

State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

D. Craig Brown
JUDGE

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VIA US MAIL AND FAX

January 16, 2018

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JAN 16 2018

S.C. SUPREME COURT

The Honorable Dan Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Stephen C. Stanko vs. State of South Carolina
Case No.: 2008-CP-22-01446

Dear Mr. Shearouse:

Enclosed please find a copy of the Order in the above matter. I have today filed the same with the Georgetown County Clerk of Court's office.

Please contact me should you have any questions.

With kindest personal regards, I am

Sincerely,

D. Craig Brown

jgb

Enclosures

cc: J. Anthony Mabry, Esquire
Lindsey Sterling Vann, Esquire
Carolina M. Scrantom, Esquire
Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)
)
 Stephen C. Stanko,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No: 2008-CP-22-01446

ORDER
 (Pursuant to Remand from Appellate C/A
 2017-000211)

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S.C. SUPREME COURT

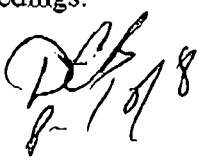
PROCEDURAL HISTORY

Trial and Appeal

In August 2006, a jury found Applicant Stephen C. Stanko (Applicant) guilty of murder, two counts of kidnapping, assault and battery with intent to kill, first degree criminal sexual conduct, and armed robbery, and recommended Applicant be sentenced to death. The Honorable Deadra L. Jefferson followed the jury's recommendation, sentencing Petitioner to death for murder. Judge Jefferson also sentenced Petitioner to thirty years for first degree criminal sexual conduct, thirty years for kidnapping, thirty years for armed robbery, and twenty years for assault and battery with intent to kill. 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, Applicant, by and through appellate counsel, filed an application for post-conviction relief (PCR). The South Carolina Supreme 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 for the PCR proceedings.



Prior to a hearing on the merits of Applicant's PCR claims, Applicant's counsel were both replaced by other attorneys. Due to medical issues, Godfrey moved to be removed as counsel and Judge Baxley issued an order substituting Stuart Mark Axelrod, Esq., for Godfrey on June 14, 2010. After becoming employed by the Office of the Attorney General, Ritner moved to be relieved as counsel for Petitioner and Judge Baxley appointed Bobby Frederick, Esq., as second chair counsel on April 22, 2013.

Axelrod and Frederick represented Petitioner through the remainder of his PCR proceedings, including filing multiple amended PCR applications and representing Applicant at the hearing on the merits of his claims. At the merits hearing, Applicant had additional representation from pro bono counsel Tristan Shaffer, Esq. Shaffer was formally added as third chair counsel in a Consent Order issued after the hearing on May 27, 2015.

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. Axelrod, Frederick, and Shaffer represented Petitioner at the evidentiary hearing. Judge Young denied relief on June 27, 2016 and denied Petitioner's Motion to Alter or Amend on January 19, 2017.

Appeal and Remand

Notice of appeal followed on February 3, 2017, and by Order of the South Carolina Supreme Court, Lindsey Vann, Esq., was appointed to represent Applicant in his PCR appeal. Emily Paavola, Esq., was appointed in a *pro bono* capacity. On October 3, 2017, Applicant moved before the Supreme Court for a remand to determine the qualification of PCR counsel pursuant to S.C. Code Ann. § 17-27-160(B). The State made a return to which Applicant replied.

DCB
p. 2/7/8

The Supreme Court granted Applicant's motion on December 14, 2017, and assigned the undersigned with exclusive jurisdiction over the remand proceedings. In accordance with that Order, the undersigned conducted a hearing in Florence County on January 9, 2018, on the limited question of whether the attorneys appointed to represent petitioner before the circuit court at PCR met the requirements of § 17-27-160. Those parties in attendance included Applicant, Stephen C. Stanko, his attorney Lindsey S. Vann, Caroline Scrantom and Ed Sulter on behalf of the South Carolina Attorney General's Office.

FACTS BEFORE THIS COURT

Prior to the hearing on January 9, 2018, attorney for the Applicant forward to all interested parties, via email, "Applicant's Notice of Intent to Rely on Affidavits" as authorized by S.C. Code §17-27-80. Along with such Notice, the affidavits of Tristan Shaffer, Bobby Frederick and Russel Stetler (along with an Exhibit "A" to this affidavit) was also forwarded to this court. Prior to the hearing, a supplemental affidavit of Russell Stetler was also provided.

Tristan Shaffer's affidavit indicated that he is an attorney licensed to practice law in South Carolina having been admitted to the South Carolina Bar on November 16, 2009. Mr. Shaffer acknowledged that he became third-chair counsel for Applicant in the Spring of 2015. He further acknowledged that at no time while involved in this case did he meet the qualification requirements set forth in S.C. Code §17-27-160(B).

Bobby Frederick's affidavit acknowledged that he is an attorney with an inactive membership in the South Carolina Bar. However, he was admitted to the South Carolina Bar on November 15, 2004 and practiced law in South Carolina until December of 2015. Mr. Frederick further acknowledged that he was appointed as second-chair counsel to Applicant on April 22, 2013. He also acknowledged that at no time had he ever represented a death-sentenced inmate

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on appeal or post-conviction or a defendant facing the death penalty. Therefore, he would not have met the requirements of Section 17-27-160.

Russell Stetler's affidavit acknowledged that he is the National Mitigation Coordinator for the Federal Death Penalty Projects. While not an attorney, he consults on death penalty cases around the country, organizes training on mitigation investigation for lawyers and mitigation specialists, and teaches at various capital training programs around the country. In March 2010, he taught several training sessions at the National Legal Aid & Defender Association's ("NLADA") Life in the Balance: A Capital Defense Training Program in Nashville, Tennessee. For several years he was involved in helping to plan the agenda for NLADA's annual Life in the Balance (LIB) training program, and he regularly served as faculty. The LIB training in 2010 was a three and one-half day training that included seven plenary sessions and approximately seventy-five breakout sessions that focused more on training for capital trials rather than appellate or post-conviction capital representation. That he reviewed the 2010 LIB agenda and identified only two, one-hour sessions specifically focused on litigating capital appeals or post-conviction cases. Those sessions were (1) Habeas Caselaw Review and (2) Litigating Ineffective Assistance of Counsel Claims – Dealing with *Strickland* Decisions.

A supplemental affidavit of Russell Stetler was also provided at the hearing. In his supplemental affidavit, as well as his initial affidavit, he recommended that an attorney that sought training in capital appellate or post-conviction litigation attend the Habeas Assistance and Training Project's annual National Habeas Seminar or the annual Anthony G. Amsterdam Capital Post-Conviction Skills Seminar. He further stated that, unlike the Life in the Balance Seminar, both the National Habeas Seminar and the Post-Conviction Skills Seminar educate lawyers handling capital post-conviction cases on the unique aspects of post-conviction investigation

DCB
P. 478 4

and litigations. He further opined that all of the sessions taught at the National Habeas Seminar and the Post-Conviction Skills Seminar are taught by individuals whose expertise is in capital post-conviction litigation.

Stuart Mark Axelrod, Esq., appeared and testified at the hearing on January 9, 2018. On direct examination of Mr. Axelrod by Attorney Vann, he testified: that he has been licensed to practice law in the South Carolina since 1997; that prior to representing Applicant in his PCR, he had been involved in the trial of two separate death penalty cases, but not death penalty Post-Conviction cases; that he had been contacted by Judge Baxley about the possibility of representing Applicant in his Post-Conviction Relief action; that he contacted Appellate Defense and inquired as to what he would need to do to become qualified to represent Applicant in his post-conviction case; that he was informed by Appellate Defense that if he attended the National Legal Aid and Defender Association Life in the Balance Seminar in Nashville, Tennessee, he would be qualified to represent Applicant in his Post-Conviction Relief action; and, that he attended the seminar as recommended by Appellate Defense; that he could only specifically recall attending one session of the approximately seventy-five breakout sessions and that was the Plenary Session of "Don't Give Up: The Wilbert Rideau Story." There were no other sessions that Mr. Axelrod had any independent recollection of attending.

Mr. Axelrod was then cross-examined by Caroline Scrantom of the South Carolina Attorney General's Office. Attorney Scrantom went through the Conference Agenda that included a description of each break-out session. She questioned Mr. Axelrod about various sessions and whether they applied to the handling of capital appellate and/or post-conviction defense. Mr. Axelrod agreed that some of the break-out session descriptions would possibly

DCB
p. 588

apply to the handling of capital appellate and/or post-conviction. However, he could not recall having attended such sessions.

ISSUE

Whether Stuart Mark Axelrod, Esq., met the requirements for appointment as first-chair in the death penalty post-conviction relief action of Stephen C. Stanko as required by S.C. Code Ann. §17-27-160.

LAW/ANALYSIS

South Carolina Code Ann. §17-27-160(B) (2014) states that an attorney appointed to represent an indigent defendant in a capital case post-conviction relief procedure "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."

Section 16-3-26(B) states:

- (1) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

Section 16-3-26 (F) states:

DCB
p. 6 of 8 6

The Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases.

The undisputed facts in this case are:

1. That Stuart Mark Axelrod, Esq., was appointed as first-chair attorney to represent Applicant in his post-conviction action by Order dated June 14, 2010, by the Honorable J. Michael Baxley (retired). (Applicant's Exhibit #5 to this hearing).
2. That Bobby Frederick was appointed as second chair counsel to represent Applicant in his post-conviction action on April 22, 2013. (Applicant's Exhibit #1 to this hearing).
3. That Tristan Shaffer was appointed as pro bono third-chair counsel of record to represent Applicant in his post-conviction action in an Order dated May 27, 2015 by the Honorable W. Jeffery Young (retired). (Applicant's Exhibit # 2 to this hearing).
4. That Bobby Frederick nor Tristan Shaffer met the requirements of Section 17-27-160, S.C. Code Ann.17-27-160 (2014).

After reviewing the affidavits submitted by Applicant prior to and at the time of the January 9, 2018 hearing, this court finds that Stuart Mark Axelrod did not meet the requirements for appointment set forth in S.C. Code Ann. §17-27-160 (2014). Mr. Axelrod had not previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings.¹ Since Mr. Axelrod failed to meet this requirement of Section 17-27-160, this court then looked to determine if he met the requirements of Section 16-3-26(B). Based upon Mr. Axelrod's testimony, this court finds that he did meet these requirements since he had at least five years'

¹ While the Order signed by the Honorable J. Michael Baxley (retired) states that Mr. Axelrod "was previously appointed by Judge John C. Hayes, III, as second counsel in the pending Joseph Ard death penalty action that is still active," Mr. Axelrod acknowledged at this hearing that this was an error in the Order. See, Applicant's Exhibit # 5 to this hearing. Mr. Axelrod testified that he represented Mr. Ard in the death penalty case.

DCB
p. 778

experience as a licensed attorney and three years' experience in the actual trial of felony cases. He had been licensed in South Carolina since 1997. Since Mr. Axelrod met the requirements of 16-3-26(B), Section 17-27-160 also makes clear that he must also 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. This court finds, through no fault of Mr. Axelrod, that he failed to meet this requirement. While Mr. Axelrod did attend the National Legal Aid & Defender Association Life in the Balance 2010 program at the direction of Indigent Defense, this court finds this program was not directed to the field of capital appellate and/or post-conviction defense as required by the statute. Although the State pointed out several break-out sessions that would possible qualify as capital appellate and/or post-conviction defense, Mr. Axelrod could not state with certainty the sessions that he attended for this court to make such conclusion. If this court were to find that this course met the requirements of the statute, then this court would be guessing and speculating as to what sessions Mr. Axelrod did attend which would be improper.

CONCLUSION

Based upon the above, this court finds that Applicant's PCR counsel, Stuart M. Axelrod, Esq., failed to meet the requirements of Section 17-27-160, S.C. Code. Therefore, this court will conduct a hearing within sixty days of this Order to determine if Applicant was prejudiced by Mr. Axelrod's lack of qualifications.

IT IS, SO ORDERED.

January 16, 2018
Florence, South Carolina



D. Craig Brown
Circuit Court Judge

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