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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO #6022.....PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

OTHER

QUESTIONS PRESENTED

I.

Whether the PCR Court erred in failing to grant Petitioner a new trial under circumstances where his trial counsel operated under an actual conflict of interest, due to trial counsel representing him at a prior trial in which the effectiveness of his representation was being challenged by Petitioner, and where the conflict of interest and resulting risks were never adequately explained to Petitioner in order for him to make a knowing waiver of the conflict of interest.

II.

Whether the PCR Court erred in denying funding for expert assistance to investigate and present evidence in support of Petitioner's constitutional claims for post-conviction relief where the PCR Court applied an erroneous standard by requiring Petitioner to demonstrate the expert assistance would lead to a favorable result prior to authorizing funding.

STATEMENT OF THE CASE

Petitioner Stephen Stanko was represented by the same attorney, William I. Diggs ("Diggs"), when he faced death penalty trials in two neighboring counties (Georgetown and Horry) – for crimes committed within twenty-four hours of each other. In 2006, Petitioner was convicted of murder and sentenced to death in Georgetown County after Diggs presented – both as the basis for an insanity defense and in "mitigation" – that Petitioner was a psychopath.

Before Petitioner was tried in Horry County, in November of 2009, Petitioner filed a post-conviction relief application (on October 17, 2008) alleging Diggs provided ineffective assistance of counsel at the Georgetown County trial. In spite of the pending PCR application, Diggs continued his representation of Petitioner at the Horry County trial. Both the Horry trial and Georgetown PCR courts raised concerns over whether there was a conflict of interest because Diggs was continuing his representation when Petitioner had alleged ineffective assistance of counsel claims against him. The State believed a non-waivable conflict of interest existed and asked the trial court to review the status of Diggs as counsel, especially given that Diggs planned to present the same not guilty by reason of insanity defense and mitigation presentation at the Horry County trial. Neither Diggs nor his Horry County co-counsel, Brana Williams, ever reviewed the Georgetown County PCR application or discussed it with Petitioner. Diggs, instead, repeatedly informed the courts that Petitioner wanted Diggs to remain as his counsel with no acknowledgment of the risks created by the conflict.

At no time during Diggs's Horry County representation was Petitioner informed of the nature of the conflict of interest afflicting Diggs. *See Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (finding a conflict of interest exists "when a defense attorney places himself in a situation inherently conducive to divided loyalties"). No one (not the trial court, Petitioner's attorneys, the State, nor independent counsel) explained to Petitioner that Diggs's

professional reputation was at stake as a result of Petitioner's allegations that Diggs provided ineffective assistance at the Georgetown County trial and that any changes Diggs made in the Horry County trial could be evidence against Diggs in support of a finding that he was, in fact, ineffective. Thus, the PCR application meant Diggs was more likely to repeat any mistakes he made at the first trial, which resulted in Petitioner being sentenced to death. Having never been informed of the nature of the conflict, Petitioner asserted he wanted to continue with Diggs's representation and the trial court allowed him to do so. Diggs presented a nearly identical defense in the second trial and Petitioner was again convicted and sentenced to death.

After trial and direct appeal, Petitioner filed a PCR application in Horry County, challenging his convictions and sentence. He was appointed counsel who began investigating his case. PCR counsel quickly learned that Diggs conducted virtually no investigation before deciding to present a not guilty by reason of insanity defense at Petitioner's trials and that Diggs decided on the defense theory (that Petitioner had brain damage and was a psychopath) prior to any mental health expert meeting or evaluating Petitioner. PCR counsel, therefore, asked the PCR court for authorization to retain experts to assist in investigating Petitioner's mental health and life history as part of a claim that trial counsel failed to adequately investigate and present mitigating evidence at Petitioner's Horry County trial. The PCR court denied funding for all experts, stating: "The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained." By requiring Petitioner to first prove that expert assistance would result in a successful PCR claim in order to authorize funding, the PCR court prevented Petitioner from obtaining expert assistance. Over Petitioner's objection and repeated requests for reconsideration, the PCR court held a hearing on Petitioner's claims. Without expert assistance, Petitioner was unable to present

evidence to support seven of his claims for relief. The PCR court denied relief on all of Petitioner's claims. The PCR Court's findings are not supported by probative evidence, its legal conclusions are controlled by multiple errors of law, and this Court should grant certiorari and reverse or remand for further proceedings with funding for expert assistance.

RELEVANT FACTS

Petitioner, Stephen Stanko, was charged with two murders which occurred within a span of approximately twenty-four hours. One occurred in Georgetown County and the other – the crime connected with the charges underlying this case – occurred in Horry County. The Solicitor overseeing criminal prosecutions in both counties (because they are in the same judicial circuit) decided to seek the death penalty in both counties. As a result, Petitioner was tried in death penalty trials in both Georgetown County (in 2006) and Horry County (in 2009). At both trials, Petitioner was represented by lead counsel William I. Diggs ("Diggs"), who presented virtually the same defense at both trials – that Petitioner is a brain damaged psychopath, and should be found not guilty by reason of insanity. Both juries rejected the defense, found Petitioner guilty, and sentenced Petitioner to death. Petitioner is, therefore, under a sentence of death in both Georgetown and Horry Counties.

I. GEORGETOWN COUNTY TRIAL PREPARATION AND PROCEEDINGS.

Petitioner was arrested on April 11, 2005 and charged with murder in both Georgetown and Horry Counties. The Georgetown County case proceeded to trial first and Diggs was appointed as Petitioner's counsel, with Gerald Kelly who was previously appointed, on August 30, 2005. App. 4461. Diggs first met with Petitioner on September 22, 2005, App. 4461, and ultimately took responsibility for working with mental health experts to explain why Petitioner committed the crimes. App. 4192. Prior to having any expert evaluate Petitioner, Diggs settled on his defense theory and identified Dr. Thomas Sachy, a psychiatrist from the Atlanta area, as a potential expert to support his theory. On March 20, 2006, Diggs contacted Dr. Sachy by telephone. App. 4204. They had a thirty-minute telephone call after which Diggs noted on his timesheet for that day: "He will be our expert." App. 4204. Diggs made this decision before any expert had evaluated Petitioner and after Dr. Sachy had only spoken with Diggs for thirty minutes. *See* App. 4204.

Dr. Sachy previously testified in a Georgia case called *Rivera*, in which he presented a theory that the defendant was a psychopath with decreased brain activity in the frontal lobes and was, therefore, insane because he could not help committing the crimes for which he stood trial. App. 4206; App. 4583-89. This was the same defense Dr. Sachy ultimately presented at Petitioner's trial, though Diggs said he did not discuss the *Rivera* case – which ended in a death sentence – with Dr. Sachy in any detail. App. 4206; App. 4583-89 (providing Diggs with information about the *Rivera* trial and its outcome).

From Diggs's brief phone call with Dr. Sachy, the decision was made to pursue the insanity defense Sachy put forward in *Rivera* and Sachy began the evaluation of Petitioner that involved numerous experts who were also involved in the *Rivera* case. *See* App. 4208, 4210, 4211 (discussing the involvement of Drs. Joseph Wu, Mark Einhorn, and Ruben Gur). From that point on in the trial preparation, Diggs did not consider changing the trial defense. *See* App. 4632. Diggs recognized there was strong evidence against Petitioner but nonetheless decided to try to convince a jury that Petitioner was not guilty by reason of insanity. App. 4195. Though Diggs was pursuing a "mental health defense" to the crime, Kelly hired a mitigation investigator Dale Davis to conduct a social history investigation. App. 4213. Davis, described Diggs as "laser focused on the [psychopath] defense." App. 4362. Davis thought this defense was actually aggravating and was a "crazy theory" because the gist was telling people Petitioner "couldn't help killing people," App. 4362, and believed using Diggs's theory as the defense was like "walking [Petitioner] to death's door." App. 4375. Davis told Diggs she did not believe the theory would work to obtain a life sentence for Petitioner, but Diggs was so obsessed with advancing psychopathy as a defense that Davis did not believe Diggs even heard her objections. App. 4362.

Davis conducted a social history investigation and did so with little input or communication from trial counsel. *See* App. 4365-66. In the course of her investigation, she collected evidence regarding Petitioner's life history and potential mental health problems. Despite not being a mental health expert, Davis recognized red flags of mental illness and sent information regarding Petitioner's obsessive compulsive tendencies and his hypergraphia[1] to trial counsel. App. 4367; 4600-04 (sending information about hypergraphia and other investigation issues to Diggs). Davis did not believe that any of the experts hired by trial counsel were provided with this information. App. 4366-67.

The Georgetown County case went to trial in August of 2006. During the guilt phase of the Georgetown County trial, Diggs presented the testimony of several experts in an effort to prove Petitioner was legally insane at the time of the Georgetown County crime. Dr. Marc Einhorn and Dr. Joseph Wu testified that their administration and review of a positron emission scan ("PET") scan of Petitioner's brain showed abnormalities in the frontal lobe that reduced frontal lobe functioning at fifty to eighty percent (compared to a normal brain). App. 5307-96. Diggs called Dr. Sachy as the "star" expert witness to describe the import of the findings from the brain scans. Dr. Sachy testified that Petitioner has a "brain defect," App. 5447, which manifested in Petitioner's brain being "unresponsive to repeated threats and jailings by the criminal system and is unresponsive to repeated psychiatric treatment." App. 5468. Dr. Sachy testified he was "100 percent certain" Petitioner is a psychopath. App. 5468. Trial counsel then argued that Petitioner

[1] Davis attached an article to the email explaining hypergraphia, which is defined as "[t]he driving compulsion to write." App. 4600-04. The article also noted that hypergraphia has been associated with temporal lobe epilepsy (a neurological condition characterized by recurrent seizures in the temporal lobe of the brain), bipolar disorder, schizophrenia, and frontotemporal dementia. App. 4600-04.

was not guilty by reason of insanity because he was a psychopath. The jury rejected the defense and found Petitioner guilty of all counts.

In the penalty phase of the trial, counsel presented additional testimony though Dr. Sachy that Petitioner's psychopathy made him prone to violence and impulsivity. App. 6068. Counsel also presented some evidence that, prior to the capital crimes, Petitioner was involved in several schemes or cons that had been reported to various state agencies but the agencies did nothing to prevent Petitioner from committing additional crimes. *See, e.g.*, App. 5680-5733 (testimony of Connie Price). Finally, counsel presented the testimony of Dr. Evelyn Califf, a Christian family counselor, who testified in generalities that Petitioner had a dysfunctional family. App. 6164-68. Dr. Califf became involved in the case two and a half weeks before testifying and stated that she found Petitioner had "a lot of psychopathic issues." App. 6181, 6186. Califf testified that in the two and a half weeks she had to prepare, she could not get in contact with Petitioner's family members. App. 6181. After hearing this evidence, the jury returned a verdict of death in approximately two (2) hours. App. 6293, 6295.

II. APPOINTMENT OF COUNSEL IN HORRY COUNTY PROCEEDINGS.

Ultimately, it would be over three years between the Georgetown and Horry County trials. Diggs was also appointed to represent Petitioner in his Horry County proceedings and Brana Williams was appointed to serve as Diggs's co-counsel.

Between the Georgetown and Horry County trials, this Court upheld Petitioner's Georgetown convictions and sentence on direct appeal on February 25, 2008. *State v. Stanko (Stanko I)*, 376 S.C. 571, 658 S.E.2d 94 (2008). Petitioner then filed an initial application for post-conviction relief ("PCR") on October 17, 2008, alleging "[i]neffective assistance of trial or appellate counsel." App. 4511-16. On December 8, 2008, Judge J. Michael Baxley, who was – at

the time – the judge assigned to the Horry County trial and the Georgetown County PCR, held a hearing on the appointment of counsel in the Georgetown PCR proceedings. App. 3048-72. At that hearing, Petitioner informed Judge Baxley about the "conundrum" that existed because Diggs would be his attorney for the second trial and the PCR application in Georgetown County alleged Diggs's ineffective assistance of counsel. App. 3066. Petitioner stated "Just because I feel he may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently." App. 3066. Judge Baxley responded that he would leave a discussion of the matter to "the attorney that's ultimately appointed for [Petitioner]." App. 3067.

On March 4, 2009, after Judge Stephen H. John was appointed on the Horry County case to replace Judge Baxley, he raised the issue of Diggs continuing his representation given the pending PCR action. App. 3074-88. The judge opined that he thought it might be a "downright disqualification of Mr. Diggs in this matter," but Diggs assured the Court "we've talked about it on a number of occasions" though he admitted he had not even "seen the PCR application." App. 3077-78. Petitioner informed the judge that he intended to file an amended application, App. 3078, and the Court asked Petitioner to have the amended PCR application sent to him. App. 3084. Diggs asserted that he did not "have a problem with [Petitioner] making that [ineffective assistance of counsel] allegation" and asked the court to revisit the issue if the judge determined the amended PCR application created a conflict. App. 3083. The judge decided to allow Diggs to stay on the case "with the ability for the court to re-visit it in the future." App. 3083-84.

On April 25, 2009, the State filed a motion to review the status of Diggs as counsel, asserting a "non-waivable conflict of interest exists between William I. Diggs, Esquire, and the defendant." App. 3696-97. The State asserted that Diggs intended "to offer a similar defense and

similar mitigation utilizing the same experts from the companion case" and asked for a hearing on issue. App. 3697. The court held a hearing on June 5, 2009, prior to the filing of an amended PCR application. App. 3090-3108. At the hearing, the State asserted that its main concern was the fact that Petitioner waived the attorney-client privilege with respect to the claims he raised in the Georgetown PCR and Diggs planned to present a similar defense with the same witnesses at the Horry County trial. App. 3093. Diggs said he did not "take a position in the case on the issue," but indicated Petitioner would like for Diggs to continue as his attorney. App. 3096. The court questioned Petitioner, who confirmed he wanted Diggs to remain on the case, App. 3101, and found that Diggs could continue to represent Petitioner. App. 3104.

On August 24, 2009, at a pretrial hearing, the State informed the court that the assistant attorney general handling the PCR case would not contact Diggs about the pending PCR application until after the conclusion of the Horry County trial. App. 3150-61. The court concluded that he "believe[d] that issue has and continues to be resolved." App. 3158. On October 21, 2009, Petitioner filed an amended PCR application in the Georgetown County case. App. 4520-27. Despite its indication that it would consider the issue again after the amended application was filed, the court held no additional hearings on the conflict issue after the filing of the final amended application. Neither Diggs nor Williams reviewed the amended PCR application or discussed it with Petitioner. App. 4252, 4432. The case proceeded to trial in Horry County, beginning on November 9, 2009, with Diggs and Williams representing Petitioner.

III. HORRY COUNTY TRIAL PREPARATION AND PROCEEDINGS.

In preparation for Petitioner's second death penalty trial, as the State predicted, Diggs proceeded with much the same plan as he had for the defense at the first death penalty trial. Diggs did not "consider changing the strategy at all for the second trial." App. 4247. In June of 2009, less

than four months before the trial, Diggs asked Davis to "prepare [her] presentation of mitigation evidence for the second trial." App. 4614. Davis believed he was not asking her to do any further investigation, but instead to re-present what had been prepared for the first trial. App. 4377. Davis refused to be involved in the case again for that reason. *See* App. 4377. Diggs did not hire a mitigation investigator to replace Davis. App. 4395. Despite her refusal to participate in the second trial, Davis attempted to convince Diggs not to offer the same defense at the Horry County trial by sending Diggs and the rest of the defense team an article about using psychopathy in criminal trials. App. 4362-63. The article stated a "new study suggests that being labeled a psychopath increases the likelihood that an offender will be locked up indefinitely or even executed." App. 4590-99.

As trial approached, Diggs intimated that he planned to move for a change of venue, but did not formally make the motion until trial. *See* App. 3249-50. Jury qualification and individual *voir dire* began on November 9, 2009 and proceeded without a defense motion for change of venue. App. 50-1329. After individual *voir dire* was completed, but before jury selection, trial counsel moved for a change of venue based on the number of jurors in the jury pool who had prior knowledge of the case, especially the jurors with knowledge of Petitioner's prior death sentence. App. 1343. Defense counsel proposed to offer testimony from Dr. Bernard Albiniak, an expert in forensic social psychology concerning the reliability of jurors' responses once they were examined by the court. App. 1344. Prior to the presentation of Dr. Albiniak's testimony, the State suggested the court take up the motion after the jury was selected and Diggs agreed, without objection. App. 1347-48. After jury selection, defense counsel raised the change of venue motion again and called Dr. Albiniak to testify. Dr. Albiniak, who testified at the Georgetown County trial about brain function, testified that in public forums, people will conform their statements to what they believe

will be generally accepted by the group even if that is not what they actually believe. App. 1395-1440. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not what they believed. App. 1405-06. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior. App. 1460. No evidence was presented regarding the type or amount of media coverage surrounding the case, nor was there any evidence regarding how likely it was that jurors from Horry County would have been exposed to the media. The court denied the defense motion for a change of venue. App. 1482.

Proceeding to trial with the jury selected from Horry County, Diggs again attempted to prove Petitioner was not guilty by reason of insanity. As in the first trial, Drs. Einhorn and Wu testified that the PET scan showed abnormalities in the frontal lobe. App. 2174-2275. Dr. Ruben Gur testified that an MRI showed Petitioner's frontal lobe, medial gray matter, and amygdala were smaller than a normal brain. App. 2110-74. Again, these experts did not testify regarding the impact of the brain abnormalities. Dr. Sachy was again the crux of the defense case, testifying that Petitioner's impaired brain made it more likely that he would act in a "psychopathic manner." App. 2290. Dr. Sachy went on to testify that Petitioner's brain dysfunction is "God-given," "[w]e can't cure it," and compared Petitioner to Ted Bundy and Jeffrey Dahmer. App. 2332, 2343-44. The jury rejected the not guilty by reason of insanity defense and found Petitioner guilty of all charges in forty (40) minutes. App. 2580.

Beginning in the guilt phase and continuing into the penalty phase, Diggs repeatedly emphasized to the jury that Petitioner's family did not like or support him. For example, Diggs told the jury: "look around the courtroom. I can tell you Steve has family, brothers and sisters, and

parents. None of them are here."[2] App. 1509. Also in the penalty phase, Diggs called Dr. James Thrasher to testify that Petitioner was under a mental or emotional disturbance during the Georgetown County crimes, which were presented as aggravation in this case. App. 2866-69. Diggs additionally presented testimony from a neighbor, three teachers, and three prison officials who said Petitioner was smart, was a good student, and could be housed safely in the department of corrections. *See* App. 2870-2911. Evelyn Califf testified again about Petitioner's family. Her presentation was largely a repeat of the Georgetown County case, but at this trial, she added a discussion of how Petitioner was "smiley" as a child, but did not smile as much as he grew older by showing pictures through childhood and high school. App. 2920. After hearing this evidence, the jury sentenced Petitioner to death in just over one hour. App. 3013.

IV. DIRECT APPEAL PROCEEDINGS.

On direct appeal of the Horry County proceedings, Petitioner was represented by Robert M. Dudek and Robert Pachak. Through counsel, Petitioner raised six issues on which he asserted the trial court erred, including that the trial court "erred by accepting a truncated and inadequate waiver of his trial attorney's conflict of interest" and that the trial court abused its discretion by refusing to grant a change of venue. App. 3709-10.

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[2] Additionally, during the closing in the guilt phase, defense counsel once again emphasized the family's absence: "[W]hen we look out there and see an empty courtroom, with no family members here because of a lifetime of deceit, lying, abuse with family members, and we see the killing of a friend for no reason, that's insanity." App. 2561. "He has four siblings. Not one of them is here." App. 2549. "He has alienated all of the family members based on his deceit, lying, inability to be – to even have a relationship with those people." App. 2550. "He's alienating all of his family members. They won't even come to see him in his trial. He tries to kill his friends." App. 2554-55. During sentencing, Diggs elicited similar testimony from the witness called to testify about Petitioner's life history. Evelyn Califf testified that Petitioner's one living grandparent would not speak to her and none of the family members were at the trial. App. 2919.

Appellate counsel argued the trial court erred in allowing Diggs to continue his representation because he had a conflict of interest and Petitioner was not adequately questioned about the potential risks of having Diggs represent him, the trial court improperly told Petitioner he could not talk to Diggs about the PCR claims despite the fact that the two cases were "inextricably intertwined," and because Diggs placed the trial court in the "untenable situation of 'monitoring' the adequacy of defense counsel's representation." App. 3734. This Court found the conflict of interest claim was not preserved because Petitioner "did not object to the appointment of Diggs as counsel" and, even if it was preserved, the Court found Petitioner validly waived the conflict of interest. *State v. Stanko (Stanko II)*, 402 S.C. 252, 269-70, 741 S.E.2d 708, 717 (2013).

With regard to the change of venue claim, appellate counsel argued that the trial court erred in failing to grant a change of venue because of the wide-spread publicity surrounding the investigation of Petitioner's crimes and his prior death penalty trial. App. 3748. This Court found the trial court did not err because all members of the jury pool who had prior knowledge of the case "indicated they could set that knowledge aside." *Stanko II*, 402 S.C. at 278, 741 S.E.2d at 721. This Court denied Petitioner's remaining claims and affirmed his convictions and death sentence on February 27, 2013.

V. POST-CONVICTION RELIEF PROCEEDINGS.

Petitioner filed his initial post-conviction relief ("PCR") Application in Horry County on January 6, 2014. App. 3890-96. This Court assigned Judge Benjamin H. Culbertson exclusive jurisdiction over the PCR proceedings and Judge Culbertson appointed attorneys Emily C. Paavola and Lindsey S. Vann to represent Petitioner on February 4, 2014. After being appointed, PCR counsel began reviewing the record and conducting an independent investigation. On April 1, 2014, PCR counsel filed Applicant's First *Ex Parte* Motion to Authorize Funding for Expert and

Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B).[3] App. 4764-94. After conducting this preliminary investigation, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Petitioner's claims. The First Funding Motion requested the PCR court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Petitioner provided facts uncovered in their preliminary investigation that necessitated investigative and expert assistance to demonstrate the services were "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"). Specifically, Petitioner asserted (1) a fact investigator was necessary to assist in investigating the possible bias of a juror and various cons and schemes used as aggravation in Petitioner's trial, App. 4770-71; (2) a mitigation investigator was necessary because it appeared trial counsel unreasonably limited their mitigation investigation by committing to the insanity and psychopathy defense early on, to assist with record

[3] In accordance with capital post-conviction practice in this State, Petitioner filed his funding motions *ex parte* based on South Carolina Code § 17-27-160, which provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, undersigned counsel believed the statue authorized requests for funding for investigative, expert and other services in capital post-conviction cases to be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160. This Court has since indicated in a footnote denying Petitioner's request to intervene in the PCR proceedings that funding requests in capital PCR proceedings should not be *ex parte*. App. 4114. Petitioner respectfully asserts this Court's determination was made without the benefit of full briefing and requests the Court reconsider its determination at the appropriate time. Nevertheless, Petitioner's funding motions have all been unsealed and are contained in the Appendix filed with this Petition. App.4737-5976.

collection made complex by Petitioner's father's military service, and to develop a relationship with Petitioner's siblings who had not been involved in Petitioner's trial, App. 4772-75; and (3) a forensic psychologist was necessary because trial counsel's focus on the psychopath theory resulted in the failure of trial counsel to direct mental health experts to consider the relationship between Petitioner's life history and brain damage and/or mental illness. App. 4775-77.

On April 29, 2014, the PCR Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. App. 4796-4806. The PCR court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the PCR court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." App. 4804

The next week, on May 8, 2014, PCR counsel moved for reconsideration of the court's denial of funding for the fact investigator and the forensic psychologist. App. 4807-18. PCR Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Petitioner's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the PCR court denied all funding requested for a forensic psychologist. App. 4830-38. The court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of [Petitioner's] claims for post-conviction relief." App. 4836. The court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of [Petitioner]." App. 4836. In denying funding for a forensic psychologist, the PCR court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

App. 4837.

Despite the lack of funding for expert services, PCR counsel continued to investigate Petitioner's case. On July 28, 2014, counsel presented the PCR court with additional facts supporting the need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). App. 4839-52. Specifically, PCR counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Petitioner argued the expert services of a licensed social worker were "reasonably necessary for the representation of the defendant," because trial counsel relied on opinions from experts hired for the specific purpose of supporting the psychopath theory and were not asked, or equipped, to look more broadly at Petitioner's life history and because Califf was retained shortly before trial, was not qualified, and was only able to testify generally about Petitioner's upbringing and family life. App. 4845-48. Petitioner argued the services of a media

saturation expert were reasonably necessary because the community had been inundated with media detailing Petitioner's crimes and prior death sentence before the Horry County trial and trial counsel failed to investigate and present any evidence regarding the amount and type of media to which the jurors in the area could have been exposed. App. 4848-50.

Approximately two months later, on September 25, 2014, the PCR court denied the requested funds for a licensed social worker and a media expert, App. 4900-02, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." App. 4901. The PCR court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Petitioner filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). App. 4903-27. In the Second Motion to Reconsider, Petitioner argued the PCR court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Petitioner could not present the PCR court with the conclusions the experts would reach. Petitioner argued the standard used by the court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state – no other South Carolina Circuit judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

On January 6, 2015, Petitioner filed a brief in support of his Second Motion to Reconsider. App. 4945-72. On the same day, based on the PCR court's denial of expert funding and failure to rule on Petitioner's Second Motion to Reconsider, Petitioner filed a Motion for Continuance, asking the PCR court to continue the merits hearing scheduled for March 2, 2015 because PCR

counsel was without expert assistance in preparing for the hearing. App. 3960-71. On February 3, 2015, having not received a decision from the PCR court on the motion to reconsider funding or the motion for continuance, PCR counsel filed a Petition for Court Oversight of Capital PCR Action in this Court. App. 4001-16. Counsel asked this Court to order the PCR court to authorize expert funding and grant a continuance to allow PCR counsel to adequately prepare for a hearing on the merits of Petitioner's PCR claims. App. 4002. This Court declined to review the PCR court's rulings and denied Petitioner's petition. App. 4114. On February 27, 2015, the PCR court summarily denied all pending motions, including Petitioner's Motion to Reconsider Denial of Funding and Motion for Continuance. App. 4161-62. On March 2, 2015, before the commencement of the PCR merits hearing, PCR counsel filed an objection to proceeding to a hearing on the grounds that Petitioner required expert assistance in order to investigate and present his claims for relief, which the PCR court had denied. App. 4163-72.

On March 2 and 3, 2015, over Petitioner's objection, the PCR court held a hearing on Petitioner's PCR claims. Petitioner again objected that he could not prove several of his claims without the assistance of experts for which he did not have funding. App. 4182. PCR counsel also indicated they intended to call witnesses at the hearing, but did not believe they could properly question the witnesses on various claims because the claims had not been fully developed. App. 4183. The objections were rebuffed by the PCR court.

Following the hearing, on May 18, 2016, the PCR Court issued an order denying relief on all claims. App. 4977-85. Petitioner timely filed a Motion to Alter or Amend Judgment. App. 4988-5031. In the Motion to Alter or Amend Judgment, Petitioner once again objected to the PCR court's wholesale denials of funding for expert assistance based on the court's erroneous interpretation of

the statute. App. 4988-91. Following oral argument, App. 5044-81, the PCR court denied Petitioner's Motion to Alter or Amend on October 2, 2017. App. 5099-5140.

ARGUMENT

REASONS THE WRIT SHOULD BE GRANTED

I. **TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND HAD AN ACTUAL CONFLICT OF INTEREST WHEN REPRESENTING PETITIONER IN HIS 2009 HORRY COUNTY DEATH PENALTY TRIAL AND THE CONFLICT WAS NOT KNOWINGLY AND INTELLIGENTLY WAIVED BY PETITIONER.**

a. **Relevant Legal Principals.**

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest." *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001) (en banc), *aff'd*, 535 U.S. 162 (2002). The trial court has a duty to protect a criminal defendant's Sixth Amendment right to conflict-free counsel, and must make an adequate inquiry when it knows or has reason to know of a conflict. *Glasser v. United States*, 315 U.S. 60, 71 (1942); *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978). Trial counsel similarly has a duty to provide conflict-free representation and to notify the court and the client of any potential conflict. *See, e.g., Holloway*, 435 U.S. at 485-86 ("defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.").

A conflict of interest exists "when a defense attorney places himself in a situation inherently conducive to divided loyalties." *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)). Although conflicts of interest often occur when an attorney represents multiple clients, a conflict may also exist between an attorney's private interests and those of the client. *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992). "A concurrent conflict of interest exists if . . . there is a significant risk that the

representation . . . will be materially limited . . . by a personal interest of the lawyer." Rule 1.7, RPC, Rule 407, SCACR.

A "significant conflict of interest arises when an attorney's interest in avoiding damage to [his] own reputation is at odds with his client's strongest argument." *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (quoting *Maples v. Thomas*, 565 U.S. 266, 285 n.8 (2012)) (internal quotation marks omitted). The Supreme Court has recognized that a conflict exists when an attorney must "denigrate their own performance" and make an argument that "threatens their professional reputation and livelihood." *Id.* Where an attorney has been charged with being ineffective in one proceeding and represents the client in another related proceeding, a conflict of interest arises because any changes or additions to evidence presented at a successive proceeding could be used as evidence of ineffectiveness at the first proceeding. *Owens v. State*, 792 So.2d 650, 655 (Fla. Dist. Ct. App. 2001) ("[D]efense counsel could not effectively represent appellant during sentencing as to both cases when he faces a possible ineffectiveness of counsel claim as the more he said, the more he put into the record which could later be used against him in the ineffectiveness claim); *see also, e.g., Adams v. State*, 380 So.2d 421, 422 (Fla. 1980); *People v. Fields*, 410 N.E.2d 1178, 1179-80 (Ill App. Ct. 1980); *People v. Norris*, 361 N.E.2d 105, 110 (Ill. App. Ct. 1977); *Roberts v. State*, 141 So. 3d 1139, 1141 (Ala. Crim. App. 2013); *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. Ct. App. 1999); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-384 (1994) (stating a conflict exists where a lawyer's representation of a defendant is limited by the lawyer's personal interests, including the lawyer's interest in avoiding liability for malpractice or preserving his reputation). The problem in this instance is that counsel has a disincentive to make changes in a later proceeding because that could be used against him in the ineffectiveness claim.

An attorney's motives when involved in an actual conflict of interest "are irrelevant." *Zuck*, 588 F.2d at 439. "[T]he sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense." *Id.* at 440. The "evil" of the conflict "is in what the advocate finds himself compelled to *refrain* from doing." *Holloway*, 435 U.S. at 490 (emphasis in original). Thus, "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Id.*

Waiver of a conflict of interest is valid only if it is made voluntarily, knowingly and intelligently. In order for a waiver of the right to conflict-free counsel to be knowing and intelligent, the State must show the defendant: (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and, (3) was aware of his right to obtain other counsel. *Zuck*, 588 F.2d at 440. The only way a defendant can knowingly and intelligently waive the conflict is if he understands the true nature of the consequences. "[A] defendant cannot knowingly and intelligently waive what he does not know," *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990), and an alleged waiver is not knowing, intelligent and voluntary unless the defendant knows of the precise form of the conflict that eventually arose at trial. *See, e.g.*, *United States v. Swartz*, 975 F.3d 1042, 1049-50 (4th Cir. 1992); *Thomas v. State*, 346 S.C. 140, 145, 551 S.E.2d 254, 256 (2001). Similarly, "informed consent" requires the lawyer to provide "reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0, RPC; Rule 407, SCACR.

Conflicts involving allegations of attorney ineffectiveness create a difficult situation for adequately informing a defendant regarding the risks of moving forward with the conflicted

attorney. In a similar situation, this Court noted, "[a] number of jurisdictions have acknowledged the conflict of interest that arises when an attorney counsels his client to waive the right to challenge his representation." *Sanders v. State*, 412 S.C. 611, 616 n.2, 773 S.E.2d 580, 582 n.2 (2015). A lawyer's ability to adequately inform and advise his client in a case where the client has alleged the attorney's ineffective assistance is compromised by the lawyer's desire not to have to "'fess up' to a mistake." *See* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by* Martinez v. Ryan, 68 Fla. L. Rev. 765, 805 (2016). "The lawyer's inability to provide fully candid, impartial advice impairs the client's capacity to make fully informed decisions concerning the representation." *Id.*

To establish a violation of the Sixth Amendment right to conflict-free assistance of counsel Petitioner must establish that: (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.*

b. **Trial counsel had an actual conflict of interest.**

In Petitioner's Horry County trial, Diggs operated under an actual conflict of interest because Petitioner had alleged Diggs was ineffective in his representation in the Georgetown County case. After Petitioner filed a PCR application alleging that Diggs was ineffective in his presentation of a defense at the Georgetown County trial, Diggs had a personal and professional stake in demonstrating that his performance at the initial trial was not deficient.

As Diggs faced the prospect of a second death penalty trial with the same defendant who was challenging the adequacy of his representation at the first trial, he would have been tempted to present the same defense as he did previously because the more he added to or changed the

defense, the more it would tend to show his prior defense was inadequate and he was thus ineffective.[4] *See Owens*, 792 So.2d at 655. For example, if Diggs abandoned the not guilty by reason of insanity defense, asked his experts not to use dehumanizing labels (such as "psychopath") to describe Petitioner, or presented additional mitigation evidence in the penalty phase, he would have tacitly acknowledged the defense presentation at the Georgetown County trial was flawed. This could have been used as evidence against his effectiveness in the Georgetown County PCR, "denigrat[ing] [his] own performance" and "threaten[ing] [his] professional reputation and livelihood." *Christeson*, 135 S. Ct. at 894.

Diggs's conflict permeated the entire trial, prejudicing Petitioner with every decision made by Diggs in the Horry County proceedings. *See Zuck*, 588 F.2d at 439 (recognizing greater "danger of ineffective representation" where "the conflict could conceivably have infected the entire trial" as opposed to the examination of a single witness). Diggs presented a virtually identical defense at the Horry County and Georgetown County trials and Diggs testified that he never considered changing his strategy after the Georgetown trial.[5] App. 4247. Diggs's failure to consider an

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[4] This is particularly true given how closely linked the two trials were. The crimes in Georgetown and Horry County occurred within twenty-four hours of each other and were part of an ongoing string of crimes committed by Petitioner. The defenses of these crimes were, therefore, intertwined. Additionally, in a death penalty case, the defendant's life history and mental health are always considerations in the penalty phase. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) ("Important sentencing phase considerations include a defendant's 'medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences'") (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, commentary ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to a jury's decision at the punishment phase."). Given that one defendant was facing two death sentences, the defendant's history was equally relevant in both trials.

[5] The State recognized Diggs's plan to go forward with the same defense, asserting: "Diggs . . . has represented to the Court in connection with the present case that he intends to offer a similar defense and similar mitigation utilizing the same experts from the [Georgetown trial]." App. 3697.

alternate defense theory and present a more robust mitigation case is not surprising given the fact that Diggs operated under a conflict that encouraged him to commit the same errors again in order to preserve his representation. As the Supreme Court has found, a "significant conflict of interest arises when an attorney's interest in avoiding damage to [his] own reputation is at odds with his client's strongest arguments." *Christeson*, 135 S. Ct. at 894 (internal quotation marks omitted). Such a conflict is exactly what arose as Diggs prepared for the Horry County trial with Petitioner's ineffective assistance of counsel claims looming in the Georgetown County proceedings.

c. **Petitioner could not and did not knowingly and intelligently waive the conflict of interest.**

Because Petitioner was never informed of the specific nature of the conflict or of the consequences of continuing with counsel under the onus of that conflict, any purported waiver of the conflict of interest was not knowing and voluntary. *See Zuck*, 588 F.2d at 440; *Hoffman*, 903 F.2d at 289 ("[A] defendant cannot knowingly and intelligently waive what he does not know."). Though the issue of a potential conflict was raised multiple times prior to trial, neither the trial court nor trial counsel articulated the nature of the conflict or the risks of proceeding with Diggs as counsel. At the first hearing on the issue, Judge Baxely acknowledged the "conundrum" that existed with Diggs's continued representation, but left the matter to be discussed with Petitioner's PCR attorneys that would be appointed to him. App. 3066. Upon Judge John's appointment to the case, he said he thought the conflict created a "downright disqualification," but deferred the issue until Petitioner filed his amended PCR application in Georgetown County. App. 3077-78. After the State filed a motion to have the trial court review Diggs's status as counsel, the trial court held a hearing and Diggs stated he had no position on the conflict[6] and asserted Petitioner wanted Diggs

[6] At the PCR hearing, Diggs agreed it was a conflict of interest for him to continue his representation after the PCR application was filed. App. 4251.

to remain on the case. App. 3096. Petitioner informed the court he was happy with Diggs and intended to file an amended PCR application in Georgetown County. App. 3101. Petitioner filed his amended PCR application on October 21, 2009, App. 4520-27, but there was no further discussion of the conflict and the Horry County case proceeded to trial without Petitioner ever being fully informed of the conflict and its potential consequences.

All of the hearings on the issue of the conflict focused on the fact that Petitioner wanted Diggs to continue as counsel, that Petitioner did not want to waive any ineffective assistance of counsel claims in the Georgetown County PCR, and on how to handle the waiver of attorney-client privilege brought about by filing the PCR application. Neither of Petitioner's lawyers, the court, nor the State informed Applicant of the potential consequences of waiving the conflict – i.e. that Diggs would be tempted to present the same defense in order to avoid damaging his professional reputation because making changes to the defense could provide evidence that his performance was deficient at the first trial. *See Holloway*, 435 U.S. at 490 (emphasizing the evil of conflicted counsel being in "what the advocate finds himself compelled to *refrain* from doing"). Without the potential consequences ever being articulated, there is no way that Petitioner could have realized what they may have been and he could not make a valid waiver, regardless of his assertions that he wanted the same counsel. *Hoffman*, 903 F.2d at 289.

d. **The PCR court erred in finding the conflict issue was fully considered on direct appeal and finding Petitioner was not prejudiced by trial counsel's conflict of interest.**

The PCR court failed to address Petitioner's conflict of counsel claims, improperly deferring to this Court's consideration of the issue on direct appeal. In his PCR application, Petitioner alleged three distinct conflict of counsel claims: (1) a claim that his right to conflict-free assistance of counsel was violated by Diggs's representation (Claim 10&11(a)), (2) a claim that trial counsel were ineffective in failing to adequately advise Petitioner and the trial court of all

relevant issues regarding the conflict of interest (Claim 10&11(c)(2)), and (3) a claim that appellate counsel failed to adequately raise and brief all legal grounds for challenging the conflict of interest (Claim 10&11(f)(2)). App. 3905-08. These claims allege, as discussed above, that Petitioner was never informed of the nature of the conflict and, therefore, could not validly waive "what he does not know." *See Hoffman*, 903 F.2d at 289. The PCR court failed address Petitioner's ineffective assistance of counsel claims and to acknowledge the inadequate information given to Petitioner when he made his purported waiver. App. 4979-80, 5104-10.

Diggs was ineffective in representing Petitioner because he operated under a conflict of interest and failed to fulfill his "obligation, upon discovering a conflict of interest, to advise the court at once of the problem." *Holloway*, 435 U.S. at 485-86; *see also Cuyler*, 446 U.S. at 346 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."). Instead, Diggs consistently said he did not personally have a problem with the fact that Petitioner alleged his ineffectiveness at the initial trial and indicated to the court that petitioner wanted to proceed with Diggs. That Diggs failed to acknowledge his divided loyalties – to his personal and professional reputation and to Petitioner – prevented him from informing Petitioner of the nature of the conflict and resulted in him laboring under "an actual conflict of interest." As discussed above, Diggs's conflict "adversely affected" his performance because Diggs offered virtually the same defense at Petitioner's Horry County trial as the defense that was rejected by jurors in Georgetown County and resulted in a death sentence.[7] Because Diggs operated under a conflict of interest which

[7] Diggs testified that he did not even consider changing his strategy between trials. App. 4247. Failure to consider a new strategy after the original strategy failed at an initial trial not only prejudiced Petitioner but is contrary to professional standards for attorneys representing death penalty clients. Russell Stetler, an expert in the investigation and presentation of mitigation evidence in capital cases, testified that the PCR hearing that professional standards for lawyers

affected his representation, prejudice is presumed. *Cuyler*, 446 U.S. at 348; *Strickland*, 466 U.S. at 692. The PCR court failed to address this claim, asserting that this Court fully addressed the conflict claim on direct appeal. On the contrary, this Court recognized that Diggs failed to preserve the conflict of counsel claim by not objecting to continuing his representation, *Stanko II*, 402 S.C. at 269, 741 S.E.2d at 717, and an ineffective assistance of counsel claim was not raised on direct appeal. As a result, this Court did not consider or rule on Diggs's failure to recognize the conflict and advise his client and the PCR court erred in failing to do so.

The PCR court also failed to adequately address Petitioner's claim that appellate counsel inadequately briefed the conflict of counsel issue in that appellate counsel, like all parties previously, failed to define the nature of the conflict of counsel. Appellate counsel asserted only that the trial court erred by accepting a "truncated and inadequate waiver" of the conflict of interest and erred in requiring that Diggs and Applicant not discuss the Georgetown County case. *See* App. 3728-37. It was not until the petition for rehearing that appellate counsel described the actual nature of the conflict. *See* App. 3878-79. However, by that time, the argument was waived for not having been raised in the initial briefing and this Court. *See* Rule 221(a), SCACR. As a result of appellate counsel's failures, this Court has never been asked to address the precise nature of the conflict that existed in this case and the PCR court erred in failing to address the claim and relying instead on this Court's prior decision.

Additionally, no evidence supports the PCR court determination that the conflict was defined for Petitioner. App. 5110; *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008) ("[T]his Court will reverse if there is no probative evidence to support the PCR court's findings."). Nothing

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require that an attorney preparing for a second death penalty case for the same defendant must "have completely fresh thoughts, reinvestigation, new strategy . . . regardless of the outcome of the . . . first trial." App. 4332.

in the record at any of the hearings indicates Petitioner was informed of the risks of continuing with Diggs as his attorney. On the contrary, the record demonstrates that Diggs stated he had not reviewed the PCR application, did not have a position on the conflict, and did not have a problem with Petitioner alleging his ineffective assistance. Diggs was, therefore, unable to adequately advise Petitioner. Even if Diggs had acknowledged the conflict and reviewed the PCR application, independent counsel would have been required to advise Petitioner on the nature of the conflict and the resulting risks because an attorney cannot advise a client on waiving challenges to his own ineffectiveness. *Sanders*, 412 S.C. at 616 n.2, 773 S.E.2d at 582 n.2. Diggs's co-counsel Williams was similarly unable to adequately advise Petitioner on the nature of the conflict because she also never reviewed the Georgetown County PCR application or any of its amendments. App. 4432.

The PCR court was also incorrect in finding that Petitioner's statement that he "trusted counsel to consider any previous errors in calibrating his defense at the second trial" indicated Petitioner understood the conflict. On the contrary, it demonstrates that Petitioner did not understand the risks associated with continued representation by Diggs because, though the conflict meant Diggs was unlikely to resolve any of the mistakes he made at the first trial, Petitioner believed Diggs would make changes. Petitioner did not understand the risks because no one ever explained them to him and he could not be expected to understand them without counsel from his attorney, the court, or an independent attorney. *Cf. Robertson v. State*, 418 S.C. 505, 517, 795 S.E.2d 29, 35 (2016) (finding it "unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge to question counsel's qualifications at the onset of the proceeding"). As a result, Petitioner's statements that he wanted to continue with Diggs as his attorney did not serve as a knowing and voluntary waiver of the conflict of counsel. *See Hoffman*, 903 F.2d at 289; *see also United States v. Cronic*, 466 U.S. 648,

657 n.21 (1984) ("[W]e attach no weight to . . . respondent's expression of satisfaction with counsel's performance at the time of trial."). The PCR court's narrow view of the conflict issue caused it to err in denying Petitioner a new trial based on trial counsel's conflict of interest. This Court should grant certiorari to fully evaluate the issue and grant Petitioner a new trial with conflict-free counsel.

II. THE PCR COURT MISREAD THE STATUTE RELEVANT TO EXPERT FUNDING FOR CAPITAL PCR APPLICANTS AND ERRONEOUSLY DENIED PETITIONER FUNDING FOR EXPERT ASSISTANCE RESULTING IN A DENIAL OF PETITIONER'S ABILITY TO FAIRLY AND ADEQUATELY PRESENT HIS CLAIMS FOR POST-CONVICTION RELIEF.

a. Relevant Legal Principals.

The South Carolina legislature has provided that indigents seeking post-conviction relief from capital judgments are entitled to expert assistance upon a finding by the court that such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant"); *see also* Rule 602(g)(6), SCACR ("In post-conviction relief matters, expenses related to representation and fees of appointed counsel may be paid where permitted and as prescribed in these Rules and the Defense of Indigents Act.").

The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are available") (citing ABA Standards, Providing Defense Services,

cmt., 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The ability to retain the services of experts and investigative assistance in various areas is particularly essential in capital cases. A capital case "is an extraordinary proceeding" where "the attorney is charged with the awesome responsibility of defending a person's life." *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506. To prepare for the guilt or innocence phase of a capital trial, an attorney must vigorously and thoroughly investigate the facts and circumstances of the alleged crime, which often requires the assistance of various experts. *See id.* (recognizing that unlike the solicitor, the defense attorney does not have "the entire array of state, county, and municipal law enforcement" at his disposal). Just as assistance is imperative in the guilt or innocence phase of a capital case, it is equally necessary during the sentencing phase where counsel is challenged by novel and complex issues. *See id.* at 461, 424 S.E.2d at 506-07. Due to the finality and irrevocability of the penalty of death, the United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In order to ensure that the appropriate sentence is imposed, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See*

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine).

Thus, in capital cases, defense counsel has a duty to vigorously investigate and present mitigating evidence. *See Sears v. Upton*, 561 U.S. 945, 951 (2010); *Williams v. Taylor*, 529 U.S. 362, 393 (2000). This duty requires that counsel's investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal quotation marks omitted)).

Post-conviction counsel must "continue an aggressive investigation of all aspects of the case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4); *see also id.* 10.15.1(E)(4) cmt. ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Post-conviction counsel must review the record and conduct investigation to determine whether the applicant's conviction or sentence are "in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code § 17-27-20(A)(1). This responsibility necessarily includes determining whether the applicant received ineffective assistance of counsel during his trial. *See*

Strickland v. Washington, 466 U.S. 668, 687 (1984). If trial counsel's decision to end investigation, including mitigation investigation, was either inconsistent with professional standards or unreasonable because known information should have led counsel to investigate further, a capital defendant may have a valid claim of ineffective assistance of counsel. *See Sears*, 561 U.S. at 951; *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); *Strickland*, 466 U.S. at 690-91; *Weik v. State*, 409 S.C. 214, 233-39, 761 S.E.2d 757, 767-70 (2014); *Council v. State*, 380 S.C. 159, 173-79, 670 S.E.2d 356, 364-66 (2009); *Von Dohlen v. State*, 360 S.C. 598, 607-08, 602 S.E.2d 738, 742-43 (2004). When evaluating *Strickland* claims, courts "evaluate the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*'" *Wiggins*, 539 U.S. at 536 (quoting *Williams*, 529 U.S. at 397-98).

b. **The PCR court misinterpreted the statute providing funding for expert assistance in capital PCR actions.**

The PCR court considered and denied Petitioner's funding requests under a standard that was inconsistent with the capital PCR funding statute, S.C. Code § 17-27-160(B) (incorporating S.C. Code § 16-3-26), and the standard used by all other courts in the state when considering funding for capital PCR applicants. The PCR court stated the standard it used as follows:

> The statute does not authorize funding for services which *cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained.*

App. 4837 (emphasis added). This interpretation of the statute by the PCR court requires a PCR applicant to obtain the services of an expert (without guarantee of payment) and that those services directly lead to a favorable decision in the applicant's PCR proceedings before funding can be authorized. This interpretation is unworkable and completely at odds with the statutory language and capital post-conviction practice in this State.

The plain statutory language permits a PCR court in a capital case to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. As this Court has recognized, the statute authorizes the funding to provide indigent defendants "an adequate opportunity to present their claims fairly within the adversary system." *Bailey*, 309 S.C. at 459-60, 424 S.E.2d at 506 (citing *Ake*, 470 U.S. at 77) (internal quotation marks omitted). Adequate opportunity to present claims necessarily requires funding prior to the presentation of the claims in order to adequately investigate and prepare the claims for presentation to the court.[8]

All other courts in this State have recognized that "reasonably necessary" funding allows capital PCR applicants access to funding for experts in order to investigate, prepare, and present their claims for relief, even if those claims are not ultimately successful. In Petitioner's post-

[8] The Unites States Supreme Court has similarly found that funding is required for capital post-conviction petitioners prior to raising claims for relief. The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 858 (emphasis added). The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–52 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake*, 470 U.S. at 82 (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

conviction proceedings, PCR counsel presented the court with the affidavits of practiced capital post-conviction attorneys in South Carolina, who agreed that no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* App. 4929 (Norris Aff. ¶ 7), 4930 (Bloom Aff. ¶ 5), 4933 (Holt Aff. ¶ 4). Instead, courts have required counsel for PCR applicants to provide factual support for their assertion that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* App. 4929 (Norris Aff. ¶ 7), 4931 (Bloom Aff. ¶ 7).

Additionally, the standard set forth in the PCR court—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action. Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* App. 4929 (Norris Aff. ¶ 8), 4935-36 (Andrews Aff. ¶¶ 5, 9). In many instances, asking an expert to provide an evaluation for which they will only receive compensation if the evaluation leads to a favorable result would be an unethical contingent fee arraignment and would subject the expert to impeachment on that basis. *See* App. 4935 (Andrews Aff. ¶ 6).

Thus, under the PCR court's standard, no expert assistance was (or ever would be) available to this (or any other) PCR applicant in violation of the capital PCR funding statute and the law of this Court and the United States Supreme Court. This Court should grant certiorari to

review the standard used by the PCR court to ensure this, and other, capital PCR applicants are not denied funding to which they are entitled in order to present a meaningful defense.

c. **The PCR court improperly denied Petitioner funding for expert assistance and Petitioner was denied the ability to adequately investigate and present evidence in support of his claims for post-conviction relief as a result.**

i. *The PCR court improperly denied funding for a licensed social worker.*

Petitioner asked the PCR court for authorization for a licensed social worker, Dr. Arlene Andrews, to expend up to 100 hours to conduct a social history evaluation and prepare to present Petitioner's social history to the PCR court. App. 4845-48. Presentation of Petitioner's life and social history would have been relevant to Petitioner's claims that trial counsel were ineffective their handling of the penalty phase of his Horry County trial (Claims 10&11(e)(1)-(4)). Petitioner submitted the following factual information supporting a finding that the funding for a licensed social worker was "reasonably necessary" to the representation of Petitioner:

> In this case, undersigned counsel's investigation reveals that trial counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial and failed to adequately investigate and present other available mitigation and social history evidence as a result. As part of their investigation, undersigned counsel interviewed Dale Davis, who served as the mitigation investigator for Stanko's Georgetown County trial. Davis stated that she objected to trial counsel's strategy to present Stanko as a psychopath. She told counsel their theory was not mitigating and that they needed to hire a social worker to aid in developing an presenting Stanko's social history. Over Davis' objections, trial counsel continued to pursue the psychopath strategy, limited their mitigation and mental health investigation accordingly, and did not hire anyone to aid in presenting Stanko's social history until approximately three weeks before trial.
>
> Thus, undersigned counsel's investigation has made it clear that trial counsel focused on its psychopath "defense" without sufficient investigation and conducted the remainder of their trial preparation with a sort of "tunnel vision," ignoring anything that did not fit the psychopath theory. Trial counsel relied exclusively on opinions from experts who were hired for the specific purpose of supporting the psychopath theory. These experts were not asked, or equipped, to look more broadly at Stanko's life history and its mitigating impact on his development. Trial counsel's focus on the psychopath theory thus resulted in a curtailed mitigation and social history investigation.

. . .

Here, trial counsel utterly failed to investigate and present the jury with an adequate and accurate overview of Stanko's social history as mitigation. Trial counsel did not call any family members and called few friends, teachers, or employers.[14] Instead, trial counsel relied solely on Evelyn C. Califf who has a doctorate in Christian Counseling. Undersigned counsel's investigation has revealed that Califf began working on this case only a few weeks prior to trial and spent only one hour with the client and spoke briefly with only one of Stanko's sisters over the telephone in preparation for trial. As a result of her limited involvement, Califf was only able to testify generally and ineffectively about Stanko's upbringing and family life.

> [14] Trial counsel also failed to even interview the appropriate people in Stanko's life to develop a full understanding of his life history and mental health. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, commentary ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, parole officers, and others.").

Undersigned counsel's investigation, conducted with the assistance of a mitigation investigator, has uncovered mitigating evidence in Stanko's social and family history that was not presented at trial. Since their appointment, counsel and the mitigation investigator have interviewed roughly twenty lay witnesses with knowledge of mitigating evidence surrounding Stanko's social history. Specifically, counsel have developed a relationship with Stanko's siblings, which was not done in preparation for trial, and have interviewed over a dozen friends, classmates, and teachers who were not interviewed by the trial team. These lay witnesses have presented a portrait of Stanko vastly different from that presented at trial.

Witnesses have described Stanko as generally well-liked, smart, outgoing, and a person with vast potential. During his late teenage years, Stanko began exaggerating the truth and, in some instances, outright lying. Around the same time, almost all of Stanko's close friends went off to college. Stanko did not go to college, despite his unquestioned intelligence and potential to succeed in college. Stanko instead began working as a salesman and began scamming friends and strangers. This led to legal trouble and eventual incarceration during Stanko's mid to late 20s. This evidence demonstrates a need for a social worker to aid counsel in understanding the information provided by the lay witnesses, directing counsel toward other potentially mitigating evidence, and in presenting that evidence to the Court in support of Stanko's ineffective assistance of counsel claim. *See* Glass Aff. ¶ 7 ("A testifying social worker is, therefore, necessary to evaluate [mitigation] information like this and to describe how . . . events shaped Mr. Stanko's life, particularly in light of his significant brain damage."); ABA Supplementary

> Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (instructing a defense team to work with a social worker "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning").

App. 4914-17.

In all capital cases, the defendant's social history must be investigated and considered for presentation at trial. *See Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) ("Important sentencing phase considerations include a defendant's 'medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences'") (quoting *Wiggins*, 539 U.S. at 524); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, cmt. ("[T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."). The testimony of a licensed social worker is one of the most basic, fundamental elements of virtually every capital sentencing proceeding in the modern era. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 10.11(E)(1)(a) (2008) (instructing that it is the duty of the defense team to prepare experts to testify, including social workers "with specialized knowledge of . . . physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning"); *see also* App. 4933, 4937.

Though Petitioner's trial counsel presented the testimony of mental health experts and some social history evidence, Petitioner likely has a viable claim for ineffective assistance of trial counsel. This Court has recognized that trial counsel can be ineffective even when presenting some mitigating evidence. In *Weik*, this Court overturned a circuit court's denial of post-conviction relief where trial counsel presented the testimony of three mental health experts and a social history witness. 409 S.C. at 233-38, 761 S.E.2d at767-70. The Court found that "[t]hough counsel

introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." *Id.* at 235, 761 S.E.2d at 768 (emphasis original). Petitioner's case involves the same circumstances where trial counsel focused their investigation and mitigation presentation on mental health evidence, while ignoring social history evidence readily available to them. The assistance of a licensed social worker was therefore necessary to assist Petitioner's counsel in developing an understanding of Petitioner's social history as it mitigates his crime and correlates to his mental health and in presenting related issues to the PCR court in support of his post-conviction relief claims. The PCR court, therefore, erred in failing to authorize funds for a licensed social worker as they were "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

ii. *The PCR court improperly denied funding for a forensic psychologist.*

Petitioner requested funding for forensic psychologist Dr. Susan Knight to evaluate Petitioner, estimating she would need approximately sixty hours to review records, interview Petitioner, conduct any needed psychological testing, and interview relevant witnesses. App. 4775-77. In support of this request, Petitioner asserted that despite the fact that Stanko's mental health has been an issue in this case since the very beginning, a competent and reliable mental health evaluation has never been completed and that counsel had uncovered sufficient facts to identify trial counsel's inadequate mental health evaluation of Stanko as a claim for post-conviction relief (Claim 10&11(e)(4)). To demonstrate that the funds were "reasonably necessary for the representation of" Petitioner, PCR counsel provided the following factual support:

> Stanko has a high IQ of 143 and little history of violent behavior. Undersigned counsel's investigation clearly reveals that trial counsel's inquiry into Stanko's mental health was inadequate in that counsel settled on a theory that Stanko is a psychopath early on in their preparation for trial. Trial counsel then sought out an expert in psychopathy, Dr. Thomas Sachy, after learning of Dr. Sachy's

involvement in a Georgia case where Dr. Sachy testified about his diagnosis of the defendant as a psychopath.[17] Undersigned counsel's interviews with members of Stanko's trial team suggest that (1) Stanko's attorney, William Diggs, selected the psychopathy defense prior to the completion of any mental health evaluation of Stanko; (2) Diggs sought out an expert (Dr. Sachy) who was obsessed with psychopathy and determined that this theory was the best fit for Stanko's defense prior to completing an evaluation of Stanko; and (3) that neither Diggs nor Sachy could be dissuaded from the psychopathy theory even though they were advised that psychopathy was a bad strategy, it was not mitigating, and it had no chance of success.[18]

> [17] Undersigned counsel's investigation has revealed the inherent flaws in trial counsel's reliance on a diagnosis of psychopathy. Dr. Pamela Crawford, who testified as a court's forensic psychologist at trial, told undersigned counsel that the problem with trial counsel's use of the psychopathy diagnosis is that psychopathy is not an accepted clinical diagnosis, does not appear in the Diagnostic and Statistical Manual (the manual setting the standard for diagnosing mental disorders), and is not a mental illness.
>
> [18] *See supra* Section III.A (describing undersigned counsel's interview with mitigation investigator Dale Davis, who objected to trial counsel's strategy because it was inherently not mitigating and encouraged trial counsel to continue investigating Stanko's social history and mental health).

Undersigned counsel have diligently worked to interview the experts who testified at trial. Counsel's interview with Dr. Sachy confirmed that Dr. Sachy's work on the case began and ended with the theory that Stanko was a psychopath. Dr. Joseph Wu and Dr. Bernard Albiniak both informed counsel that their involvement in the case was limited in nature and they were never asked to conduct a formal mental health evaluation or provide a diagnosis. Counsel's investigation further indicates that Dr. Ruben Gur was only asked to analyze magnetic resonance imaging (MRI) of Stanko's brain and Dr. Marc Einhorn was only asked to conduct neurological testing, designed to evaluate brain functioning. Neither Dr. Gur nor Dr. Einhorn's reports indicate they conducted a mental health evaluation or made a mental health diagnosis. Finally, Dr. James Thrasher appears to have evaluated Stanko only for competency to stand trial and criminal responsibility. Dr. Thrasher's report does not indicate that he evaluated Stanko for mental illness as it related to mitigation. Accordingly, though six[19] psychological experts testified at Stanko's trial, none completed a full mental health evaluation. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 4.1 commentary ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process" but is "often of vital importance to a jury's decision at the punishment phase.").

> [19] The Court's order indicates there were seven mental health experts who testified at trail. Undersigned counsel submits there were only

> six. Brent Turvey, who also testified at trial, specializes in crime scene reconstruction and did not conduct a mental health evaluation of Stanko. Additionally, Dr. Evelyn Califf, who testified during the penalty phase of the trial, is a certified Christian counselor, not a psychologist. Dr. Califf was asked to present a social history, not to conduct a mental health evaluation.

App. 4919-21.

Petitioner argued in the PCR court that while PCR counsel could not point to a specific diagnosis of Petitioner, their inability to do so was due to the fact that they themselves are not mental health experts and the mental health experts retained at trial were not asked to consider or provide opinions regarding any alternative diagnoses. Counsel, therefore, asked for a mental health professional to assist in their investigation. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1 ("Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions . . . that could be of critical importance."); *id.* at 4.1(A)(2) (ABA Guidelines mandating that "The defense team should contain at least one member qualified by experience to screen individuals for the presence of mental or psychological disorders or impairments").

"Mental health experts are essential to defending capital cases." *Id.* at 4.1, cmt. Jurors making a determination of the punishment for a defendant often find "the defendant's psychological and social history and his emotional and mental health [to be] of vital importance." *Id.* Given the fact that trial counsel prematurely abandoned investigation into Petitioner's life history and its effect on Petitioner's mental health, there is a strong possibility that Petitioner had a viable claim for ineffective assistance of counsel under *Sears*, *Wiggins*, *Williams*, and *Strickland.* The PCR court, therefore, erred in denying Petitioner the ability to investigate his claim that trial counsel were ineffective in failing to adequately investigate and present mitigating evidence, particularly evidence related to how Petitioner's "mental health/illness affected his behavior,

mental state, and functioning over the course of his life." PCR App Claim 10&11(e)(4); *Wiggins*, 539 U.S. at 521-24; *Weik*, 409 S.C. at 233-38, 761 S.E.2d at 767-70.

iii. *Funding was improperly denied for a media saturation expert.*

Petitioner also requested funds for media expert Neil Vidmar to expend thirty (30) hours conducting a study of the media saturation surrounding Petitioner's case prior to the Horry County trial in support of his claim that trial counsel were ineffective in failing to conduct such a study in support of the motion to for change of venue (claims10&11(b)(1)-(2)). App. 4848-50. Petitioner presented the following factual information in support of a finding that funding was "reasonably necessary" to his representation:

> Prior to trial in Horry County, defense counsel decided to move for a change of venue. At the pre-trial motions hearing held one month prior to jury selection, however, trial counsel informed the trial court that they were not presenting the change of venue motion at that time. ROA 3110. Partway through voir dire, counsel asked for a change of venue based on members of the jury pool's prior knowledge of the case against Stanko. ROA 1284-90. The State suggested it would be better for the court to consider the change of venue argument after the jury had been selected, but before it was sworn. ROA 1289.
>
> In support of the change of venue motion, defense counsel did not object to the State's suggestion and the court delayed consideration of the change of venue motion until after selection of the jury. ROA 1289-90. After the jury was selected, defense counsel formally moved for a change of venue. ROA 1334-1415. Defense counsel presented the testimony of Dr. Bernard Albiniak, an expert in social psychology, who testified that in public forums, people will conform their statements to what they believe will be generally accepted by the group even if that is not what they actually believe. ROA 1336-81. Dr. Albiniak is not an expert in media saturation; he has never conducted a media study; and, during his testimony, he did not even mention having reviewed such a study. Dr. Albiniak opined that the jurors, when asked by the court if they could set aside their prior knowledge of the case, would tell the judge they could do so even if it was not what they believed. The State pointed out that none of Dr. Albiniak's research or studies involved juror behavior. With no evidence of the extent of the media coverage surrounding Stanko's case, the court denied the defense motion for a change of venue. ROA 1415.
>
> The media coverage of Stanko's crimes and trial began immediately after the crimes occurred. Local and national media has continually covered all stages of Stanko's case, including law enforcement's national manhunt for and arrest of

> Stanko, preparations for his trial in Georgetown, each day of the trial in Georgetown County, Stanko's conviction and death sentence in Georgetown County, and preparations for Stanko's trial in Horry County. In fact, the entire Georgetown County trial was covered by 48 Hours, which aired an hour long special on Stanko multiple times prior to Stanko's trial in Horry County. Trial counsel were aware of the media coverage surrounding Stanko's case before the jury was selected in Horry County, yet trial counsel did not present the trial court with any information about media coverage in moving for a change of venue.

App. 4922-24.

The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. Pretrial publicity about a case can be so pervasive and saturate the community to such an extent as to make it impossible to select an impartial jury from the community where the crime occurred. *See Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). In such a case, the pretrial publicity creates a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected from a local jury pool. *See Skilling v. United States*, 561 U.S. 358, 379-80 (2010).

The Horry County community was inundated with media detailing the crimes for which Petitoner stood trial and Petitioner's conviction and death sentence in Georgetown County. The media even extensively covered and detatiled the trial strategy used in Georgetown County, which was again presented in a nearly identical fashion to the Horry County jury. This creates a likelihood that, with the services of an appropriate expert, Petitioner could have shown that an impartial jury could not have been selected from residents of Horry County. Trial counsel, however, presented no evidence relating to the amount and type of media coverage the potential jurors encountered in their daily lives before becoming members of the jury pool. Petitioner, therefore, likely a viable claim for ineffective assistance of counsel under *Strickland.* An expert in media studies and media saturation was therefore necessary to conduct a study of the media coverage leading up to Petitioner's trial and to present that evidence to the PCR court. The PCR court, therefore, erred in

denying funds for a media expert as they were "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

iv. *The improper denial of funding for expert assistance prevented Petitioner from adequately investigating and presenting evidence in support of this claims for post-conviction relief.*

As the hearing on Petitioner's PCR claims approached, Petitioner was in an untenable position. He had pled claims in his PCR application alleging his constitutional rights had been violated during his Horry County trial proceedings and supported the claims with facts to the extent that he could without expert assistance, but was unable to fully prepare to litigate the claims at the PCR merits hearing because he was repeatedly denied expert assistance. On March 2, 2015, at the outset of the PCR merits hearing, Petitioner objected to going forward with the hearing because he did not have the resources necessary to prove seven of the claims he raised in his PCR application. Petitioner asserted he could not prove the following claims without the assistance of expert services:[9]

- 10&11(b)(1) & (2) – Alleging trial counsel were ineffective in (1) agreeing to postpone raising the change of venue motion until after *voir dire* was completed, despite the fact that prior to *voir dire* a defendant can present evidence that negative pretrial publicity raises a presumption of juror prejudice, *see Skilling*, 561 U.S. at 379-80; *Rideau*, 373 U.S. at 726; *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, 530 (1982); and (2) failing to retain an appropriate expert to conduct a formal study of the type and prevalence of media coverage of the crimes.
- 10&11(d) – Alleging the State presented false testimony through Dr. Kenneth Spicer regarding Petitioner's PET scan.
- 10&11(e)(1)-(4) – Alleging trial counsel were ineffective during the sentencing phase in (1) unreasonably informing the jury that Petitioner's family did not like

[9] These claims were identified by PCR counsel's review of the record and trial counsel's files without the assistance of experts and are not the type of fully informed allegations one would expect to raise with expert assistance. There may also be other viable claims for post-conviction relief that could be identified with the assistance of experts.

him,[10] (2) eliciting testimony that Petitioner is a psychopath and other testimony tending to dehumanize Petitioner,[11] (3) failing to investigate and present all mitigating evidence about Petitioner's life history and background,[12] and (4) failing to investigate and present all mitigating evidence about how Petitioner's mental health/illness affective his behavior, mental state and functioning over the course of his life.

App. 3905-08.

In order to prove these claims, Petitioner required, at a minimum, the assistance of a forensic psychologist, a testifying social worker, and a media expert. The change of venue claims

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[10] In considering trial counsel's performance, the PCR court incorrectly found Diggs was not deficient because he made a strategic decision to inform the jury of Petitioner's family's dislike of him fails to address whether this strategic decision was reasonable. Where counsel's asserted strategic reason for doing or not doing something at trial is not reasonable, counsel's performance is deficient. *See, e.g., Ard v. Catoe*, 372 S.C. 318, 332-34, 642 S.E.2d 590, 597-98 (2007); *Council*, 380 S.C. at 175-76, 670 S.E.2d at 364-65; *Moore v. Johnson*, 194 F.23d 586, 618 (5th Cir. 1999).

[11] Due to the inherently dehumanizing nature of labels like "psychopath" and "antisocial personality disorder," the overwhelming weight of legal authority views such evidence as aggravating rather than mitigating. *See, e.g., Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1349 (11th Cir. 2010) (quoting *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010)); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994). Because prosecutors easily turn evidence of antisocial personality disorder against the defendant, no competent capital defense attorney would ever pursue a diagnosis of antisocial personality disorder or label his client a psychopath. *See Looney v. State*, 941 So.2d 1017, 1028-29 (Fla. 2006); *Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 788 (11th Cir. 2003).

[12] Under United States and South Carolina Supreme Court precedent, it is clear that Diggs's failure to conduct investigation or have any expert evaluate Applicant prior to deciding on the trial strategy was deficient performance. *See Wiggins*, 539 U.S. at 521-22; *Williams*, 529 U.S. at 396 ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. . . . . [The omissions] clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."); *Weik*, 409 S.C. at 235, 761 S.E.2d at 768 (counsel were ineffective in failing to develop and present mitigating evidence, even when trial counsel introduced psychological testimony regarding mental illness because counsel "failed to present even a skeletal version of Petitioner's *social history*"); *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 742-43 (counsel were ineffective in failing to investigate and prepare expert testimony about the defendant's mental condition as it existed at the time of the murder; though counsel in this case were more diligent that counsel in *Wiggins*, counsel were deficient in failing to conduct an adequate investigation).

could not be proven without the assistance of a media saturation expert who would have conducted a study of the type and amount of media circulating in Horry County prior to the trial and the likelihood the potential jurors were exposed to such media. The remaining claims required the assistance of a mental health and social history (social worker) expert to fully investigate potentially mitigating evidence and prepare the evidence for a PCR hearing. Without such assistance, Petitioner was able to question counsel about their investigation and decisions in preparation for the trial,[13] but was not able to present evidence of what counsel should have done if they had conducted an appropriate evaluation (evidence necessary for the prejudice inquiry under *Strickland*) because Petitioner himself was prevented from conducting an adequate investigation with qualified expert assistance. Because Petitioner was unable to investigate and present evidence on these issues due to lack of expert assistance, the PCR court denied Petitioner sufficient process in his PCR proceedings.

In total, PCR counsel filed six pleadings requesting funding for expert assistance and explaining that the PCR court was misreading the funding statute. The PCR court's erroneous denials of funding resulted in Petitioner going to an evidentiary hearing on the merits of his PCR claims without funding for a single expert witness. As far as undersigned counsel is aware, no capital PCR applicant in South Carolina has been forced to investigate and present his post-conviction claims without any expert funding. To correct the PCR court's error and to ensure other courts properly interpret the capital PCR funding statute, this Court should grant certiorari and

[13] Petitioner does not believe he asked every relevant question of the witnesses who did testify at the PCR hearing because he was unable to work with experts to help him identify all of the inadequacies in trial counsel's performance. Petitioner objected to questioning witnesses at the hearing without fully preparing his claims for relief. App. 4182.

remand for further proceedings with adequate funding for Petitioner to investigate and litigate his constitutional claims for relief.

CONCLUSION

For all of the reasons discussed above, Petitioner is entitled to post-conviction relief or further proceedings in the circuit court with the assistance of experts. This Court should grant the writ of certiorari and ultimately grant Petitioner a new trial or a new post-conviction relief hearing with adequate funding to ensure effective representation by counsel.

Respectfully submitted,

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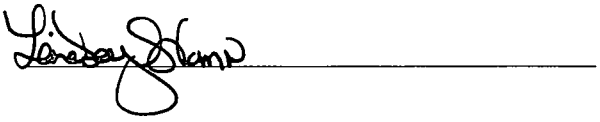

September 6, 2018.

STATE OF SOUTH CAROLINA

IN THE 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 Petition for a Writ of Certiorari was served by hand-delivery this 6th day of September 2018, upon the following:

Caroline M. Scrantom
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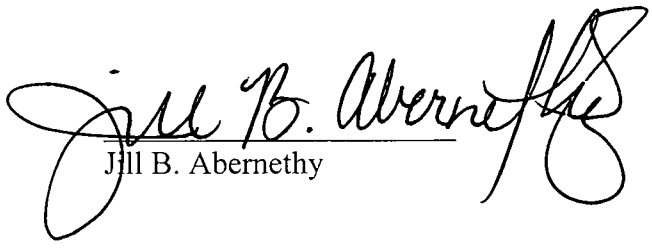

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