

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 06 2017

Appeal from Horry County

S.C. SUPREME COURT

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO #6022,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

The undersigned respectfully moves this Court for the appointment of outside counsel for Petitioner, Stephen Stanko, based on a conflict of interest. In support of this motion, the undersigned would show this Court:

(1) Petitioner was indicted by the Horry County grand jury for the offenses of murder, and armed robbery.

(2) The State sought the death penalty on the murder charge. Petitioner was represented at trial by William I. Diggs and Brana Williams. He was found guilty of all counts. Following a penalty hearing, the jury recommended that Petitioner be sentenced to death and a death sentence was imposed by the Honorable Steven H. John on November 19, 2006.

(3) Petitioner appealed his convictions and sentences. He was represented on direct appeal by Robert M. Dudek and Robert Pachak of the South Carolina Office of Appellate Defense. This Court affirmed Mr. Stanko's convictions and death sentence. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2012). Rehearing was denied on April 3, 2013.

(4) Petitioner filed a timely application for post-conviction relief ("PCR") in the Horry County Court of Common Pleas. Petitioner was represented by Emily C. Paavola and Lindsey S. Vann at a hearing on his PCR application. In the final amended application for PCR, Petitioner raised issues of ineffectiveness of appellate counsel in addition to ineffective assistance of trial counsel. Appellate counsel Robert Dudek testified at the PCR hearing. The circuit court's order of dismissal made specific findings regarding the issue of ineffective assistance of appellate counsel and denied relief on that basis on pages 3, 8-9. The order is attached as Exhibit A. Petitioner filed a timely notice of intent to appeal in this Court.

(5) Undersigned counsel respectfully requests that she be appointed to represent Petitioner in this appeal. Outside counsel should be appointed because the Office of Appellate Defense has a conflict of interest given that Robert Dudek, the Chief Attorney of the Office of Appellate Defense, was appellate counsel and issues regarding the competency of his representation is at issue in this case. Because Mr. Dudek is the chief attorney, the entire Office of Appellate defense would have a conflict in handling this appeal because it would require any other attorney in the office to evaluate and litigate the competency of representation provided by their boss. Moreover, given the unique circumstances of this case, appointment of the undersigned as outside counsel would be the most efficient use of judicial time and resources.

(6) Appointment of undersigned counsel would create judicial efficiencies because she, along with Emily Paavola, represented Petitioner in his PCR proceedings in this case. As a result,

undersigned counsel is familiar with the trial, appeal, and PCR record. Additionally, Petitioner is also under the sentence of death imposed in Georgetown County for crimes committed within twenty-four hours of the crimes charged in this case. The Georgetown County trial occurred first and Mr. Stanko was represented by the same lead counsel in both cases, making the Georgetown County trial record relevant to the Horry County case. On March 24, 2017, this Court appointed undersigned counsel to represent Petitioner in the Georgetown County appeal of the denial of PCR. As a result, undersigned counsel is already familiar with the record in both of Petitioner's cases and it would be most efficient for her to handle both appeals.¹

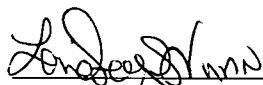
(7) Ms. Paavola, who is similarly familiar with the records in both of Petitioner's cases, has agreed, if undersigned counsel is appointed as outside counsel, to assist with this case in a *pro bono* capacity.

(8) Finally, though he understands he does not have a right to counsel of his choice, Petitioner has indicated that he desires undersigned counsel to represent him in appeal of the denial of PCR in his Horry County case as well as his Georgetown County case.

¹ The record in this case (prior to the post-conviction relief proceedings) totaled over 3,500 pages. Similarly, the record in the Georgetown County case (prior to the post-conviction relief proceedings) totaled over 3,700 pages. Undersigned counsel has previously reviewed and become familiar with both records, which combined total over 7,000 pages.

Respectfully, for the above reasons, undersigned counsel requests that this Court appoint her to represent Petitioner on appeal. Furthermore, counsel requests that time limits governing assembling of the appendix and filing of a petition for a *writ of certiorari* be tolled during the pendency of this motion.

Respectfully submitted,



Lindsey S. Vann, SC Bar No. 101408
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044

November 3, 2017.

Exhibit A

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2014-CP-26-035

Stephen C. Stanko, #6022,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

FINAL ORDER
DENYING POST-CONVICTION RELIEF

TRIAL DATE March 2 – 3, 2015
PRESIDING JUDGE Benjamin H. Culbertson, Circuit Court Judge
APPLICANT'S ATTORNEYS Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
RESPONDENT'S ATTORNEYS Donald J. Zelenka, Assistant Attorney General
Caroline M. Scrantom, Assistant Attorney General
COURT REPORTER Grace L. Hurley

This case comes before the court on an application for post-conviction relief. The applicant, Stephen C. Stanko ("Stanko"), seeks post-conviction relief from his conviction and sentence for murder and armed robbery occurring in Horry County, S.C.. On 11/19/2009, Stanko received a death sentence for murder and a 20-year sentence for armed robbery. His conviction and sentence were affirmed on appeal. See *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013), cert. denied *Stanko v. South Carolina*, 134 S.Ct. 247, 187 L.Ed.2d 183, 82 USLW 3186 (U.S.S.C. 10/7/2013).

In his Final Amended Application For Post-Conviction Relief, Stanko alleges the following grounds for post-conviction relief:

1. denial of the right to conflict-free assistance of counsel;
2. ineffective assistance of counsel during the pre-trial phase of his criminal trial;
3. ineffective assistance of counsel during guilt-or-innocence phase of his criminal trial;

4. denial of due process during the guilt-or-innocence phase of his criminal trial;
5. ineffective assistance of counsel during the sentencing phase of his criminal trial;
6. ineffective assistance of counsel during his appeal;
7. denial of an impartial jury;
8. unconstitutionality of his death sentence.

At the outset of this trial, Stanko voluntarily dismissed his claims for ineffective assistance of counsel arising out of his criminal attorneys' alleged failure to properly *voir dire* potential jurors regarding Stanko's prior conviction in Georgetown County, S.C.,¹ and their alleged failure to adequately impeach the State's expert witness, Dr. Pamela Crawford. Stanko also voluntarily dismissed his claim for post-conviction relief arising out of the alleged denial of his right to an impartial jury.

Prior to the presentation of his case, Stanko argued that he is unable to fully present a case for post-conviction relief on the following allegations due to inadequate funding from the Court:²

1. that he was denied effective assistance of counsel because his criminal trial attorneys "agreed to postpone raising the change of venue motion until after *voir dire* was completed and the jury was impaneled..."
2. that he was denied effective assistance of counsel because his criminal trial attorneys "failed to retain an appropriate expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevalence [sic] of media coverage of the crimes and defendant in order to present the information to the trial court in support of the change of venue motion;"
3. that he was denied due process during the guilt-or-innocence phase of his criminal trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer..." and

¹ Prior to Stanko's criminal trial, he was convicted in Georgetown County, SC, of murder, criminal sexual conduct in the 1st degree, assault and battery with intent to kill, armed robbery and two counts of kidnapping ("Georgetown case").

² Pursuant to this Court's orders dated 4/29/2014, 6/3/2014, 9/25/2014 and Form 4 order dated 2/27/2015 (denying Stanko's Motion to Reconsider), the Court partially granted and partially denied Stanko's *ex parte* petition to authorize funding for expert and investigative services. The basis for this court's ruling is set forth in those orders. Further, pursuant to the South Carolina Supreme Court's Order in *Stanko v. State*, Appellate Case No. 2015-000212, the Supreme Court denied Stanko's "Petition for Court Oversight of Capital PCR Action" wherein Stanko petitioned the Supreme Court for continuance of this PCR trial pending reconsideration of this Court's denial of funding for investigative and expert services.

4. that he was denied effective assistance of counsel during the sentencing phase of his criminal trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the preponderance of the evidence presented during the trial of this case, I do hereby find the following salient facts and conclusions of law:

I. Right to Conflict-Free Assistance of Counsel

Stanko alleges that one of his criminal trial attorneys, William Diggs, had a conflict of interest in representing him in his criminal trial in Horry County. Mr. Diggs had previously represented Stanko in his Georgetown case.³ At the time of Stanko's criminal trial in Horry County, he had an action for post-conviction relief pending in Georgetown County for alleged ineffective assistance of counsel by Mr. Diggs arising out of Mr. Diggs' representation of Stanko in the Georgetown case.⁴ Stanko also alleges that he was denied effective assistance of counsel by his appellate attorneys for their failure to raise this issue on appeal.

Even if Mr. Diggs had a conflict of interest in representing Stanko in his criminal trial, that conflict was knowingly, voluntarily and effectively waived by Stanko. In pre-trial hearings, Stanko was questioned and advised extensively regarding Mr. Diggs' representation while Stanko's allegations of ineffective assistance of counsel were pending against Mr. Diggs for services rendered in the Georgetown case. Notwithstanding that advice, Stanko wanted Mr. Diggs to continue as his criminal attorney and waived any conflict of interest that may exist. Further, Stanko's appellate counsel raised this issue and it was addressed on appeal. See *State v. Stanko, id.* Therefore, Stanko's application for post-conviction relief on the grounds that he was denied conflict-free assistance of counsel in his criminal trial and that he was denied effective

³ See Footnote 1, *ibid.*

⁴ Stanko's action for post-conviction relief arising out of his conviction and sentencing in the Georgetown case is still pending and no ruling has been made on his allegation of ineffective assistance of counsel in that case.

MAC

assistance of counsel in his appeal due to appellate counsels' alleged failure to raise this issue should be denied.

II. Ineffective Assistance of Counsel in Pre-Trial Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the pre-trial phase of his criminal trial due to his criminal trial attorneys': 1) agreement to postpone raising a motion for change of venue until after a jury was impaneled; 2) failure to retain an expert or conduct a study to support a change of venue; and 3) failure to seek a pre-trial ruling that the South Carolina death penalty statute is unconstitutional.

Contrary to Stanko's allegations, his criminal trial attorney raised a motion for change of venue prior to jury selection. After the State objected to hearing the motion prior to jury selection, Stanko's attorney consented to argue his motion after striking the jury but before the jury was sworn. He argued his motion for change of venue at the agreed time but, the motion was denied. The court's denial of Stanko's motion to change venue was also addressed on appeal. See *State v. Stanko, id.*

Although Stanko's criminal attorney did not retain an "expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevalence [sic] of media coverage of the crimes and defendant,"⁵ he argued to the court about the amount of pre-trial publicity surrounding the criminal trial. He also retained a psychologist, Dr. Albiniak, who testified at the motion hearing that potential jurors' often fail to be totally forthcoming in their responses to *voir dire*.

As to Stanko's allegation that his criminal trial counsel was ineffective for not arguing that the South Carolina death penalty statute is unconstitutional "because [it] does not genuinely narrow the class of offenders eligible for a death sentence," his criminal attorney did argue in

⁵ Final Amended Application For Post-Conviction Relief, ¶ 11(b)(2).

pre-trial motion that the death penalty is unconstitutional and that issue, likewise, was addressed on appeal. See *State v. Stanko, id.*

In an action for post-conviction relief, the applicant bears the burden of proving he is entitled to relief. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). To establish ineffective assistance of counsel, one seeking post-conviction relief must prove that his counsel's performance was deficient and that a reasonable probability exists that, but for counsel's errors, the result of trial would have been different. *Brown v. State, id.* citing *Strickland v. Washington*, 466 U.S. 668 (1984).

In the case at hand, Stanko's criminal attorneys sought a change in venue and challenged the constitutionality of the South Carolina death penalty statute prior to trial. Both motions were denied and both decisions were affirmed on appeal. Therefore, nothing indicates that Stanko's criminal attorneys were deficient in their pre-trial representation or that they could have presented representation that would have achieved a result more beneficial to Stanko. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the pre-trial phase of his criminal trial should be denied.

III. Ineffective Assistance of Counsel in Guilt-or-Innocence Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney "failed to protect [Stanko's] right to conflict-free counsel by failing to adequately advise [Stanko] and the trial court of all relevant issues regarding the conflict of interest created by [Stanko's] then pending PCR application alleging counsel was ineffective in a prior, related proceeding."

As stated above, Mr. Diggs' representation of Stanko while allegations of ineffective assistance of counsel were pending against him were extensively discussed with Stanko in pre-

trial hearings. Stanko wanted Mr. Diggs to continue as his attorney and knowingly, voluntarily and effectively waived any conflict of interest. The matter was raised, addressed and affirmed on appeal. The fact that the issue was not raised again in the guilt-or-innocence phase of the criminal trial is inconsequential. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney failed to protect his right to conflict-free counsel should be denied.

**IV. Denial of Due Process of Law and Fair Trial
in Guilt-or-Innocence Phase of Criminal Trial**

Stanko alleges that he was denied due process of law and a fundamentally fair trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared [Stanko's] brain PET scan to an inappropriate database and testified that the PET scan was 'perfectly normal,' despite knowing the database was inappropriate for comparison to [Stanko's] PET scan."

Dr. Kenneth Spicer testified on the State's behalf during in the criminal trial regarding Stanko's PET scan. However, Stanko challenged that testimony during his cross-examination of Dr. Spicer and through the testimony of Stanko's expert witness, Dr. Joseph L. Chong-Sang Wu. Although Dr. Wu and Dr. Spicer rendered different opinions regarding Stanko's PET scan, nothing indicates that the State knowingly "presented false, misleading, inaccurate, and unreliable expert testimony...." Therefore, Stanko's application for post-conviction relief on the grounds that Dr. Spicer's testimony denied him due process of law and a fundamentally fair trial should be denied.⁶

⁶ This court is aware that it denied Stanko's request for funding in this PCR action to obtain an expert who could dispute Dr. Spicer's testimony in the criminal trial. However, such evidence would have only corroborated the testimony of Dr. Wu and would not have indicated any due process violations by the State.

V. Ineffective Assistance of Counsel in Sentencing Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the sentencing phase of his criminal trial because his criminal trial attorneys: 1) informed the jury that Stanko's family did not like him and were not in attendance at trial; 2) elicited expert testimony that Stanko was a psychopath; 3) failed to investigate and present mitigating evidence of Stanko's life history and background; and 4) failed to investigate and present mitigating evidence of Stanko's mental health.

Stanko's criminal attorney admits that he informed the jury during the sentencing phase of the criminal trial that Stanko's family was not in attendance. This was a conscious decision on counsel's part. He opined that if he could persuade the jury that Stanko's family was so angry and disappointed with Stanko that they felt justified in refusing to attend the trial, that extreme perception of Stanko by his own family would support Stanko's defense that he could not function like a normal person and, thus, mitigate his culpability. Counsel's argument to the jury that Stanko's family was not in attendance at trial was an intentional trial strategy to curry sympathy for his client. Also, references to psychopathy, including testimony from Stanko's expert witness that Stanko is a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions.

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the sentencing phase of his trial because his criminal trial attorneys informed the

jury that Stanko's family was not at trial and because Stanko's expert witness testified as to his psychopathy should be denied.

Contrary to Stanko's allegations, his criminal attorneys investigated and presented mitigating evidence of Stanko's life history, background and mental health. Most of the investigation occurred in preparation of Stanko's Georgetown case. Rather than conducting extensive investigation into Stanko's life history, background or mental health again, his criminal attorneys decided not to retain a mitigating investigator but, rather, use the information obtained in preparation of Stanko's Georgetown case in the criminal trial of his Horry County case. Such a decision does not constitute ineffective assistance of counsel.⁷ Therefore, Stanko's application for post-conviction relief on the grounds that his criminal trial attorneys failed to investigate and present mitigating evidence of Stanko's life history, background and mental health should be denied.

VI. Ineffective Assistance of Counsel in Appeal

Stanko alleges that he was denied effective assistance of counsel in his appeal because appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Stanko's prior murder conviction over trial counsel's consistent objections. Stanko's appellate attorney chose not to raise this issue on appeal because he felt the argument was futile.

During the sentencing phase of Stanko's criminal trial and over his criminal attorney's objection, the trial court permitted references to Stanko's murder conviction in the Georgetown case. A defendant's prior conviction for murder is admissible as an aggravating circumstance in

⁷ In this case, the court granted up to \$15,000.00 in funding for Stanko to retain a mitigation specialist, Drucy A. Glass. However, Ms. Glass did not testify in this PCR action and no evidence from her services was presented. Further, this court is mindful of its denial of Stanko's funding request for a fact investigator and forensic psychologist. However, the request to fund a fact investigator and forensic psychologist in this PCR action was not for the purpose of determining whether Stanko's criminal trial attorneys were ineffective but, rather, to determine whether the investigators that were used missed anything.

the sentencing phase of a subsequent death penalty case for murder. Code of Laws of South Carolina 1976 §16-3-20(C)(a)(2). Therefore, Stanko's appellate counsel was not ineffective for failing to raise this issue on appeal.

VII. Unconstitutionality of South Carolina Death Penalty Statute

Stanko alleges that he is entitled to post-conviction relief because the South Carolina death penalty statute, Code §16-3-20, does not genuinely narrow the class of offenders eligible for death sentence.

The constitutionality of the Death Penalty Act is well settled. *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985), certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178 (U.S.S.C. 1985). Further, this issue was addressed in Stanko's appeal. See *State v. Stanko*, *id.* Therefore, Stanko is not entitled to post-conviction relief due to the alleged unconstitutionality of the South Carolina death penalty statute.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the Applicant, Stephen C. Stanko, is **DENIED** post-conviction relief in this case.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

May 13, 2016
Georgetown, SC

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
NOV 06 2017
S.C. SUPREME COURT

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO #6022,

PETITIONER,

V.

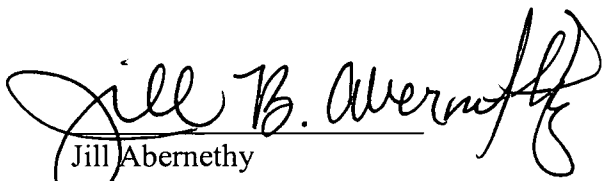
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Motion for the Appointment of Outside Counsel was served by first class United States mail, postage prepaid, this 3rd day of November, 2017, upon the following:

Donald J. Zelenka
J. Anthony Mabry
Caroline M. Scrantom
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill Abernethy