

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Jeffrey Young, Circuit Court Judge

STEPHEN C. STANKO,

PETITIONER,

V.

THE STATE,

RESPONDENT.

Appellate Case No. 2017-000211

**MOTION TO RELIEVE THE OFFICE OF APPELLATE DEFENSE AND
MOTION FOR APPOINTMENT OF COUNSEL**

Petitioner respectfully moves this Court to relieve the Office of Appellate Defense in this case and to appoint counsel for this appeal. To support this motion Petitioner would show the following:

1. The present case involves an appeal from Petitioner's Georgetown County PCR (hereinafter "the Georgetown PCR"). The Georgetown PCR collaterally attacks Petitioner Georgetown County conviction and death sentence.

2. The Georgetown County conviction and sentence were previously reviewed by the Court in a direct appeal filed by then Chief Appellate Defender Joseph Savitz and Appellate Defender Katherine Hudgins. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008).

3. For the Georgetown PCR, Petitioner was represented by Stuart M. Axelrod as lead counsel and Tristan M. Shaffer¹ as second-chair. Both Counsels were appointed pursuant to rule 608.

4. As part of the Georgetown PCR, Petitioner has alleged multiple grounds concerning his Sixth Amendment right to effective assistance of appellate counsel.

5. Former Chief Appellate Defender Joseph Savitz testified at the evidentiary hearing for the Georgetown PCR.

6. In addition to the present case, Petitioner also was sentenced to death in Horry County. Petitioner's Horry County conviction and sentence were previously reviewed by the Court in a direct appeal filed by the current Chief Appellate Defender Robert Dudek and Appellate Defender Robert Pachak. *See State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).

7. Petitioner has collaterally challenged his Horry County conviction and sentence by filing PCR action number 2014-CP-26-0035 (hereinafter "the Horry PCR"). For the Horry PCR, Petitioner is currently represented by Emily Paavola and Lindsey Vann. In the Horry PCR, Petitioner has alleged that Chief Appellate Defender Robert Dudek and Appellate Defender Robert Pachak were ineffective.

8. Chief Appellate Defender Robert Dudek testified at the evidentiary hearing for the Horry PCR.

9. Generally, when PCR Counsel is appointed the case would be transferred to the Office of Appellate Defense when a notice of appeal is filed. *See Rule*

¹ Mr. Shaffer appeared as third-chair for the evidentiary hearing but was later appointed second-chair after the Court relieved Bobby Frederick.

602(e)(3), SCACR. However, Petitioner objects to such an appointment due to a conflict of interest.

10. Petitioner has a right to counsel to appeal his PCR. *See Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (noting that in the statutory right to seek appellate review of a PCR is a right to counsel for an appeal of a PCR). The right to an attorney for a capital PCR is statutory. *See* S.C. Code § 17-27-160. Inherent in the right to counsel is the right to conflict free counsel. *See Holloway v. Arkansas*, 435 U.S. 475 (1978); *see also, Mickens v. Taylor*, 535 U.S. 162, 168 (2002). Therefore, assigning Petitioner appellate counsel who has a conflict of interest would violate Petitioner's right to due process under the Fourteenth Amendment. *See Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that the Due Process Clause protects against the arbitrary loss of a statutory right.).

11. Petitioner has alleged that the following five Appellate Defenders or former Appellate Defenders were ineffective: Robert Dudek is the current Chief Appellate Defender; former² Chief Appellate Defender Joseph Savitz; Appellate Defender Robert Pachak; Appellate Defender Katherine Hudgins; and trial counsel, William I. Diggs, who was a former Chief Appellate Defender. Three of these attorneys currently work for the Office of Appellate Defense accounting for twenty-five percent of the office's twelve attorneys.

12. Petitioner asserts that the conflict is pervasive throughout the Office of Appellate Defense because Chief Appellate Defender Robert Dudek is required by statute to oversee the entire appellate division. *See* S.C. Code § 17-3-360 ("The division must be administered by a chief attorney" (emphasis added)). The fact that

any Appellate Defender appointed would in fact be a subordinate to Mr. Dudek creates a conflict on interest. *See* Rule 1.7, Rule 407, SCACR Comment 10 (“The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client, or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client.”).

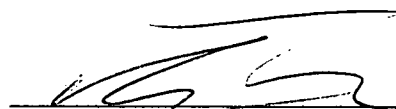
13. Additionally, even if Mr. Dudek was not mandated by statute to oversee the office, there is a conflict of interest with any attorney at the office created by his ineffective assistance of counsel claims against three current Appellate Defenders and two former Chief Appellate Defenders. *See* Rule 1.7, Rule 407, SCACR (“A concurrent conflict of interest exists if...there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” (emphasis added)).

THEREFORE, Petitioner would respectfully request that the Office of Appellate Defense be relieved and that conflict free counsel be appointed for this appeal. Counsel requests that the time limits for filing the Petition for Writ of Certiorari be held in abeyance pending a ruling on this motion.

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² Mr. Savitz retired from the office in 2010.

Respectfully submitted,



Tristan M. Shaffer (SC Bar # 77565)

225 Columbia Ave.

Chapin, SC 29036

Phone: (803) 575-0384

tristan@shafferlawsc.com

February 8, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
Jeffrey Young, Circuit Court Judge

STEPHEN STANKO,

PETITIONER,

V.

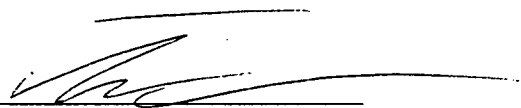
THE STATE,

RESPONDENT.

Appellate Case No. 2016-00902

Certificate of Service

I certify that on this day, I have served a copy of the Motion to Relieve the Office of Appellate Defense and Motion for Appointment of Counsel in the above captioned case on Respondent by depositing it in the United States mail with postage prepaid and addressed to the Attorney for Respondent as listed below.



Tristan M. Shaffer (SC Bar # 77565)
225 Columbia Ave.
Chapin, SC 29036
Phone: (803) 575-0384
tristan@shafferlawsc.com

February 9, 2017

Other Counsel of Record:
Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent