the letter back
14 from me and that when he started walking from the
15 school and the school -- of the school house."
16 No, stop. Huh uh. "When he start walking from the
17 back of the school house."
- 18 Q. You didn't say anything about him getting the
19 letter back from you because he said you were going
20 to take it straight to the police, did you?
- 21 A. Not -- it's not on here.
- 22 Q. Why didn't you say it? You're saying it today, Ms.
23 Smith. Why didn't you say it then?
- 24 A. From my understanding, I did say it then.
- 25 Q. Would you read on this page. Start at the top,

- 1 right here. It's the last page of the Certificate.
- 2 A. "This is to veri-" huh uh. What is that,
- 3 Certificate? "This is to certify that the regoing
- 4 page ---
- 5 Q. Foregoing.
- 6 A. Huh?
- 7 Q. Foregoing.
- 8 A. ---foregoing, okay, pages accurately ---
- 9 Q. Accurately.
- 10 A. ---Okay. To describe of the proceedings and
- 11 testimony given by the -- what is that--
- 12 preliminary hearing before me at the Branchville
- 13 Town Office, Main Street, Branchville, South
- 14 Carolina, beginning at four o'clock on Thursday,
- 15 September the twenty-first, nineteen ninety-one, to
- 16 witness, therefore, I have hereunto set by the hand
- 17 and seal this eleventh day of March nineteen
- 18 ninety-one.
- 19 Q. Can you read the signature on there?
- 20 A. Gerald A. Thompson, Orangeburg County Magistrate.
- 21 Q. Now, if you would hold onto this just one minute,
- 22 since you had some trouble with the -- do you know
- 23 what that says?
- 24 A. (No verbal response.)
- 25 Q. It says -- you stumbled over some of the words.

1 It says "This is to certify that the foregoing
2 pages accurately reflect a description of the
3 proceedings and testimony ---

4 SOLICITOR SIMS: Your Honor, at this time I would
5 have to impose an objection. It is not her certifying to
6 his. This is for someone else. She didn't certify to
7 that. Someone else certified to that.

8 THE COURT: Is that an actual court reporter who
9 took that?

10 MR. BOWMAN: No, sir. It was signed by the Judge
11 as being -- with his certificate that this accurately
12 reflects what happened.

13 THE COURT: All right, yes, sir. You can go ahead
14 and publish that.

15 Q. Ms. Smith, you had a little bit of trouble with the
16 words, so I just want you to understand, this
17 reading, it says "This is to certify that the
18 foregoing pages accurately reflect a description of
19 the proceedings and testimony given at the
20 preliminary hearing held before me at the
21 Branchville Town Hall, Main Street, Branchville,
22 South Carolina, beginning at four P.M., on
23 Thursday, February twenty-first, nineteen ninety-
24 one. In witness whereof, I have hereunto set my
25 hand and seal this eleventh day of March, nineteen

1 ninety-one. Signed: Gerald A. Thompson,
2 Orangeburg County Magistrate, at Branchville, South
3 Carolina."

4 A. Uh huh.

5 Q. Now, the Magistrate certified what's in this
6 transcript of your testimony as being an accurate
7 reflection of what you said. Are you saying that
8 you said something different?

9 A. Regardless, I know what happened to me.

10 Q. But you didn't say anything in Branchville on the-
11 --

12 A. I say ---

13 Q. --- twenty-first of January about my client taking
14 that note back from you, saying you would take it
15 straight to the policeman, did you?

16 A. Maybe, if I forgot, but still, I know what happened
17 to me, and I know I read a letter that night, and I
18 know he took it from me.

19 Q. And it's your testimony that you saw Mr. Lewis--
20 Mr. Stokes' friends ---

21 A. Yes.

22 Q. --- between seven twenty and ---

23 A. Something to eight.

24 Q. --- something to eight, ---

25 A. We had sex.

- 1 Q. --- at which time y'all had sex. Right?
- 2 A. It was about seven thirty or something to eight
- 3 when his friends had came out there, about round
- 4 that time.
- 5 Q. And were you afraid?
- 6 A. Of them?
- 7 Q. Of him?
- 8 A. Yeah, I was afraid of him.
- 9 Q. Well, what did you say to his friends ---
- 10 A. I didn't say ---
- 11 Q. --- in order to get them to save you?
- 12 A. They didn't save me. They didn't have anything to
- 13 do with it. They came up there. He didn't even
- 14 hold a conversation with them.
- 15 Q. Did you?
- 16 A. Did -- no.
- 17 Q. Did you ask them for help?
- 18 A. He don't allow me to talk to none of his friends.
- 19 Q. He doesn't allow you to?
- 20 A. Yeah.
- 21 Q. Well, how could he keep you from doing that?
- 22 A. He sets his rules, and his rules stick.
- 23 Q. And had -- you can scream, can't you?
- 24 A. Yeah, I can scream.
- 25 Q. Did you scream then?

- 1 A. No, I didn't.
- 2 Q. What -- what is it that he did that prevented ---
- 3 A. We were just already sitting down holding a
- 4 conversation, and his friends had pulled up there,
- 5 and like I say, he told them he was going up there.
- 6 Q. But you didn't ---
- 7 A. They didn't say anything to him, and he didn't say
- 8 anything to them. The only thing what happened
- 9 when they came up there, two of them got out the
- 10 car and went to the back of the car. He say "Come
- 11 on, I don't want to look at these hags."
- 12 Q. Well, how far away were they from you?
- 13 A. They wasn't that far away, maybe about eight, nine
- 14 steps away, ten steps away.
- 15 Q. Just nine steps away?
- 16 A. Yeah. They was -- the guy pulled his car -- back
- 17 his car up close to the swings with ---
- 18 Q. Were they as close as y'all then as I am to you
- 19 now?
- 20 A. Right.
- 21 Q. And you didn't say anything to them?
- 22 A. No.
- 23 Q. You didn't scream?
- 24 A. I don't have no conversation for his friends,
- 25 period.

- 1 Q. And you wouldn't ask them for help if you were in
2 trouble?
- 3 A. I shore wouldn't. Cause them's his friends. They
4 wouldn't help me.
- 5 Q. People that he didn't even want to talk to because
6 he says he didn't want to see their hags -- hag
7 faces, they wouldn't help you?
- 8 A. No, they wouldn't, and they were his friends.
- 9 Q. Now, it -- it is a fact, is it not, Ms. Smith, that
10 you have had male friends, or boy friends at the
11 place where you lived before?
- 12 A. Yes, I did.
- 13 Q. And was that -- where was that -- that was in the
14 Charleston area?
- 15 A. That was in Hanahan, South Carolina.
- 16 Q. Hanahan?
- 17 A. Uh huh.
- 18 Q. And who was your boy friend down there?
- 19 A. Kevin Rambert.
- 20 Q. Kevin Rambert?
- 21 A. Uh huh.
- 22 Q. How would you spell his last name?
- 23 A. R-A-M-B-E-T-T.
- 24 Q. Rambett?
- 25 A. B-R -- B-T -- yeah, R-A-M-B-E-R-T, Rambert.

1 Q. And how long had you been boy friend, girl friend
2 with Mr. Rambert?

3 A. From January up until September.

4 SOLICITOR SIMS: Your Honor, may we approach,
5 please?

6 THE COURT: Yes, sir.

7 (WHEREUPON, A BENCH CONFERENCE
8 IS HELD OUT OF THE HEARING
9 OF THE JURY AND THE REPORTER.)

10 Q. And how long had you been boy friend, girl friend
11 with Kevin Rambert?

12 A. From January up until September.

13 Q. And it was in September that you left him, didn't
14 you?

15 A. Yes, I did.

16 Q. And he didn't even know you were going to leave
17 him, did he?

18 A. No, he didn't.

19 Q. And he -- what -- and he threatened to do you
20 bodily harm ---

21 A. No, he didn't.

22 Q. --- because of that, didn't he?

23 A. No, he didn't.

24 Q. He had never beaten you?

25 A. Yeah, but that ain't got nothing to do with that.

- 1 He didn't know I was even leaving.
- 2 Q. I know. He had beaten you before, hadn't he?
- 3 A. He had hit me before.
- 4 Q. And you left him without him even knowing you were
- 5 leaving?
- 6 A. No. This was before that. When I left, he didn't
- 7 know I was even going. How he know I was left, he
- 8 called my mama's house, and Sammie got on the phone
- 9 and said "It's no need for you to come back to
- 10 Branchville because me and Audrey's getting back
- 11 together." So he cancelled that, for him to come
- 12 back and try to get back with me, or anything.
- 13 Q. But Kevin -- you left him and he didn't even know
- 14 you were leaving, did he?
- 15 A. No, he didn't know.
- 16 Q. But he knew where you were, didn't he?
- 17 A. Sure, he did.
- 18 Q. He wasn't happy about you leaving him, was he?
- 19 A. Well, he didn't know I was leaving him.
- 20 Q. But after you left ---
- 21 A. I couldn't tell you that, because I didn't get in a
- 22 conversation with him. Him and Sammie talk on the
- 23 phone.
- 24 Q. Now -- but you talked to him before that?
- 25 A. No, I haven't.

- 1 Q. You never talked to him on that conversation before
2 Sammie got on the phone?
- 3 A. He tell -- the only thing he tell me, he say
4 "Audrey, come back." and Sammie say "Well, let me
5 hold the phone."
- 6 Q. So it's your contention that Sammie Stokes broke up
7 your former relationship?
- 8 A. The relationship was already broken up.
- 9 Q. So Sammie Stokes ---
- 10 A. Sammie just made it clear there wasn't no need of
11 him coming back. So if he did have any use of
12 coming back, Sammie put a stop to that right then.
- 13 Q. And when you got to Branchville -- when you moved
14 back to Branchville, which I think you said was in
15 September of nineteen ninety?
- 16 A. September twenty-first, nineteen ninety.
- 17 Q. The twenty-first?
- 18 A. That's right.
- 19 Q. Then it was you that restarted the relationship
20 between you and Sammie Stokes, wasn't it?
- 21 A. I can't say that I was the one. I hold
22 conversations with him, but the relationship was
23 not up to me.
- 24 Q. Well, but you tried to start -- restart it, didn't
25 you?

- 1 A. No. The only thing I wanted was an understanding,
2 because I had to live in Branchville, as sure as he
3 had to live in Branchville.
- 4 Q. And you sent your friend, Mary Ann Bradley ---
- 5 A. That's not my friend.
- 6 Q. --- to go -- she's not your friend?
- 7 A. That's my cousin.
- 8 Q. Your cousin. Y'all are not friends?
- 9 A. That's my cousin and my friend, just like a sister
10 to me.
- 11 Q. And you sent her to go talk to Sammie Stokes for
12 you, didn't you?
- 13 A. The decision was made that we was going -- I'll
14 tell you the whole detail. We was going out, which
15 when we went out, we was going earlier, so she said
16 "Well," -- we call him Lewis, we does not call him
17 Sammie. We said "Lewis may want to come, too." So
18 that's when she said "Well, you stay at my house,
19 and I'll be right back." And when she came right
20 back, she came back with him.
- 21 Q. But you were in full agreement with her going to
22 get him and bringing him back ---
- 23 A. I didn't ---
- 24 Q. --- so he could go out with y'all, weren't you?
- 25 A. The whole conversation, the choice still was his.

1 Q. Did she bring him back?

2 A. Yes, she did.

3 Q. And y'all got together?

4 A. We talked.

5 MR. BOWMAN: May we approach the bench?

6 THE COURT: Yes, sir.

7 (WHEREUPON, A BENCH CONFERENCE
8 IS HELD OUT OF THE HEARING OF
9 THE JURY AND THE REPORTER.)

10 THE COURT: Ladies and gentlemen, we're going to
11 take a recess at this time. If you would please step to
12 your jury room for a few minutes, please. You can go
13 ahead and step down now.

14 (RECESS)

15 THE COURT: Mr. Bowman have you again conferred
16 with the defendant during the recess?

17 MR. BOWMAN: Yes, Your Honor, I have followed your
18 instructions, and I have talked to him about the progress
19 of the trial, and reiterated to him again your invitation
20 to come into the courtroom and that you wanted him in the
21 courtroom, and he says he still does not want to come in.
22 And we discussed why today is the first time he has
23 mentioned to me or anybody that he wanted to get another
24 lawyer.

25 THE COURT: All right, sir, and that's an important

1 factor, and I had neglected to ask you about that before.
2 So today is the first time that he had ever brought up
3 any dissatisfaction he had with you at all. Is that
4 correct?

5 MR. BOWMAN: Yes, sir. This is the first time that
6 I had heard anything about him wanting to hire a paid
7 lawyer or having plans to hire a paid lawyer. All of my
8 previous contacts with Mr. Stokes have dealt with trial
9 preparations, and I would say that there was a note that
10 he gave to me some time last week saying that he would
11 like to have it put off a while. I think that through
12 the natural processes of the operation of the Court, his
13 case did not come up last week and that was when -- that
14 was when -- but we did have his witnesses up here just in
15 case ---

16 THE COURT: All right.

17 MR. BOWMAN: --- so that gave another full week for
18 us to prepare his case. Of course, as I stated earlier, I
19 have re-subpoenaed his witnesses. They are here, all of
20 them -- my investigator has gotten all of them in the
21 hall way.

22 THE COURT: Good.

23 MR. BOWMAN: Now in talking to the two male
24 witnesses -- there are two male witnesses and two female
25 witnesses -- I asked them, that's Mr. Goldsmith and Mr.

1 Utsey, if anybody had talked to them in a room and told
2 them that either their testimony was not important or they
3 weren't needed, and it turned out that that involved the
4 two female witnesses, Ms. Dixon and Ms. Bradley. And Ms.
5 Dixon indicates that she was in a room with Mr. Sims and
6 Mr. Sims -- I think they may misconstrued what Mr. Sims
7 told them, which was that the case was not going to be
8 tried that week, meaning last week, and that they
9 wouldn't have to be back anymore that day or that week,
10 and they may have ---

11 THE COURT: Oh, I see, it was a scheduling thing
12 rather than ---

13 MR. BOWMAN: It was a scheduling thing.

14 THE COURT: All right, sir.

15 SOLICITOR SIMS: Your Honor, I had informed Mr.
16 Bowman that I had gotten a call from a witness who had
17 been subpoenaed in this case, who asked me something about
18 when the event had happened, and I told him what she had
19 said. When they came in last week, because we had
20 originally scheduled this matter for last week, everybody
21 came together. I didn't know who anybody was, and I
22 wasn't asking ---

23 THE COURT: Sure.

24 SOLICITOR SIMS: --- any person individually. Then
25 when we determined that we were not going to try it last

1 week I said, "Well, you all don't have to come back.
2 We'll notify you when we reschedule this for trial." And
3 that was basically it.

4 THE COURT: All right, well that's fine. I
5 appreciate both of you putting it on the record.

6 MR. BOWMAN: One last matter, we -- before the
7 break I had reiterated my need for an answer to my Brady
8 motion. The State has given me a criminal record from the
9 SLED computer and it appears to be on another Audrey Smith
10 with a different middle name, a different birth date, a
11 different social security number.

12 THE COURT: All right, sir. All right, are there
13 any further questions of this witness or are there not?

14 MR. BOWMAN: No, I would have no further questions
15 on cross-examination of the witness.

16 THE COURT: No further questions.

17 SOLICITOR SIMS: Your Honor, ---

18 THE COURT: You had some redirect. Please come up
19 and have a seat, then. And please bring in our jury
20 panel, Mr. Clerk.

21 (WHEREUPON, THE FOLLOWING
22 TAKES PLACE IN THE PRESENCE
23 OF THE JURY.)

24 THE COURT: Mr. Bowman?

25 MR. BOWMAN: No more on cross-examination, Your

1 Honor.

2 THE COURT: All right, you may examine, then, Mr.
3 Sims.

4 AUDREY SMITH, continuing under oath,
5 testifies as follows:

6 REDIRECT EXAMINATION

7 BY SOLICITOR SIMS:

8 Q. Ms. Smith, you, on cross-examination, were asked
9 about the friends who had come up to the elementary
10 school when you all were there, and that they were
11 about nine steps from you.

12 A. Uh huh.

13 Q. I believe you were asked why you didn't ask them
14 for help. Had you seen the letter at that time?

15 A. No, I hadn't.

16 Q. Okay. And up to that point when the friends came,
17 what you all doing, just walk and talking?

18 A. No, we was sitting down on the swing, just talking.

19 Q. Okay. And it was after the friends left -- or you
20 all walked away from the friends when everything
21 began to unfold. Is that correct?

22 A. Yeah, the friends, they was out there, and we was
23 walking towards the back.

24 Q. Further, you were also asked about the -- and given
25 and shown this transcript of this preliminary

1 hearing.

2 A. Right.

3 Q. On the day that you had the preliminary hearing did
4 you answer the questions that were asked of you?

5 A. Yes, I did.

6 Q. And is this your first time seeing this?

7 A. Yes, it is.

8 Q. Did anybody ask you to go over this to make any
9 corrections or deletions or additions to it?

10 A. No, they didn't.

11 Q. You didn't sign this document anywhere, certifying
12 that it was correct, did you?

13 A. No, I didn't.

14 SOLICITOR SIMS: That's all I have.

15 MR. BOWMAN: No further questions, Your Honor.

16 THE COURT: All right, then, you may step down.
17 Please call your next witness.

18 SOLICITOR SIMS: Thomasina Miller.

19 THOMASINA MILLER, being first duly
20 sworn, testifies as follows:

21 DIRECT EXAMINATION

22 BY SOLICITOR SIMS:

23 Q. Ms. Miller, where do you live?

24 A. [REDACTED], Branchville, South Carolina.

25 Q. How long have you lived in Branchville?

1 A. About nine and a half years.

2 Q. Okay, and I bring your attention back to December
3 the second of nineteen ninety. That evening were
4 you at home?

5 A. Yes, I was.

6 Q. And who was at home with you?

7 A. My husband.

8 Q. Okay.

9 A. And my children.

10 Q. And your children.

11 A. Uh huh.

12 Q. And what happened -- did anyone come to your door
13 that night?

14 A. About -- that Sunday evening I was watching the
15 nine o'clock movie, and I don't know exactly what
16 time, but I heard a knock on the door. When I got
17 up I didn't see anybody, because she was so short.
18 Then I looked again and then Audrey came in the
19 house.

20 Q. And when she came in the house how was she -- what
21 was her condition that you noticed?

22 A. When she came in the house, I believe she had her
23 shoes in her hand and she was, like, gasping for
24 air, and crying. I said "Audrey, what's the
25 matter, have you been in an accident?" She said

- 1 "No." I said "What's wrong?" She said "Lewis
2 tried to kill me." And then I took her into my
3 living room and told her to sit down, and then I
4 went back into my bed room and woke up my husband
5 and told him to go call Officer Tuttle and get the
6 rescue squad.
- 7 Q. Okay. Now, did you have an opportunity to -- when
8 she got in and sat down in your living room did you
9 have an opportunity to observe her physical
10 appearance?
- 11 A. Well, her eyes was bloodshot, like, bulging, and
12 she had a mark around her neck with blood, and I
13 went and got a rag and was trying to wipe some of
14 the blood off of her face and she told me to stop
15 because it was hurting. And she had a lot of
16 leaves in her hair.
- 17 Q. And was she upset that you know of?
- 18 A. She was -- she was, like, hysterical. She just
19 kept breathing -- talking and breathing real fast
20 like she was running. "He tried to kill me, he
21 tried to kill me." And I said "Who tried to kill
22 you?" She said "Lewis Stokes."
- 23 Q. Uh huh. And that was your only involvement, was to
24 wait for the --
- 25 A. I wait for Office Tuttle and the rescue squad.

1 Q. And the rescue squad. And you just let her in your
2 home. Is that correct?

3 A. And I told her to stay still, you know, until they
4 got there.

5 SOLICITOR SIMS: Answer any questions that Mr.
6 Bowman may have.

7 MR. BOWMAN: No questions, Your Honor.

8 THE COURT: All right, then. You may step down.

9 SOLICITOR SIMS: Mr. Allen Oakley.

10 ALLEN OAKLEY, being first duly
11 sworn, testifies as follows:

12 REPORTER: Spell your last name, please.

13 WITNESS: O-A-K-L-E-Y.

14 DIRECT EXAMINATION

15 BY SOLICITOR SIMS:

16 Q. Mr. Oakley, where are you employed?

17 A. Right now I'm employed with the South Carolina
18 National Guard.

19 Q. Okay. And back in December of last year, of
20 nineteen ninety, December second, where were you
21 employed?

22 A. With Orangeburg County Emergency Medical Service.

23 Q. And how long had you been employed with Orangeburg
24 County Medical Emergency Services?

25 A. About a year, part time, and then about a year full

- 1 time.
- 2 Q. What were your duties as an employee of the EMS?
- 3 A. To treat emergency situations, accident victims,
- 4 any calls that come in that the ambulance is
- 5 dispatched to.
- 6 Q. So you were in -- a treating paramedic?
- 7 A. EMT -- Emergency Medical Technician.
- 8 Q. Okay. And had you served in that capacity any
- 9 place else, other than Orangeburg EMS?
- 10 A. Yes. I'm a volunteer with Branchville Rescue
- 11 Squad.
- 12 Q. I'm sorry.
- 13 A. With Branchville Rescue Squad.
- 14 Q. And were you with the Branchville Rescue Squad back
- 15 on -- in December of this year?
- 16 A. Yes, I was.
- 17 Q. Okay. Did you have an opportunity to respond -- to
- 18 go to Ms. Miller's home?
- 19 A. Yes, I did.
- 20 Q. And when you got to Ms. Miller's home, who was
- 21 there?
- 22 A. There were some children in the house, and I don't
- 23 recall who let us in the door, but I asked the
- 24 persons that let us into the house where the
- 25 patient was, or whoever needed an ambulance, and

1 they directed me to a room inside the house, and
2 Ms. Smith was sitting in a chair.

3 Q. What, if anything, did you notice about her when
4 you saw her at that point?

5 A. Well, I first observed the patient, or Ms. Smith,
6 she had signs of traumatic asphyxiation.

7 Q. Now, she -- what is traumatic asphyxiation?

8 A. It's when your airway has been cut off due to, your
9 know, whatever means, whether you are choking, or
10 somebody has, you know, cut your air way off, or--
11 her eyes were bulging, she had a hematoma on her
12 left choroidal artery, she had rings around her
13 neck, where it looked like an object, a cord, a
14 string or something had been wrapped around her
15 neck, she had some lacerations, abrasions, and her
16 clothes were ruffled up and she had some trash and
17 grass and stuff in her hair, and she was grasping
18 for air. And I asked her what all was hurting,
19 your know, normal questions that we ask a patient,
20 and she said that her neck was bothering her, and
21 she was having extreme difficulty in breathing.
22 And I asked her how this happened, because we to
23 know the mechanism of injury ---

24 MR. BOWMAN: I object to this testimony as hearsay,
25 Your Honor.

1 SOLICITOR SIMS: Your Honor, we'd like to ---

2 THE COURT: Yes, sir, I sustain it.

3 SOLICITOR SIMS: May we approach the bench?

4 (WHEREUPON A BENCH CONFERENCE

5 IS HELD OUT OF THE HEARING

6 OF THE JURY AND THE REPORTER.)

7 Q. As a result of your conversation what did you treat
8 her for?

9 A. Neck injuries, respiratory distress.

10 Q. And you had mentioned something about a hematoma.
11 Would you explain to us what a hematoma is and
12 where did you find it?

13 A. Well, it's -- Oh, on the left side of your neck, or
14 on both sides of your neck the choroidal artery
15 runs down the side of the neck, and a hematoma is
16 when a blood vessel under the skin ruptures or
17 tissue is torn and it swells up on the inside of
18 the skin, and it was right on the choroidal artery.
19 And as well as I remember, there were small
20 lacerations on the side of her neck and some other
21 abrasions and all.

22 Q. Now, did you have help in treating Ms. Smith?

23 A. Yes, I did. Mary McIntosh was the other EMT on the
24 scene and we had a driver, and then, there was a
25 couple of other people that are affiliated with the

1 rescue squad that came up after we got there to
2 help us treat the patient.

3 Q. And, I don't know whether I asked you or not, but
4 what did you -- how did you treat her? What did
5 you do to her?

6 A. When we first got into the house -- we took the
7 stretcher and all in, and then I sent somebody else
8 back out to the ambulance to get some more
9 equipment and also I wanted to know if -- I sent
10 somebody out to the radio to find out if Chief
11 Tuttle was on the way, because basically it was an
12 unsecured scene.

13 Q. Uh huh, okay.

14 A. And we put her in full spinal precautions, high
15 flow "0" two, and we were on the scene for ---

16 REPORTER: What was that last statement?

17 A. High flow "0" two.

18 Q. I believe you mean oxygen. Is that correct?

19 A. Right.

20 Q. Okay.

21 A. And we were on the scene for twelve minutes -- it
22 was either eleven or twelve minutes. We placed her
23 in the unit and we needed a higher level of care
24 for the patient than what we were trained to do, so
25 we notified Orangeburg County to send us a

1 paramedic, an ACLS unit, and we met them in route
2 and the paramedic got on board our unit.

3 Q. When you said you needed a higher trained person
4 for what you were doing, what do you mean by that?

5 A. An emergency medical technician is just trained
6 for basic life saving measures. Anything else,
7 like starting I-Vs or anything that the doctor
8 would request to be done in route before the
9 patient arrives at the hospital has to be done by a
10 paramedic. So we called for paramedic backup from
11 Orangeburg.

12 Q. And that was your involvement -- you transferred her
13 to Orangeburg Regional. Is that correct?

14 A. Well, I was on the unit for approximately half the
15 way, and then in the process of transporting her a
16 car ran a stop sign and there was a wreck that
17 happened in between our ambulance and the
18 Orangeburg County ambulance, and I -- the patient
19 was already turned over to the paramedic, which is
20 the highest level of, or person trained to care
21 that was on board the unit. I -- then we stopped.
22 I got off of that unit and helped the other EMT
23 that was with the Orangeburg unit start packaging
24 the patients in the accident.

25 SOLICITOR SIMS: Okay. Answer any questions Mr.

1 Bowman may have.

2 CROSS-EXAMINATION

3 BY MR. BOWMAN:

4 Q. What kind of personnel did you need that you
5 didn't have? A paramedic?

6 A. Right.

7 Q. And you are an emergency medical technician?

8 A. Right.

9 Q. And when did you get -- are you certified to do
10 that kind of work?

11 A. I'm certified by the State of South Carolina.

12 Q. When did you get that -- get certified?

13 A. March seventeenth, three years ago. I'm just re-
14 certified for another three years. My
15 certification is now good until nineteen ninety-
16 four.

17 Q. But that was subsequent to the night that you are
18 talking about with Ms. Smith? The re-certification
19 that you're ---

20 A. That was after that, but at the time I was
21 certified by the State.

22 Q. As an emergency medical technician?

23 A. Right.

24 Q. But you needed a paramedic, you thought, to ---

25 A. Right. I called paramedic backup due to the fact

1 of her nature of injuries and any further level of
2 care that she may need or a doctor may ask for.

3 Q. Well, but you are -- your testimony is that she had
4 lacerations on her neck?

5 A. Right.

6 Q. You need a paramedic to dress the lacerations?

7 A. No, sir. We treated her to our level, but due to
8 her injuries there is a possibility that we could
9 have complications in route, and any time that you
10 have a patient that, due to your training and your
11 judgment, that the patient may result in
12 complications higher than what you are trained to
13 treat, you always call for paramedic backup.

14 Q. So y'all, you know, out of an abundance -- an
15 overabundance of precaution -- then you gave her--
16 you gave her oxygen?

17 A. That's not an overabundance of caution. We treated
18 her for what we saw. She was having respiratory
19 distress.

20 Q. And you say there was an accident involving an
21 ambulance?

22 A. Neither one of the ambulances got hit. It was
23 almost hit. We were approaching Cattle Creek Road
24 that runs off of Highway twenty-one. A car ran a
25 stop sign, came out in between the two ambulances.

1 Q. As they were approaching each other?

2 A. No, sir. We were -- Branchville's unit was in
3 front, Orangeburg County's unit was behind us,
4 following at a safe distance. As the Branchville
5 unit approached Cattle Creek Cross Road, he was
6 right in front of it and the driver of the unit
7 hollered, he noticed that the car wasn't going to
8 stop. The car ran the stop sign, crossed Highway
9 twenty-one, coming out in between the two
10 ambulances. When it got between the two
11 ambulances, it struck another car that was coming
12 down twenty-one going toward Branchville.

13 Q. Neither one of the ambulances were involved in the
14 accident?

15 A. No, sir.

16 Q. And a hematoma, as you referred to, that, that
17 really is a deep bruise?

18 A. Basically, but it depends on where it's at, you
19 know, as to how significant it could be.

20 Q. But it is a bruising, right?

21 A. Right.

22 Q. Blood underneath -- blood in the tissues below the
23 skin?

24 A. Right. There was marks around her neck where it
25 looked like a cord or something had been around it,

1 and when I asked her, you know, how did it happen
2 and everything. She told me that ---

3 Q. Well, I just want to know what you -- what a
4 hematoma was. That's all I asked.

5 SOLICITOR SIMS: Nothing further from this witness.

6 THE COURT: All right, then. You may step down,
7 sir. You are free to be excused.

8 SOLICITOR SIMS: Mary McIntosh.

9 MARY MCINTOSH, being first duly
10 sworn, testifies as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR SIMS:

13 Q. Ms. McIntosh, you speak kind of soft, so I'm going
14 to ask that you speak up because they're going to
15 have to hear what you have to say, and she's going
16 to take it down. You're employed with EMS, is that
17 correct?

18 A. I'm employed with Evans Wholesale, ---

19 Q. Uh huh.

20 A. --- and I'm an EMT. I'm a volunteer with the
21 Branchville Rescue Squad.

22 Q. Okay. And were you on duty back on December second
23 of nineteen ninety?

24 A. Yes, I was.

25 Q. Were you the driver of the automobile on that

1 night?

2 A. No. I was an EMT, in the back with the patient.

3 Q. Okay. And did you go into the home of Ms. Miller?

4 A. Yes, I did.

5 Q. And when you got there what did you do in relation
6 to Ms. Smith?

7 A. When we arrived we had a driver, and Mr. Oakley and
8 I were in the back as EMTs, and we went -- when we
9 were showed into the house and found the patient we
10 immediately examined her, and I went out to the
11 ambulance to call for a backup from Orangeburg
12 County for advance life support, because we saw
13 right away that she was having respiratory
14 problems.

15 Q. Okay. So you made the call. Is that correct?

16 A. Right.

17 Q. And were you the person who was also providing the
18 treatment for her until the advanced person came
19 on?

20 A. Yes, I was.

21 Q. And did you wait in Branchville or did you meet
22 that other ambulance?

23 A. We met in route, between Branchville and
24 Rowesville. I'm not exactly sure where because I
25 never got out of the back of the ambulance.

1 Q. Okay. And while on the way what were you treating
2 her for? How were you treating her?

3 A. Well, when I examined her on the scene her eyes
4 were bulging, she had blood coming from her eyes,
5 she had blood coming from her nose, she was gasping
6 for breath, she had severe marks around her neck,
7 where obviously something had been wrapped, a
8 hematoma, and she had several lacerations, and I
9 asked her if she had been stabbed because they, you
10 know, I wasn't sure about the lacerations, and she
11 said no, she hadn't been stabbed, and we just
12 treated them as lacerations, as such. And she was
13 having difficulty breathing.

14 Q. Are you certified?

15 A. Yes, I am.

16 Q. And were you certified at that time?

17 A. Yes, I was.

18 Q. And when was your certification ending for that
19 period of time?

20 A. I was certified, I think it was nineteen seventy-
21 eight, and it runs from February to February.

22 Q. Okay, so you've been re-certified over the years,
23 since nineteen seventy-eight?

24 A. Yes, sir.

25 SOLICITOR SIMS: Answer any questions that Mr.

1 Bowman has.

2 MR. BOWMAN: No questions for this witness.

3 THE COURT: All right, then, you may step down, and
4 you are free to be excused.

5 SOLICITOR SIMS: Ms. Virginia Ott.

6 VIRGINIA F. OTT, being first duly
7 sworn, testifies as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR SIMS:

10 Q. Ms. Ott, where are you employed?

11 A. I'm self-employed, but I'm a volunteer for
12 Branchville Rescue Squad.

13 Q. And -- a volunteer what for the Orangeburg Rescue
14 Squad?

15 A. EMTI.

16 Q. EMTI. Would you tell us what that is?

17 A. It's a -- it's the second level. It's EMT, EMTI,
18 and paramedic. I do some advance procedures.

19 Q. Okay. And have you been certified to do those
20 procedures?

21 A. Yes.

22 Q. And when were you first certified?

23 A. In seventy-eight.

24 Q. And your certification has been re-occurring over a
25 period of time?

1 A. Every three years.

2 Q. Every three years. And were you certified as such
3 on December second of nineteen ninety?

4 A. Yes, I was.

5 Q. And did you have an opportunity to meet with the
6 other EMTs in route from Branchville?

7 A. Yes, I met them down at the town hall, because they
8 asked me -- they needed some assistance, and they
9 said yes, so I met them in route, in front of the
10 town hall.

11 Q. Okay. And when you entered the ambulance, what, if
12 anything, did you see, and who was there?

13 A. The two EMTs on the truck and Ms. Audrey Smith, the
14 patient.

15 Q. Did you provide any assistance to her on that
16 night?

17 A. There -- everything had already been taken care of
18 and the backup -- the paramedic backup was on the
19 way, so I just helped to -- just finished up what
20 we were doing -- what they were doing, and just
21 cared for her in route.

22 Q. And at this time how long -- do you know how long
23 she had been treated by the other paramedics -- the
24 other EMTs before you got there?

25 MR. BOWMAN: Your Honor, I object. That's

1 irrelevant.

2 THE COURT: I'll sustain that.

3 Q. That was your only involvement. Is that correct?

4 A. Yes, sir.

5 SOLICITOR SIMS: That's all.

6 THE COURT: All right, now, just ---

7 MR. BOWMAN: No further questions.

8 THE COURT: No further questions?

9 MR. BOWMAN: No further questions.

10 THE COURT: All right, sir.

11 SOLICITOR SIMS: Your Honor, those are the
12 witnesses for the State.

13 THE COURT: All right, then, Madam Forelady and
14 ladies and gentlemen, at this time I will ask that you
15 please step to your jury room just for a minute and I'll
16 bring you back in.

17 (WHEREUPON, THE FOLLOWING
18 TAKES PLACE OUT OF THE
19 PRESENCE OF THE JURY.)

20 THE COURT: All of the testimony on behalf of the
21 State is in. If you have a motion I will be glad to hear
22 it at this time.

23 MR. BOWMAN: Thank you, Your Honor. At this time I
24 would move for a directed verdict of acquittal on behalf
25 of my client. Realizing that the State is -- that the

1 Court must look at the evidence in the light most
2 favorable to the State, I would say that it's, as
3 presented, is too incredible and insufficient to form a
4 basis for the jury to render a verdict.

5 THE COURT: All right, sir. I deny that motion. I
6 find there is sufficient evidence to go to the jury. I
7 would like for you to go and advise your client as to
8 where we are in the case and encourage him to come into
9 the courtroom, please, sir ---

10 MR. BOWMAN: Thank you, Your Honor.

11 THE COURT: --- to -- because his case is just
12 about to begin.

13 MR. BOWMAN: All right, sir.(TIME: 12:25 pm.)

14 (RECESS)

15 MR. BOWMAN: I'm sorry it took so long.

16 THE COURT: That's all right, sir.

17 MR. BOWMAN: I reiterated to my client your urging
18 me to get him to come in, your invitation to him, and the
19 reason I took a little bit longer was because I wanted to
20 discuss with him the plea bargain that I had arranged for
21 him, to make sure he understood it again, and that was
22 that the State had offered to let him plead to the lesser
23 charge of assault and batter of a high and aggravated
24 nature, and I was explaining to him how that -- the
25 maximum on that defense versus the maximum penalty on the

1 charge contained in the indictment, and I wanted to make
2 sure that he was turning down the plea bargain offer that
3 I had worked out for him.

4 THE COURT: All right, sir.

5 MR. BOWMAN: I'm sorry that took so long.

6 THE COURT: All right, then. And there will be
7 witnesses, then, on behalf of the defense?

8 MR. BOWMAN: Yes, there would.

9 THE COURT: All right. That ---

10 MR. BOWMAN: Can I go and get them?

11 THE COURT: Yes, sir, certainly. That will be
12 fine. Mr. Bowman.

13 MR. BOWMAN: At this time I would call Mary Ann
14 Bradley.

15 MARY ANN BRADLEY, being first duly
16 sworn, testifies as follows:

17 DIRECT EXAMINATION

18 BY MR. BOWMAN:

19 Q. Ms. Bradley, where do you live?

20 A. [REDACTED].

21 Q. And how long have you lived in Branchville?

22 A. About two years.

23 Q. And you are acquainted with Audrey Smith?

24 A. Yes, sir. That's my cousin.

25 Q. And how long has she been living in the same area

- 1 with you?
- 2 A. About four years.
- 3 Q. Four years? And when did that four year period
- 4 start?
- 5 A. I forgot what year that was.
- 6 Q. Are you saying she has lived in the Branchville
- 7 area for the last four years?
- 8 A. Uh huh.
- 9 Q. And do you know about the relationship she had with
- 10 Sammie Stokes?
- 11 A. Yeah.
- 12 Q. How would you say -- what was their relationship?
- 13 A. You mean, when they first together, or what?
- 14 Q. Yeah.
- 15 A. You mean at first -- no, I don't know about the
- 16 first time. I only know when -- in the four years
- 17 I was there.
- 18 Q. Okay. Well, what was it like during that time?
- 19 A. It was nice.
- 20 Q. Nice?
- 21 A. Yeah.
- 22 Q. Girl friend, boy friend?
- 23 A. Yeah.
- 24 Q. They got along good?
- 25 A. Yeah.

- 1 Q. And she recently moved back to Branchville ---
- 2 A. Yeah.
- 3 Q. ---like last fall?
- 4 A. Yeah.
- 5 Q. Do you remember when that was?
- 6 A. Let's see now, it was in -- I'm not sure.
- 7 Q. And where had she been living before she came back
- 8 to Branchville?
- 9 A. Charleston.
- 10 Q. And during that time were she and Sammie Stokes
- 11 still together?
- 12 A. No.
- 13 Q. Well, when she came back she sent you to go see
- 14 him, did she not?
- 15 A. Yeah, because she was scared of him. She said she
- 16 wouldn't talk to him because of what happened the
- 17 first time.
- 18 Q. But she sent -- and Kenneth Goins went with you?
- 19 A. Me and Kenneth Goins, me and Kenneth Goins. Uh
- 20 huh.
- 21 Q. But actually, she's the one that sent you to go get
- 22 him?
- 23 A. Yes.
- 24 Q. And to bring him to where she was?
- 25 A. Yeah, because she had wanted to talk to him,

1 because she said she didn't trust him, because we
2 was going out to a night club.

3 Q. But she's the one that wanted you to go get her and
4 bring him to her?

5 A. Yes.

6 Q. And do you remember when that was?

7 A. That -- I think that was in September, but I don't
8 remember what the date was, but I know it was on a
9 Friday night, because we went out to -- we went out
10 to a club. She said she didn't want to go in the
11 club because she didn't want him to run up on her
12 because she didn't trust him for what he did the
13 first time, so she had sent me back.

14 Q. Okay, well, I understand that.

15 A. Okay.

16 MR. BOWMAN: That's all I have for this witness,
17 Your Honor.

18 THE COURT: All right, sir, you may examine her.

19 CROSS-EXAMINATION

20 BY SOLICITOR SIMS:

21 Q. And that was in September. Is that correct?

22 A. Uh huh.

23 Q. And December, December second of nineteen ninety,
24 did she send you over to get him at that point?

25 A. No, no.

1 SOLICITOR SIMS: That's all I have, Your Honor.

2 THE COURT: All right, then, you may step down.

3 MR. BOWMAN: At this time I would call Spencer
4 Utsey.

5 SPENCER UTSEY, being first duly
6 sworn, testifies as follows:

7 DIRECT EXAMINATION

8 BY MR. BOWMAN:

9 Q. Is Spencer Utsey your whole name?

10 A. Yes, sir.

11 Q. And where do you live?

12 A. Branchville, South Carolina.

13 Q. Are you employed anywhere?

14 A. Yes.

15 Q. Mr. Utsey, I'm going to ask you if you'll sit up
16 straight and speak into the microphone so everybody
17 can hear your answers. Now, are you familiar with
18 Mary Ann Bradley?

19 A. Yes, I am.

20 Q. And do you know Sammie Lewis Stokes?

21 A. Yes.

22 Q. Did you remember an occasion when Ms. Bradley came
23 to where you were living?

24 A. Yes, sir.

25 Q. Could you tell about what happened then?

- 1 A. Well, Mary And, she -- you know, me and Lewis, we
2 was staying with these two girls. And then that's
3 when, your know, Mary Ann came over one night and
4 when she came over, you know, she knocked on the
5 door and I answered it, and she asked was Lewis
6 there, and I said "Yes, your know, he's in the
7 back." And so, that's when he came up, or he came
8 out, your know, and then he got in the car and
9 they left.
- 10 Q. Lewis Stokes got in the car with whom?
- 11 A. Mary Ann.
- 12 Q. And they left?
- 13 A. Yes, sir.
- 14 Q. Who were the female companions that you and Lewis
15 were living -- staying with?
- 16 A. Sonya McAlhaney and Johnicia Thornton.
- 17 REPORTER: I can't understand you.
- 18 A. Sonya McAlhaney and Johnicia Thornton.
- 19 Q. Is that the same person as Johnicia Diaxon?
- 20 A. Yeah, Johnicia Diaxon now. She's married.
- 21 REPORTER: Johnicia?
- 22 A. Johnicia.
- 23 Q. Do you remember being with Nelson Goldsmith and
24 seeing Audrey Smith and Sammie Stokes one night?
- 25 A. Yes.

1 Q. Tell us about what happened on that occasion?

2 A. Well, we drove up to the park with our girl
3 friends, and when we backed in we saw Audrey and
4 Lewis, they was sitting on, you know, Audrey was
5 sitting on Lewis' lap. And I said, "What's up,
6 Lew?" And he said, "What's up, Spence?" like
7 that, and then ---

8 Q. Which park are you talking about?

9 A. Branchville.

10 Q. Branchville?

11 A. Elementary School.

12 Q. And where is -- where is that in relation to
13 [REDACTED]?

14 A. It's not that far. It's about a twenty minute
15 walk.

16 Q. But, how -- can you estimate the distance from the
17 elementary school to the [REDACTED]?

18 A. I couldn't approximately estimate it, but it's
19 probably -- I could say it's a twenty minute walk.

20 Q. It's down, down south of -- [REDACTED] are
21 down south of town from the park that you saw them
22 in ---

23 A. Yes.

24 Q. --- right?

25 A. Yeah.

1 Q. And you say you spoke to him?

2 A. Yeah.

3 Q. What did you say to him?

4 A. I said "What's up Lew?" I said "What's up, Cool
5 Two?" That's his nick name, you know, I call him
6 that.

7 REPORTER: Cool what?

8 A. Cool Two.

9 Q. And what happened then?

10 A. Well, they just was sitting over there, swinging on
11 the swings, your know, and me and my home boy, you
12 know, we was just out there playing, wrestling with
13 our girls and, like that, that was it.

14 Q. You and who?

15 A. My home boy, Nelson.

16 Q. All right, and how long did y'all stay there,
17 talking to your girl friends?

18 A. I'd say about fifteen or twenty minutes.

19 Q. And during this time is when you saw Audrey Smith
20 sitting in Lewis -- Sammie Lewis Stokes' lap?

21 A. Yes.

22 Q. What did they appear to be doing?

23 A. Just swinging on the swing, you know. They wasn't
24 swinging but, you know, just a little rock.

25 Q. Did she, Audrey Smith, say anything to you?

1 A. No, sir.

2 Q. How did they -- did it appear that anything was
3 wrong?

4 A. Not to me.

5 Q. All right. Where were y'all headed that night?

6 A. Well, we wasn't headed nowhere. Then we start
7 talking, and it was getting boring, so we just
8 decided to go to a movie.

9 Q. Where was the movie?

10 A. Orangeburg.

11 Q. And do you know what time it was that you were
12 there talking to your girl friend with Nelson
13 Goldsmith?

14 A. It was approximately about eight o'clock.

15 Q. Now, had there been occasions, not this night but
16 other occasions when you had mentioned to Sammie
17 Stokes about, you mentioned Audrey Smith to him?

18 A. Yeah. We was pretty close, you know, and he told
19 me, you know ---

20 SOLICITOR SIMS: Objection, Your Honor. What he
21 told me.

22 THE COURT: Yes, I'll sustain the objection.

23 Q. Well, without going into what he told you, do you
24 have an impression as to -- what was his reaction
25 when you would mention her name?

1 A. Well, he told me that he was ---

2 SOLICITOR SIMS: I object.

3 THE COURT: I sustained the objection. You can't
4 testify to that.

5 MR. BOWMAN: That's all the questions for this
6 witness.

7 THE COURT: All right. You may examine. No, just
8 remain seated.

9 CROSS-EXAMINATION

10 BY SOLICITOR SIMS:

11 Q. Lewis Stokes is your homie?

12 A. Yes, sir.

13 Q. Y'all hang together?

14 A. Yes, sir.

15 Q. Live together? You lived with a couple of women
16 together, didn't you?

17 A. Yes, sir.

18 Q. Y'all are real good friend?

19 A. Yes, sir.

20 Q. What date was this when you saw them on the swing,
21 sitting on the lap?

22 A. I think the same night it happened.

23 Q. So he was with her?

24 A. Yes.

25 Q. There was nobody else out there but Lewis Stokes,

1 right?

2 A. And Audrey.

3 Q. And Audrey. Well, they were just sitting there,
4 weren't they? Isn't that the real truth? Now, she
5 wasn't sitting in his lap, was she?

6 A. Yes, she was. She was sitting on him, and they was
7 swinging in the swing.

8 Q. Did you talk to your homie about this?

9 A. No, I didn't.

10 Q. You haven't talked to Lewis about this case?

11 A. Cause he -- yeah, I came up there, I carried him
12 some money about two or three times, and a pair of
13 sneakers.

14 Q. So -- and when you do that -- when you did that you
15 never talked to him about this case or what you
16 were going to say?

17 A. No, I did not.

18 SOLICITOR SIMS: That's all I have.

19 MR. BOWMAN: No further questions of this witness.

20 THE COURT: All right, sir.

21 MR. BOWMAN: I would next call Nelson Goldsmith.

22 NELSON GOLDSMITH, being first duly
23 sworn, testifies as follows:

24 DIRECT EXAMINATION

25 BY MR. BOWMAN:

1 Q. Is Nelson Goldsmith your whole name?
2 A. Yes, sir.
3 Q. And where do you live, sir?
4 A. [REDACTED].
5 Q. Is -- what town is that in?
6 REPORTER: [REDACTED]?
7 A. [REDACTED].
8 Q. What town is that in?
9 A. Orangeburg.
10 Q. Orangeburg? And how long have you lived in
11 Orangeburg?
12 A. About three years.
13 Q. Are you familiar with Sammie Lewis Stokes?
14 A. Yeah.
15 Q. Do you know Audrey Smith?
16 A. Yeah.
17 Q. Well, do you know her when you see her?
18 A. Yeah.
19 Q. Do you see her this morning?
20 A. No.
21 Q. You don't see her this morning?
22 A. Oh, yeah.
23 Q. And do you remember -- going back -- taking you
24 back to December of last year, do you remember
25 seeing Sammie Stokes and Audrey Smith?

- 1 A. Yeah.
- 2 Q. Where was that?
- 3 Q. At the Branchville Elementary School.
- 4 A. And who were you with then?
- 5 A. Me and Spencer, and ---
- 6 Q. Spencer ---
- 7 A. Utsey.
- 8 Q. Utsey. And what did you see when you went over to
- 9 the playground at the school?
- 10 A. Well, when I came up, and I seen some -- they was
- 11 sitting in the swing.
- 12 REPORTER: I can't hear you.
- 13 Q. Would you sit up straight and talk into the
- 14 microphone.
- 15 A. When I came up to the elementary school, I was
- 16 backing up and I saw somebody -- people in the
- 17 swing, so I got out, and they was sitting in--
- 18 Lewis and Audrey was sitting in the swing.
- 19 Q. Where was she -- who was sitting in the swing?
- 20 A. Lewis was sitting down and she was sitting on him.
- 21 Q. She was sitting on him?
- 22 A. Yes.
- 23 Q. In his lap?
- 24 A. Yes.
- 25 Q. And did y'all say -- did you say anything to them?

- 1 A. I say, "What's up, Lew?"
- 2 Q. And what happened after that?
- 3 A. Then me and my -- then my girl out, me and her was
4 playing around for a few minutes, then Spencer got
5 out, and then Spencer say "What's up, lew?" Then
6 me and Spencer was talking, and then I said "Y'all
7 want to go to the movies?"
- 8 Q. Who did you say that to?
- 9 A. Spencer. And then they said -- Spencer said he
10 didn't care, so I said what time it was, and
11 somebody -- and Spence asked Lewis and he ain't
12 said nothing, so I believe then I cranked up my car
13 and I don't know for shore -- I can't say what time
14 it was, but then I say "Well, let's go" I say
15 "Well, maybe we can catch the movie." So we went
16 on to Orangeburg.
- 17 Q. And do -- how often -- how long did you see Lewis
18 Stokes -- Sammie Lewis Stokes and Audrey Smith at
19 that time?
- 20 A. How long?
- 21 Q. Yes.
- 22 A. Well, ---
- 23 Q. How long were y'all there?
- 24 A. I'd say about fifteen minutes.
- 25 Q. Did she say anything to you?

1 A. No, sir.

2 Q. Did it look like there anything wrong between them?

3 A. No. Like they usually is.

4 Q. Are you --

5 MR. BOWMAN: That's all the questions I have for
6 this witness.

7 CROSS-EXAMINATION

8 BY SOLICITOR SIMS:

9 Q. Are you sure you see Audrey Smith in this courtroom
10 today?

11 A. Yeah. I know her.

12 Q. There was some hesitation when you were first
13 asked.

14 A. I thought he said have I seen her this morning, I
15 mean, before I come in here.

16 Q. And you are basically a good buddy, or friend with
17 Utsey, aren't you?

18 A. Oh, yeah, me and Spencer, yeah.

19 Q. And you know Sammie Smith -- Sammie Stokes, don't
20 you?

21 A. Yes, sir.

22 Q. Y'all hang around together?

23 A. Me and -- before Lewis went to jail me and Lewis
24 didn't really socialize. I only know him cause him
25 and Spencer been hanging together.