

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2017-000211.

Stephen C. Stanko, #6022,

Petitioner,

v.

State of South Carolina,

Respondent.

**RETURN TO PETITIONER'S MOTION TO REMAND TO DETERMINE
QUALIFICATION OF COUNSEL PURSUANT TO S.C. CODE § 17-27-160(B)**

Prior to preparation of the Petition for Writ of Certiorari in this capital post-conviction relief (PCR) appeal, Petitioner seeks a remand to have the circuit court determine whether his appointed PCR counsel met the qualifications set forth in S.C. Code Ann. § 17-27-160(B) (1996) and recently emphasized in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). (Pet. Mot. for Remand). In opposition to that motion, Respondent respectfully submits the following:

I. Relevant Procedural History

Trial and Appeal

On August 11, 2006, a jury found Petitioner Stephen C. Stanko (Petitioner) guilty of murder, two counts of kidnapping, assault and battery with intent to kill, first degree criminal sexual conduct, and armed robbery. The charges arose from the April 8, 2005, death of Laura

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Ling and the attempted murder and sexual assault of Ling's fifteen-year old daughter in the Ling home. On August 18, 2006, the jury recommended Petitioner be sentenced to death, finding the State had proven beyond a reasonable doubt all of the statutory aggravating circumstances it alleged: that the murder was committed while in the commission of criminal sexual conduct in any degree, while in the commission of kidnapping; while armed with a deadly weapon; while in the commission of larceny with the use of a deadly weapon, and while in the commission of physical torture.

The Honorable Deadra L. Jefferson followed the jury's recommendation, sentencing Petitioner to death for the murder of Laura Ling. Judge Jefferson also sentenced Petitioner to thirty years for first degree criminal sexual conduct, thirty years for the kidnapping of Ling's daughter, thirty years for armed robbery, and twenty years for assault and battery with intent to kill. Judge Jefferson did not sentence Petitioner for the kidnapping charge of Laura Ling pursuant to South Carolina law.

On appeal, Petitioner's convictions and sentence were affirmed. *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008).

Appointments of Post-Conviction Relief Counsel

On October 17, 2008, Petitioner, by and through appellate counsel, filed an application for PCR. This Court appointed the Honorable J. Michael Baxley with exclusive jurisdiction over the matter. Judge Baxley initially appointed Everett P. Godfrey, Jr., Esq., as first chair counsel, and J. Andrew Ritner, Esq., as second chair counsel. (Or. Appointing PCR Counsel filed Jan. 28, 2009 (Attached as Exhibit 1)).

Shortly before this case was to be tried at the originally scheduled merits hearing, Mr. Godfrey was relieved as counsel because of personal illness. (Or. Relieving Lead Counsel and

Appointing Substitute PCR Counsel filed Jul. 28, 2010 (Ex. A to Pet. Mot. for Remand)). At the same time, Judge Baxley appointed Stuart Mark Axelrod, Esq. as Petitioner's lead counsel. The Order appointing Mr. Axelrod was issued on June 14, 2010. (*Id.*).

Months later, Mr. Ritner moved to be relieved because he became employed with the Attorney General's Office, though his employment was with a unit other than the Capital and Collateral Litigation unit which has exclusively handled Petitioner's appellate and post-conviction litigation. Judge Baxley relieved Mr. Ritner as second chair counsel and ordered Mr. Axelrod to inform the court as to whom he would request serve as second chair. (Or. Relieving Second Chair Counsel and Appointing Substitute PCR Second Chair Counsel filed May 6, 2013 (Ex. B to Pet. Mot. for Remand)). Mr. Axelrod proposed the appointment of Bobby G. Frederick, Esq. Petitioner consented, and Judge Baxley then appointed Mr. Frederick as second chair. The Order appointing Mr. Frederick was issued on April 22, 2013. (*Id.*).

Counsel and the Post-Conviction Relief Evidentiary Hearing

Upon the retirement of Judge Baxley from the bench, the Honorable W. Jeffrey Young was appointed with exclusive jurisdiction over this PCR matter. The evidentiary hearing took place before Judge Young on April 27 and 28, 2015, in Georgetown County. Mr. Axelrod and Mr. Frederick represented Petitioner at the hearing in addition to pro bono counsel Tristan Shaffer, Esq. Mr. Shaffer was formally added as third chair counsel in a Consent Order issued after the hearing on May 27, 2015. (Consent Or. to Add Pro Bono Counsel filed Jun. 17, 2015 (Ex. C to Pet. Mot. for Remand)). Regardless of the timing of the order of appointment, three attorneys represented Petitioner at the evidentiary hearing.

After submission of proposed orders from both parties, Judge Young denied Petitioner relief in full in an Order filed July 15, 2016. Petitioner, by and through Mr. Shaffer, timely

moved to alter or amend judgment and simultaneously renewed an earlier motion for Judge Young's recusal. Respondent opposed the motion, and Judge Young denied the motion in an Order issued January 19, 2017. Notice of this appeal and appointment of appellate PCR counsel followed.

II. Procedure for Challenging the Qualification of Capital PCR Counsel

Petitioner seeks remand for the limited purpose of conducting a hearing to determine whether Mr. Axelrod and Mr. Frederick meet the statutory requirements of S.C. Code Ann. § 17-27-160(B) (1996) such that they were qualified to represent Petitioner at the time of first-chair appointment on June 14, 2010, and of second-chair appointment on April 22, 2013. (*See* Ex. A and B to Pet. Mot. for Remand).

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in [his capital PCR] action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160(B) (1996). The alternative qualification enumerated within this statute allows “[o]ne of the attorneys so appointed [to] have at least five years’ experience as a licensed attorney and at least three years’ experience in the actual trial of felony cases,” and further that “[t]he Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases.” S.C. Code Ann. § 16-3-26(B) and (F) (1996).

“The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings.” § 17-27-160(B). In December of last year, this Court

decided *Robertson v. State, supra*, therein discussing the aforementioned qualifications and emphasizing the requirement that appointed capital PCR counsel have prior experience with capital PCR proceedings, not just capital trials. 418 S.C. 505, 518-19, 795 S.E.2d 29, 36 (2016). This Court found “the Legislature intended for an indigent capital defendant to be appointed counsel who: (1) has previous experience representing a capital defendant in state or federal PCR proceedings, or (2) was qualified to try a capital case and successfully completed at least twelve hours of South Carolina Bar approved (a) CLE specifically involving *capital* appellate or *capital* PCR proceedings or (b) professional training specifically involving *capital* appellate or *capital* PCR proceedings.” *Id.* at 518, 795 S.E.2d at 35-36 (emphasis in original).

Robertson concluded that an “allegation that prior PCR counsel were unqualified is not foreclosed by *Aice*¹ or its progeny and constitutes a ‘sufficient reason’ to avoid the prohibition of section 27-17-90 against successive PCR applications.” *Id.* at 522, 795 S.E.2d at 37-38. The opinion also established the “remedy for lack of qualified counsel,” holding that where PCR counsel is determined to have been unqualified under § 17-27-160(B), that PCR counsel was *per se* deficient. *Id.* at 520-21, 795 S.E.2d at 37. However, this Court held that a PCR judge must then examine that counsel’s performance from the initial PCR proceeding through the strictures of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), and make a finding as to whether the unqualified counsel caused Petitioner prejudice by the nature of their representation.² *Id.* at 522, 795 S.E.2d at 38. *Robertson* then remanded the PCR action to the

¹ *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991).

² Between 2003 and *Robertson*, “counsel has been held to be qualified to represent a capital PCR applicant if counsel is qualified to represent a capital defendant *at trial* and has completed the continuing legal education requirements.” *Robertson v. State*, 418 S.C. 505, 526, 795 S.E.2d at 40 (Toal, dissenting) (citing *Re Appointment of Counsel in Capital Post-Conviction Relief Matters*, dated August 15, 2003, found at

circuit court to conduct a hearing limited to PCR counsel's fulfillment of the statutory qualifications and any resulting prejudice. *Id.*

Taken together, the holdings and conclusion in *Robertson* enumerate a proper remedial procedure for the issue raised in Petitioner's Motion to Remand. 418 S.C. at 520-22, 795 S.E.2d at 37-38. Where a Petitioner has cause to challenge the qualification of counsel appointed as representation in the initial PCR, a Petitioner may *file a successive PCR application* alleging the lack of qualification. *Id.* That application should be filed within one year of Petitioner's discovery of the alleged lack of qualification. *Id.* at 522, 795 S.E.2d at 37 (citing S.C. Code Ann. § 17-27-45 (1995)). The circuit court may then conduct a hearing to delve into the qualifications of the initial collateral counsel. *Id.* "If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." *Id.* at 522, 795 S.E.2d at 38.

III. Petitioner's Motion is Premature and does not Align with the Proper Procedure to Challenge Capital PCR Counsel's Qualifications for Appointment

As of the date of this Return, Petitioner has not filed a second or successive PCR application, nor has Petitioner raised any claim of deficient performance or prejudice related to his three PCR counsel's representation at the evidentiary hearing.

A vehicle exists for challenging the qualification of appointed PCR counsel in a capital case, but a remand is not the proper outlet for the challenge presented. By filing a motion to remand, Petitioner has not comported with the remedy enumerated in *Robertson*. The PCR application which is subject to this appeal does not contain an allegation that appointed PCR counsel is or was not qualified for appointment. *Robertson* instructs that such a challenge must

<http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=165> (footnote omitted).

be properly brought through the filing of a successive PCR action.

Moreover, the requested remand is premature at this juncture. Assuming *arguendo* that Petitioner's PCR counsel was *per se* deficient because they were not qualified under the strictures of *Robertson* and § 17-27-160(B), a limited remand to conduct a hearing on the extent of their appointment qualifications could not reach to the ultimate issue of whether their representation caused Petitioner prejudice.³ Without knowing the outcome of this appeal—which arises from appointed PCR counsel's representation—it is too soon to hear testimony on the issue of whether Petitioner's PCR counsel caused him prejudice.

Also in regards to the precipitous nature of Petitioner's motion, assuming *arguendo* that this Court were to grant certiorari, order the completion of merits briefing in this appeal, and then were to reverse the circuit court and grant relief, any allegation that Petitioner's initial PCR counsel were not qualified would be moot.

WHEREFORE, undersigned Respondent prays that this Court deny Petitioner's motion to remand this proceeding prior to such time as this Court has completed its consideration of the pending Petition for Writ of Certiorari, as a remand is not the proper vehicle for determining whether Petitioner received the assistance of qualified PCR counsel in light of *Robertson, supra*, and as a remand at this juncture in the proceedings would be premature for the reasons discussed

³ Respondent, aware of the alleged cause to challenge counsel's qualifications as stated in Petitioner's Motion, has not as of this date concluded an investigation into those allegations and is not at this time in the position to oppose or concede whether any of the appointed counsel had adequate felony trial experience or CLEs. However, the result of that investigation could not speak to the prejudice prong of *Strickland, supra*, for the procedural reasons stated herein.

Moreover, any discussion of PCR counsels' qualifications, and not the procedure for raising such a challenge, would only be appropriate before the circuit court. A remand to the circuit court for a hearing regarding the totality of PCR counsels' qualifications would require full disclosure of CLE attendance during the relevant time frame as well as a full discussion of felony trial and practice background as to all counsel.

herein.⁴ Respondent additionally prays that upon resolution of this motion, this Court deny Petitioner's request to stay the pending deadlines for filing the Petition for Writ of Certiorari and Appendix in this action.

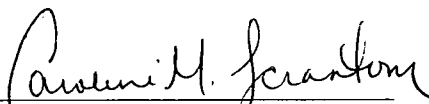
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 13, 2017
Columbia, South Carolina

⁴ Like Judge Baxley, Judge Young has retired from the bench since the conclusion of the evidentiary hearing. There thus exists a need for assignment of exclusive jurisdiction over this matter to a new, and third, PCR judge if this Court were to grant Petitioner's motion.

EXHIBIT 1

STATE OF SOUTH CAROLINA)
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 COUNTY OF GEORGETOWN)
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 Stephen C. Stanko, #6022,)
)
 Applicant,)
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 vs.)
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 State of South Carolina,)
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)
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 Respondent.)
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IN THE COURT OF COMMON PLEAS

C/A No. 08-CP-22-1446

ORDER APPOINTING
 POST-CONVICTION RELIEF COUNSEL

2009 JAN 28 AM 8:53
 ALVIN T. WHITE
 CLERK OF COURT

Jan 28

This matter comes before this Court pursuant to the Order of the Supreme Court of South Carolina staying the order of execution of Georgetown County death row inmate Stephen C. Stanko to allow him to pursue potential state post-conviction relief. The Order assigned this Court with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. The Order directed this Court to conduct a hearing on Mr. Stanko's desires within thirty (30) days of that date pursuant to In Re Stays of Execution, 321 S.C.544, 471 S.E.2d 140 (1996). This Court scheduled a hearing on December 8, 2008 to consider appointment of state post-conviction relief counsel.

Petitioner Stephen C. Stanko was indicted on August 25, 2005 by the Georgetown County Grand Jury for the offenses of murder, two counts of kidnapping, assault and battery with intent to kill, criminal sexual conduct in the first degree, and armed robbery. These charges arose from the

April 8, 2005 murder of Laura Ling and the rape and attempted murder of her daughter Christine Ling on the same date.

The case was initially called for trial with his co-defendant on August 7, 2006. Petitioner was represented by Gerald Kelly, Esq. and Bill Diggs, Esq. The matter was tried before a jury and the Honorable Deadra L. Jefferson, Presiding Judge. The jury found Petitioner guilty of murder, two counts of kidnapping, assault and battery with intent to kill, criminal sexual conduct in the first degree, and armed robbery.

On August 18, 2006, the sentencing proceeding began. At the conclusion of the evidence, the jury was instructed to consider the following statutory aggravating circumstances:

1. The murder was committed while in the commission of criminal sexual conduct in any degree.
2. The murder was committed while in the commission of kidnapping.
3. The murder was committed in the commission of robbery while armed with a deadly weapon.
4. The murder was committed while in the commission of larceny with the use of a deadly weapon.
5. The murder was committed while in the commission of physical torture.

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The jury was further instructed on the following mitigating circumstances:

1. The murder was committed while the defendant was under the influence of mental or emotional disturbance (S.C. Code Ann. Section 16-3-20(C)(b)(2)), and
2. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (S.C. Code Ann. Section 16-3-20(C)(b)(6)).
3. Any other mitigating circumstance supported by the evidence.

The jury found the existence of all of the aggravating circumstances beyond a reasonable doubt. Further, the jury returned a recommendation of a death sentence. On August 18, 2006, Judge Jefferson sentenced the Petitioner to death for murder, twenty years for assault and battery with intent to kill, thirty years for criminal sexual conduct in the first degree, thirty years for the kidnapping of Christine Ling, and thirty years for armed robbery. Pursuant to South Carolina law, Judge Jefferson did not sentence Petitioner on the kidnapping charge for which the deceased Laura Ling was the victim.

The Petitioner appealed to the Supreme Court of South Carolina. On appeal, Petitioner was represented by Joseph L. Savitz, III, Chief Appellate Defender and Katherine H. Hudgins, both of the South Carolina Office of Appellate Defense. In his appeal he raised the following issues:

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1. Did the trial court err in refusing to allow Appellant to ask potential jurors about their feelings and viewpoints concerning the defense of insanity during voir dire?
 2. Did the trial court err in failing to instruct the jury on an additional and unrequested statutory mitigating circumstance?

On February 25, 2008, the Supreme Court of South Carolina affirmed the convictions and death sentence in State v. Stephen Christopher Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). After a petition for rehearing was timely made, the Court denied the petition on March 19, 2008.

Petitioner next filed a petition for writ of certiorari in the United States Supreme Court. In that petition, he asserted the following question:

- (1) Is a capital defendant who relies solely on the defense of insanity at the guilt phase of his murder trial entitled, under the Sixth and Fourteenth Amendments, to question prospective jurors about their possible bias against that defense?

Certiorari was denied on October 6, 2008.

Petitioner next filed a petition for a stay of execution on October 9, 2008. In his petition, through appointed appellate counsel Savitz and Hudgins, Petitioner asserted that he intended to file an application for state post-conviction relief, alleging the following ground for relief of ineffective assistance of counsel:

1. Petitioner Stanko did not receive effective assistance of either trial or appellate counsel because the Court held that the failure to instruct the jury on the statutory mitigating circumstance of the age or mentality of defendant at the time of the crime as provided by S.C. Code Ann. Section 16-3-20(C)(b)(7) was not preserved for appellate review.

The Supreme Court granted the stay and ordered this proceeding to occur concerning the appointment of counsel with Chief Justice Toal dissenting.

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On Monday December 8, 2008, this Court convened a hearing in Conway, South Carolina at the Horry County Courthouse to determine the desires of Petitioner Stanko regarding counsel. Petitioner was present at the hearing. The Respondents were represented by J. Anthony Mabry, Assistant Attorney General, of the South Carolina Office of the Attorney General. This Court made inquiry of Mr. Stanko and finds that he desires to have counsel appointed to represent him in the state post-conviction relief action. Further, at the conclusion of the hearing, the Court provided Petitioner with a list of appropriately certified local counsel, and gave Petitioner an additional fourteen (14) days to comment in writing as to his preference of counsel. The State objected to this action, arguing that state law did not give Petitioner the right to choose his court-appointed counsel. This objection was overruled on the basis that giving Petitioner an opportunity to express a preference as to counsel was not granting Petitioner the right to choose counsel. Subsequently, a

letter from Petitioner dated December 18, 2008 was sent to the Court and state's counsel expressing such preference. A copy of this letter is filed with the Clerk of Court. After further consideration, the Court appointed qualified counsel that were not on Petitioner's preference list.

A. Appointment of Qualified Counsel

Section 17-27-160 provides:

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. **At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.** The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings. The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment.

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This Court has considered the qualifications of Everett P. Godfrey, Jr. of the Greenville Bar. He has been an active member of the South Carolina Bar since 1989. Mr. Godfrey has in the past worked in the Richland and Pickens Public Defender Offices, in which he had varied experience in the trial of felony cases, including murder, which would satisfy the demands of §16-3-26. He was most recently appointed by Judge Larry R. Patterson as second counsel in the still pending John Wood death penalty PCR action that was heard in November 2007. Furthermore, Mr. Godfrey served as first chair counsel in the second re-sentencing capital trial for Freddie Owens in November of 2006. This Court finds that Mr. Godfrey meets the minimum qualifications of the prior experience pursuant to §17-27-160(B) to qualify as experienced counsel. Additionally, he has

maintained continuing legal education dedicated to representation of capital inmates in similar actions. This Court finds it appropriate to appoint Everett P. Godfrey, Jr. as a qualified first chair counsel in this matter.

This Court has also considered the qualifications of J. Andrew Ritner of the Horry Bar. He graduated from Michigan State University Law School in 2002. Since 2003, he has been a member of the South Carolina Bar, practicing both civil and criminal law in Horry County. He has previously been appointed as defense counsel for cases involving felony charges and has offered his services as conflict counsel to the Horry County Public Defender's Office. This Court finds it appropriate to appoint J. Andrew Ritner as a qualified second chair counsel in this matter.

Therefore, it is ordered that the following be appointed to represent Mr. Stephen C. Stanko in the potential state post-conviction relief matter:

1. Everett P. Godfrey, Jr., Esquire
Godfrey Law Firm, LLC
10 East Ave.
Greenville, SC 29601
864-497-9196

2. J. Andrew Ritner, Esquire
P. O. Box 2733
Myrtle Beach, SC 29578
843-488-3500

B. Scheduling Order


This Court reminds newly appointed state post-conviction relief counsel of its obligation, pursuant to In Re Stays, 471 S.E.2d 140 (S.C. 1996), to provide to the Clerk of the South Carolina Supreme Court, with a copy to this Court and opposing counsel J. Anthony Mabry of the South

Carolina Attorney General's Office, a status letter every sixty (60) days to ensure the pending stay of execution is continued during these proceedings.

It is the further intention of the Court to establish a scheduling Order consistent with In Re Stays and Section 17-27-160. Counsel is requested to discuss this matter among themselves and proposed a scheduling Order within thirty (30) days of the date of this Order. In the event counsel cannot agree, the Court will conduct a hearing to resolve the issue and set the case schedule.

WHEREAS, this Court has conducted the initial hearing of appointment as mandated by the Order of the Supreme Court and appointed the above-named counsel.

IT IS SO ORDERED this 22nd day of January, 2009.



J. Michael Baxley
Presiding Judge
Conway, South Carolina