THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
(Capital PCR Action)
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO, #6022,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER'S 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.

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

I. In light of the record, did the PCR court err in denying relief on a conflict-of-interest claim which was presented to and decided by this Court during Petitioner's direct appeal, and at which time this Court found Petitioner to have made a complete, intelligent, knowing, and voluntary waiver of any potential conflict of interest?

II. In light of the record, the claims pursued at PCR, and facts presented in support of the funding motion, did the PCR court err in finding that not all of Petitioner's requests for funding were reasonably necessary, especially where Petitioner benefitted from the services and testimony of a number of sophisticated experts at trial?

STATEMENT OF THE CASE

On the morning of April 8, 2005, Petitioner shot and killed Charles Henry Turner at his residence near Conway and stole his keys and truck. Petitioner was arrested in Augusta, Georgia four days later. *State v. Stanko*, 402 S.C. 252, 258–59, 741 S.E.2d 708, 711–12 (2013) (*Stanko II*). The State sought the death penalty for the murder and armed robbery. Petitioner was appointed attorney William (Bill) Diggs and Brana Williams to represent him on the Horry County charges. (App. 3031-46; 3694-95).

Prior to the Horry County proceedings, Petitioner was tried, convicted, and sentenced to death for the Georgetown County murder, kidnapping, and armed robbery of Laura Ling and for the rape, assault and battery with intent to kill, and kidnapping of Ling's teenage daughter. *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008) (*Stanko I*). These crimes immediately preceded the Turner murder. Diggs represented Petitioner in these Georgetown County proceedings along with appointed attorney Gerald Kelly. (App. 4511-15).

Because Diggs previously represented Petitioner in Georgetown County for the same string of crimes, a series of hearings were conducted in the pending Horry County prosecution to determine the extent of any conflict of interest in Digg's continued representation. A hearing was also conducted on this issue in Petitioner's PCR action, which was filed *pro se* following the Georgetown conviction. At these hearings, Petitioner affirmatively explained his reasons for wishing to continue with Diggs as his attorney, waiving any conflict and expressing a cognizance of the need to file for PCR within the statutory time period in order to retain the benefit of the collateral litigation. (App. 3040-43, 3066-71, 3074-84, 3090-3104, 3017-19). Petitioner stated: "I'm not declaring that there weren't mistakes made in that [Georgetown County] case but that

does not mean that I don't trust Mr. Diggs 100 percent in this upcoming [Horry County] case." (App. 3102).

Petitioner proceeded to trial on the Horry County charges before the Honorable Steven H. John beginning November 14, 2009. At the conclusion of the guilt phase, the jury was instructed that they may find him not guilty; not guilty by reason of insanity; guilty but mentally ill; or guilty of the crimes charged. (App. 2568-75). The jury returned a verdict of guilt as to each charge. (App. 2581). At the penalty phase, the jury unanimously found the State had proven two aggravating circumstances: that the murder was committed during the commission of an armed robbery, and that the murder was committed while in the commission of larceny with the use of a deadly weapon. The jury unanimously recommended a sentence of death. (App. 3015). Judge John followed the jury's recommendation, sentencing Petitioner to death for Turner's murder and twenty years for armed robbery. (App. 3024-25).

Petitioner appealed his Horry County convictions and death sentence to this Court raising six issues on appeal. (App. 3715-16). Of relevance to the present proceeding is issue II from the appeal:

> Whether the court erred in accepting a truncated and inadequate waiver of his attorney's conflict of interest where defense counsel represented appellant in his prior trial at which appellant was sentenced to death and defense counsel was the subject of a pending accusation of ineffective assistance of counsel and the court's discretion to defense counsel and appellant not to discuss the prior case was impractical and erroneous where the murders were committed closely together, and the insanity defenses at both were inextricably entwined?

(App. 3715).

This Court affirmed the convictions and death sentence. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013) (*Stanko II*). Petitioner was denied rehearing in this Court and certiorari in the United States Supreme Court. (App. 3845-89).

The factual predicate for this capital PCR action has been previously addressed by this Court during direct appeal and duplicated herein:

> On April 8, 2005, at approximately 3:30 a.m., Appellant called his friend, seventy-four year old Henry Turner (the Victim), and falsely informed him that Appellant's father had died. Appellant arrived at the Victim's residence around 4:00 a.m. Later that morning, the Victim drove to a nearby McDonald's restaurant for breakfast. After returning with breakfast, sometime later that morning, the Victim was shaving in front of his bathroom mirror. Appellant approached the Victim from behind with a gun and a pillow as a silencer, and shot him in the back. Appellant then struck the Victim in the head, and fatally shot him in the chest.
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> Appellant stole the Victim's gray Mazda truck and fled the scene. On the evening of April 8, Appellant visited Columbia's Vista district. Appellant held himself out as a resident of New York City, visiting South Carolina to close a "big deal." Appellant proceeded to spend large amounts of cash and buy drinks for several people he met that night.
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> On April 9, Appellant travelled to Augusta, Georgia and visited Surrey Tavern. There, Appellant met a woman, and convinced her that he was a businessman in town for The Master's Golf Tournament. Appellant and the woman spent the next several days together, and Appellant stayed at her apartment. The two attended church services together on Sunday, April 10, and she introduced Appellant to her co-workers on Monday, April 11. Appellant left the woman's apartment at approximately 1:00 a.m. on Tuesday, April 12. Later that day, the woman recognized Appellant's picture in the newspaper with a headline alerting her to his alleged involvement in the Victim's murder. She notified police and assisted in Appellant's arrest. Appellant possessed the Victim's vehicle at the time of his arrest. Police searched the vehicle and recovered a bag containing a .357 Magnum caliber double-action revolver, .38 caliber bullets, and a checkbook belonging to the Victim. Testing later revealed that the .357 Magnum fired the bullets recovered from the Victim's body.
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> On August 25, 2005, the Horry County Grand Jury indicted Appellant for the Victim's murder and armed robbery. The case proceeded to trial, and Appellant relied on an insanity defense. Specifically, Appellant averred that he suffered from central nervous system dysfunction, and at the time of the Victim's murder he did not understand "legal right from wrong."

402 S.C. at 258–59, 741 S.E.2d at 711–12.

Stanko II proceeded to PCR with the filing of the initial application on January 6, 2014.

(App. 3890-96). Subsequently, the Honorable Benjamin H. Culbertson was appointed with exclusive jurisdiction over the PCR matter and attorneys Emily Paavola and Lindsey Van were appointed to represent Petitioner. Petitioner's counsel filed amendments to the application. (App. 3898-3910). Prior to any evidentiary hearing, as series of *ex parte* hearings were conducted in regards to Petitioner's motions for funding for expert and investigative services. Respondent was not privy to, nor took a position on, any funding request as a result. A procedural history of these *ex parte* proceedings appears within Petitioner's petition for oversight, filed in and denied by this Court. (App. 4001-08). Following this Court's order denying oversight and citing to *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996), the *ex parte* motions and orders were unsealed by the PCR court and have been made part of the appendix in this action. (App. 4737-4976).

Also prior to any evidentiary hearing, Petitioner requested a continuance premised upon the PCR court's denial of funding for expert and investigative services. (App. 3960-76). Prior to the PCR court's ruling on that motion, Petitioner additionally filed in this Court a petition for oversight regarding the funding and time cited as necessary to prepare its case. (App. 4001-82). To each, Responded countered with a request to unseal the *ex parte* proceedings, which Petitioner opposed. (App. 3977-4000, 4083-4113). This Court denied the petition and while noting that the circuit could ably address the motions before it. (App. 4114-15).

The evidentiary hearing convened in early March 2015 over Petitioner's continued objection to the denial of funding for certain expert and investigative services. Petitioner called six witnesses. (App. 4174-84). The PCR court denied relief on the merits of the allegations in an Order issued May 13, 2016. (App. 4977-85). Petitioner filed a motion to alter or amend judgment. (App. 4986-5031). After oral argument, the PCR court denied the 59(e) motion in an order issued September 27, 2017. (App. 5044-5140). This appeal follows.

STANDARD OF REVIEW I

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id.*; *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (an appellate court's review of the PCR's court's decision is limited to "whether any evidence of probative value exists to support that decision.").

Ineffective assistance of counsel claims have "two components: A Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673 (1984)). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP; *see also Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 87). "The standard for judging counsel's representation is a most deferential one." *Richter*, 562 U.S. at 105. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Holden*, 393 S.C. at 572, 713 S.E.2d at 615 (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d

813, 815 (1985); *Strickland*, 466 U.S. at 690.

In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense." *Wiggins*, 539 U.S. at 534 (citing *Strickland*, 466 U.S. at 692). For sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (quoting *Strickland*, 466 U.S. at 695); *see also Sigmon v. State*, 403 S.C. 120, 127, 747 S.E.2d 394, 398 (2013) (same). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694; *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) ("applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different."). Further, the prejudice evaluation includes the consideration of the prior evidence along with that presented during the PCR and a comparison to that presented in furtherance of the aggravating circumstances. *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (citation omitted).

In light of the record, when the question presented by Petitioner is analyzed within this legal framework, Petitioner cannot establish either an error of law or an absence of probative facts supporting the PCR judge's ruling.

ARGUMENT I

The PCR court properly declined to grant relief on the claims concerning Petitioner's waiver of any conflict of interest because this Court considered and decided the waiver issue on direct appeal.

The PCR considered the triad of conflict-of-interest claims before it and properly recognized, foremost, that any conflict of interest that existed in Diggs' Horry County representation of Petitioner after such time as Petitioner was convicted and sentenced to death in Georgetown County was resolved on direct appeal. The PCR court also therefore appropriately denied Petitioner's related ineffective assistance of trial and appellate counsel claims, as they were raised to and ruled upon by the appropriate court at the appropriate time. (App. 4979-4980, 5104-10). The record supports these findings.

"[T]he Sixth Amendment right to conflict-free representation, like the right to counsel itself, may be the subject of a waiver." *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992). "To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." *Thomas v. State*, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (citing *United States v. Swartz, supra*; *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990)).

This Court ruled, on direct appeal, that Petitioner knowingly, intelligently, and voluntarily waived any conflict of interest flowing from Diggs' continuing to represent him even after Petitioner had filed a placeholder PCR application in his Georgetown County case. *State v. Stanko (Stanko II)*, 402 S.C. 252, 265-70, 741 S.E.2d 708, 715-17 (2013). Petitioner's appellate counsel raised, and this Court considered, the validity of the waiver on the merits. This Court demonstrated within its findings a complete review of the record of the November 15, 2006, December 8, 2008, March 4, 2009, and June 5, 2009 hearings addressing Petitioner's desire to continue with Diggs' representation. *Id.*; (*see* App. 3040-43, 3066-71, 3074-84, 3090-3104; *see*

also App. 3017-19). This Court found Petitioner "did not object to the appointment of Diggs as counsel, but instead emphatically requested that Diggs continue to represent him. . . . Appellant never raised a single objection." *Id.* a 269-70, 741 S.E.2d at 717.

As to the merits of the waiver, this Court found: "To the extent that this situation gave rise to a conflict of interest, implicating any constitutional right, Appellant was fully informed of that conflict. Appellant's extensive endorsement of Diggs's continued representation constituted a valid waiver." *Id.* at 270, 741 S.E.2d at 717. When an issue raised in a PCR application has been fully decided on direct appeal, a collateral challenge to that finding is not proper before the PCR court. *Drayton v. Evatt,* 312 S.C. 4, 430 S.E.2d 517 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.") (citing *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975)).

And, given this Court's finding of a knowing, intelligent, and voluntary waiver to any conflict of interest, it was appropriate for the PCR Court to deny the related ineffective assistance of counsel allegations. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052, 2064-65 (1984). Here, the trial court visited and re-visited the conflict of interest waiver with Petitioner and with trial counsel such that the adversarial process cannot be found to have been undermined. (App. 3040-43, 3066-71, 3074-84, 3090-3104; *see also* App. 3017-19).

Additionally, in order to demonstrate a basis for relief on an ineffective assistance of appellate counsel claim, a petitioner "must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel unreasonably

failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Strickland v. Washington*, 466 U.S. at 687-91). If he can succeed, "he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief [on the cited issue], he would have prevailed on his appeal." *Id.*; *Gilchrist v. State*, 612 S.E.2d 702, 705 (S.C. 2005). Generally, only by showing that stronger, meritorious arguments were not presented will an applicant carry his burden. *Smith v. Robbins*, *supra* at 288. Petitioner failed to demonstrate error: this issue was raised by Petitioner's appellate counsel, but simply was not decided in Petitioner's favor. *Stanko II*, *supra*.

Importantly, the record reflects that Petitioner's waiver included a consideration of the conflict as defined in the petition for a writ of certiorari. Petitioner presents the speculative argument that Diggs' continued representation was plagued with a "tempt[ation] 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." (Cert. Pet. at 24-25). However, Diggs was not aware of the specific PCR claims and thus could not be influenced by the specificity of any alleged error. Diggs was free to calibrate his defense for the Horry County trial as he and his client saw fit. (App. 3077, 4252-54). Also, the record of the waiver hearings demonstrates that Petitioner addressed the concept being presented in the certiorari petition.

First, at the November 2006 hearing regarding the appointment of counsel in the Horry County prosecution, Judge Baxley discussed *ex parte* with Petitioner the nature of any potential conflict. Petitioner responded that he was "satisfied with what Mr. Diggs did" in the "way [they] designed the defense," but was dissatisfied with second-chair counsel's preparation for and

presentation of his case in mitigation. (App. 3041-43).

Second, at a December 2008 hearing also before Judge Baxley but in regards to the appointment of counsel in the Georgetown County PCR matter, Petitioner initiated this explanation of his "conundrum":

> I have one other query for you [Judge Baxley] that needs to be presented right now at this time. As you are aware, in the second trial Williams Diggs is going to be my attorney; or at least, I – I hope he is. The conundrum that I have is that: In the same sense, this post-conviction relief may have allegations of ineffective assistance of counsel against him.
>
> My argument is: 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. So my conundrum is I don't want to lose him; because I believe in him. He knows my case. He's the one who had the test ordered and found out everything that was wrong with my medical frontal lobe. I don't want to lose him. . . .

(App. 3066). The PCR court in this instance allowed Petitioner the opportunity to discuss this with the PCR attorneys that would be appointed to him. (App. 3067).

Third, Judge John directed a hearing on the conflict issue in March 2009 in the Horry County prosecution. (App. 3076-84). Petitioner at that hearing explained that his appellate counsel in the Georgetown County prosecution advised him to file the PCR application "in order to stop the death watch[.]" (App. 3078). Petitioner again expressed an understanding that the filing of the PCR application indicated he would likely be filing ineffective assistance claims against his current trial counsel, but that doing so did not equate with a belief that Diggs would not reconsider his presentation of the first trial in his calibration of the defense in the second. To the contrary, Petitioner articulated:

> (A) If he did commit errors that, let's say, he even determined as being errors, by looking at that case, I believe that Mr. Diggs would say, "Maybe I should have done this differently, and in this particular case, which is going to use a very similar defense, wouldn't he have learned from that?

(B) Even if I did file [the ineffective assistance claims against Diggs], is it not a situation where it would have no effect on this case as long as I do trust and believe in him and his efforts toward this case?

(App. 3080). In turn, Judge John questioned Diggs concerning whether he believed any conflict to exist, and Diggs responded he did not "have a problem with [Petitioner] making [PCR allegations against him]." (App. 3083). Diggs informed the court that if it identified a conflict in the theories being presented, if they undermined the overall status of Petitioner's case, that the trial court should revisit the conflict issue. (App. 3083).

Fourth, Judge John in June 2009 again addressed the conflict of interest upon motion by the State. (App. 3092). Critically, Diggs at that time represented to the trial court that he did not

> take any exception to any [PCR allegation], any defense attorney who's in business for any length of time will go through the post-conviction relief process as a witness from time to time. That doesn't cause me a problem . . . If I remain as counsel I will do the best that I can do in the case that has no effect on my ability or willingness to represent this case.

(App. 3096). The trial court responded that it was aware it needed to cover with Diggs his ability to effectively represent Petitioner in light of the PCR application being filed, asking Diggs whether the PCR proceedings' initiation had "interfered with [his] representation" of Petitioner "in any way," to which Diggs replied "it has not." (App. 3096-97).

Judge John also questioned Petitioner about whether he felt he had "free and open communication" with Diggs "despite the fact that the PCR application ha[d] been filed," and whether he was "able to fully discuss all issues that [he] deem[ed] necessary with him." Petitioner persisted he was not having, nor did he expect to have, any problems with Diggs' "presenting the second trial." (App. 3100-01). At this time, Petitioner again expressed an understanding that Diggs would not refuse to consider alternative methods of presenting the trial:

"I'm not declaring that there weren't mistakes made in that case but that does not mean that I don't trust Mr. Diggs 100 percent in this upcoming case." (App. 3102).

More, Petitioner's theory ignores trial counsel's presentation at PCR. Diggs testified at PCR that, while he considered his continued representation to fall within the category of a conflict of interest once the PCR application was filed in the Georgetown case, "Stephen liked the defense that we presented. He wanted to pursue that in Conway as well, and we were willing to do that." (App. 4253, 4271). In advising Petitioner about the conflict, Diggs testified he "assumed the worst case scenario" about the claims that would be raised. His professional background made him cognizant the application would include "various allegations" of ineffective assistance of counsel against him and he took that into account when addressing the conflict with his client. (4251-56). Diggs later expounded the PCR application was "not something that [he] focused on. . . . [He] had a job to do in this case" and he understood the PCR "was something [Petitioner] had to do." (App. 4270). Diggs informed Petitioner he was aware that ineffective assistance claims were going to have to be levied against him; he "also let him know it wasn't going to affect any representation that [he] provided for him at the second case." (App. 4272). Notably, second-chair trial counsel Brana Williams testified that she, Diggs, Petitioner, and the court discussed the conflict of interest "ad nauseam, quite frankly." (App. 4443-45; *see also* App. 4452-54). "Mr. Stanko waived it. He absolutely wanted Bill. He didn't want anybody else but Bill handling Stanko II." (App. 4444). Further, Diggs explained:

> I always understood Stephen to be happy with the defense because it explained to him why he did these things. You know, for the first time I think he understood what was happening and what was occurring that would allow him to do these things. It wasn't his nature, you know, ordinarily to be an aggressive, angry, malicious, hurtful, spiteful person, that something was going on up there that most people didn't experience, and he liked – I think he was somewhat at, at comfort with that because he understood now how this could happen, maybe it explained

how it could happen.

(App. 4272).

According to second-chair counsel, Diggs' "defense was a solid defense, and he believed in it. Stanko believed in it, and it had a really good shot of wining at this level and at least it needed to be put forth." (App. 4453). "[T]here was nothing else we had, and if you have a doctor who will say that your client is insane, I think it would have been absolutely inexcusable to go to trial and not put that evidence up." (App. 4450). Just as a defendant has a Sixth Amendment right to waive a conflict of interest, a defendant has a Sixth Amendment right to assert an objective for his defense without an express override by his counsel. *McCoy v. Louisiana*, -- U.S. --, 138 S.Ct. 1500, 1509 (2018) (citing ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation")).

The record supports the PCR court's finding regarding the conflict-of-interest claims. The record backs neither the contention that Petitioner was not fully advised of the conflict, nor that his waiver of that conflict was not knowingly, intelligently, and voluntarily made. Petitioner continually and "emphatically requested that Diggs continue to represent him." *Stanko II* at 269, 741 S.E.2d at 717. There also is no support either law or fact for the assertion that Diggs' presentation of the defense in *Stanko II* was done out of fear that his reputation may be damaged by changing course from the Georgetown County trial. It follows that no ineffective assistance of counsel flows from the conflict where the appellate court, after a thorough review of the conflict's nature and extent to which it was addressed by trial counsel and the court, conducted a merits review of the issue and deemed Petitioner to have exercised a knowing, intelligent and voluntary waiver.

STANDARD OF REVIEW II

Requests for funding for expert and investigative services in a capital PCR fall within the discretion of the trial judge and may be granted upon a finding "that investigative, expert, or other expenses are reasonably necessary for the representation of the defendant." S.C. Code Ann. § 16-3-26(C)(l); S.C. Code Ann. § 17-27-160(13) ("Counsel appointed in [capital PCRs] shall be compensated from the funding provided in Section 16-2-26"); S.C. Code Ann. § 17-3-340(I)(6)-(7) (SCCID to approve and implement procedures for "compensating experts, investigators, and other persons who provide services necessary for the effective representation of indigent persons"). With the decision on funding resting in the discretion of the trial judge, this Court "will not disturb such decisions absent a showing of an abuse of that discretion." *State v. Yates*, 280 S.C. 29, 35, 310 S.E.2d 805, 809 (1982), *overruled on other ground by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

ARGUMENT II

The PCR court applied the proper standard in issuing a partial denial of Petitioner's funding requests, as Petitioner benefitted from the services and testimony of the a number of sophisticated experts at trial, and as the experts for which the PCR court denied funding were not reasonably necessary in light of the record and claims before it.

Since the proceedings in regards to any issue on funding were conducted *ex parte*, Respondent had no occasion to take a position on any funding request at any previous point in this litigation. Each request was made and decided without service upon the State. However, the supplemented record of these proceedings supports the PCR court's partial denial of funding for expert and investigative services in this case such that certiorari is not warranted. Petitioner asks this Court to find that the PCR erroneously applied the "reasonably necessary" standard in light of the testimony presented at Petitioner's trial. The PCR court did not misapply the funding

standard in denying relief, and gave Petitioner leave to re-raise these requests. The PCR court appropriately sought a more exacting presentation by Petitioner, which Petitioner failed to do.

Funding is not a shoe-in, even in capital actions. South Carolina Code Section 16-3-26(C) "does not require the trial judge to honor every [funding] request made by defense counsel. But only those requests that are reasonably necessary for the representation of the defendant. The court is empowered to decide which requests are appropriate." *State v. Yates*, 280 S.C. at 35, 310 S.E.2d at 809 (internal quotation omitted). When a PCR applicant has previously benefitted from the same type of expert services sought, additional requests for duplicative expert witness fees may be appropriately curtailed, even when made in the interest of ongoing collateral litigation.[1] *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). In *Thames*, a PCR applicant had been examined by two psychiatrists prior to her guilty plea. *Id.* The South Carolina Supreme Court found that the PCR court did not abuse its discretion when it denied funds for a third psychiatric opinion, stating "the mere possibility that petitioner could find an expert somewhere to support her claim . . . is insufficient to warrant the authorization of funds to pay an expert." *Id.* A petitioner's request for expert funding may only further, "[a]t best, a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

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[1] Even capital defendants at trial are not entitled to unlimited funding. *See, for example, Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator."); *see also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003)); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

A capital defendant also does not enjoy a right to effective assistance of expert witnesses, which is distinguishable from the right to the effective assistance of counsel. *See Poyner v. Murray*, 964 F.2d 1404, 1418-19 (4th Cir. 1992) ("The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate psychological disorders simply does not constitute ineffective assistance."). "When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry [at PCR] 'is not whether counsel should have presented a mitigation case' but 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable.'" *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)); *see Buckner v. Polk*, 453 F.3d 195, 206-07 (4th Cir. 2006) (largely cumulative detail insufficient to show ineffective assistance); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005) (no prejudice where counsel did not present more evidence concerning petitioner's childhood abuse), *cert. denied,* 546 U.S. 1108 (2006). Capital trial counsel is not obligated to locate an expert willing to offer a more favorable opinion. Counsel need not second-guess the evaluation of a qualified expert, and any alleged "failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance." *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (finding that attorneys are not required to second-guess the contents of expert reports).

Petitioner's case has a history that may not be ignored. Asking the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *See Thames v. State*, *supra*. As stated in the Order of Dismissal, the PCR court denied Petitioner's request to fund certain experts because their purported purpose did not reach to determine whether Petitioner's trial attorneys were ineffective. (*See* App. 4984, n.7). Orders

dated April 29, 2014, June 3, 2014, September 25, 2014, and a February 27, 2015, Form 4 Order set out the bases for the court's prior funding decisions. (App. 4795-4806, 4830-38, 4899-4902, 4978, n.2). The PCR court did not abuse its discretion. Rather, Petitioner failed to meet its burden of showing that the requested expert and investigative services were reasonably necessary for the furtherance of its ineffective assistance of counsel claims. The expert services sought could not support the claims pursued.[2]

Change of Venue Motion (Request for an Expert in Media Saturation)

The PCR court found that Petitioner's trial counsel "sought a change in venue . . . prior to trial" and the motion was denied and affirmed on appeal. "Therefore, nothing indicates that Stanko's criminal attorneys were deficient in their pre-trial representation or that they could have presented representation that would have achieved a result more beneficial to Stanko." (App. 4981). The record supports this finding as it shows that trial counsel moved to change venue after voir dire and prior to the jury strike. (App. 1383-47). The trial record is also clear that due to timing considerations, the parties agreed to strike a jury prior to taking testimony on the change of venue motion, but that the jury would not be sworn in until the conclusion of the motion in the event that it were granted. (App. 1348-50). The PCR court's finding on this issue comports with well-settled South Carolina law: "If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until the jury panel is voir dired." *State v. Manning*, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997) (citing *State v. Easler,* 322 S.C. 333, 471 S.E.2d 745 (Ct.App.1996), *aff'd as modified,* 327 S.C. 121, 489 S.E.2d 617 (1997)). Therefore, the record demonstrates that defense counsel made the motion at the

[2] Claims 10&11(b)(1)&(2), 10&11(d), and 10&11(e)(1)-(4). (Cert. Pet. at 45). Respondent will address these allegations in numerical order.

appropriate time and a finding of error and prejudice was not warranted.

However, Petitioner also sought relief upon an allegation that trial counsel tendered substandard representation during the change of venue motion by failing to retain a media expert or to conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevalence of media coverage related to the crimes. (*See* App. 5002-04). Counsel in this PCR action sought funding for a media saturation expert due to a "likelihood" that "Stanko could have shown that an impartial jury could not have been selected from residents of Horry County." (App. 4924; *see also* App. 4849, 5004, n.4). The PCR court denied the funding request on the basis that this type of expert was not reasonably necessary to further the allegation.[3] (App. 4183, 4901). This ruling was not an abuse of discretion. Given the record and the legal standard applicable to this claim, there was no basis upon which to grant funding for a media saturation expert.

A defendant pursuing a change of venue bears the burden of demonstrating actual juror prejudice resulting from pre-trial publicity. *Sheppard v. State*, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004) (citing *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). "[T]he relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.* In Petitioner's

[3] On the merits of the claim, the PCR court also denied Petitioner relief upon the basis that trial counsel presented a psychologist, Dr. Albiniak, at trial to testify in furtherance of the change of venue motion. (App. 4980). Dr. Albiniak testified that in a number of organized settings, including the courtroom, a societal pressure to appear open-minded and the presence of authority inside the courtroom may influence a person's answering questions in conformity with what they believe to be the desired answer. (App. 1408-21, 1432). He testified that a potential juror's questionnaire, filled out in the comfort of their own home, is "probably a better reflection of what their views are than the rehabilitation they might occur in the courtroom" during voir dire. (App. 1428).

case, this Court had already found, prior to the PCR action, that no jurors stated they could not ignore exposure to pretrial publicity. That court opined on the issue in full in its decision affirming Petitioner's conviction and sentence on direct appeal:

> [A] jury in neighboring Georgetown County convicted Appellant of murder, and recommended death, prior to the trial of the instant case . . . In denying Appellant's change of venue motion, the trial court concluded that the vast majority of the jurors knew nothing about the case:
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> > A few of them know [Appellant's] name. That's on the questionnaire they were given . . . . It's no kind of pretrial publicity of any kind. And the one person that said they had some kind of information, again, without equivocation of any kind, indicated that they could set it aside.
>
> . . .
>
> **In the instant case, Appellant fails to present even one juror who stated he or she could not ignore exposure to pretrial publicity prior to serving as a juror.** In the case of Juror # 480, she did not claim to know specific details of the instant case or Appellant's prior conviction, and stated that she could be fair and impartial. Appellant advances broad and unsupported arguments regarding the publicity of this case, **but fails to meet his burden of demonstrating actual juror prejudice as a result of that publicity. . . . The Record does not support a finding that the trial court ignored actual juror prejudice related to pretrial publicity, and thus, the trial court did not abuse its discretion in denying Appellant's motion to change venue.**

Stanko II, 402 S.C. at 276–79, 741 S.E.2d at 720–22 (emphasis added) (citing *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007); *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999); *State v. Caldwell*, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990)).

A media saturation expert was not reasonably necessary to further this ineffective assistance of counsel claim given the record and the well-established legal standard which controlled the underlying merits of this issue. The expert Petitioner sought to retain would not have furthered the allegation because that expert's purported testimony did not reach to the standard necessary to grant a change of venue motion. Again, "mere exposure to pretrial

publicity does not automatically disqualify a prospective juror." *State v. Manning*, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) (citing *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. 853, 118 S.Ct. 146 (1997); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). Thus, the relevant inquiry is only whether the jurors demonstrated that they could indeed refrain from partiality. Only one juror had any previous knowledge about Petitioner's prior crimes and stated she did not "remember that much about [the crimes], and just kind of wiped it out." (App. 664-86, 671). The remainder of the eleven jurors and the four alternates either knew nothing about the case or only had heard the name of the defendant. (App. 1477-80). In fact, each seated juror independently testified that he or she would set aside anything that they had heard or seen outside the courtroom and decide the case and issues therein based only on the evidence introduced at trial. (App. 101-17, 118-33, 185-97, 266-79, 299-86, 294-306, 149-32, 434-49, 454-66, 664-86, 724-37, 744-59, 770-82, 786-97, 866-80, 944-56). Even so, trial counsel moved to change venue and put forward expert testimony from Dr. Albiniak in furtherance of the motion. *Infra* n.3. The fact that trial counsel did not prevail in a change of venue does not render his performance *per se* deficient. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

The record demonstrates that the degree of media saturation was not an issue during jury selection. Trial counsel duly moved to change venue at the appropriate time and the trial court correctly denied the motion in accord with our State's legal standard on this issue. Petitioner did not succeed in garnering a new venue for his trial because no juror testified to knowing any particular detail about the case which would influence his or her ability to sit impartially. Therefore, funding for such a study was not reasonably necessary in furtherance of this ineffective assistance of counsel claim. S.C. Code Ann. § 16-3-26(C)(1).

Guilt-Phase Claim Concerning State's Expert Dr. Spicer (Funding Request Undefined)

The PCR court denied Petitioner funding to obtain an expert to dispute the trial testimony of State's expert Dr. Kenneth Spicer, stating in its Order of Dismissal that "such evidence would have only corroborated the testimony of Dr. Wu and would not have indicated any due process violations by the State." (App. 4982, n.6). Petitioner alleged at PCR that Dr. Kenneth Spicer offered false and misleading testimony, rendering the guilt phase of the trial fundamentally unfair and violating Petitioner's right to due process. (*See* App. 5004-05). The certiorari petition fails to identify or argue which request for funding pertained to the guilt-phase ineffective assistance allegation concerning Dr. Spicer's testimony, and thus fails to define how the partial denial of Petitioner's funding requests resulted in a substandard presentation of this claim at PCR. (*See* Cert. Pet. at 45). Respondent submits that the issue presented has been abandoned insofar as it relates to the PCR allegation about Dr. Spicer. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). "Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Petitioner at no time argued facts in support of funding that would assist in development of this allegation. (App. 4768-78, 4808-17, 4843-51, 4910-26).

Moreover, this allegation was not appropriate before the PCR court because the claim itself did not pertain to the ineffective assistance of counsel. "The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." *Drayton v. Evatt,* 312 S.C. 4, 430 S.E.2d 517 (1993) (citing *Simmons v. State,* 264 S.C.

417, 215 S.E.2d 883 (1975)); S.C. Code Ann. § 17-27-20(B) PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). And even if cognizable, the record lends no support to the allegation that the State's rebuttal witness testified in any untruthful manner. The State put forth Dr. Spicer, an employee of MUSC with residency training in diagnostic radiology and fellowship experience in nuclear medicine, in reply to Petitioner's presentation of a number of medical experts. (App. 2446-90). Using the same data as that relied upon by Petitioner's expert, Dr. Spicer's reply testimony did not include any new diagnosis or previously un-introduced information related to Petitioner's mental and/or physical condition. The State called Dr. Spicer in reply to critique the methodology utilized by defense witnesses Drs. Wu and Sachy in their PET scan analysis as well as to offer a competing opinion regarding Petitioner's PET scan.[4] (App. 2465-97). The State ably presented its own expert testimony in refutation of Petitioner's case-in-chief. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5, 10 (1944) ("He upon whom lies the burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of true reply and not such as should have been offered in the case in chief.").

Sentencing-Phase Claims Related to Petitioner's Mental Health and Life Histories
(Funding Request for a Forensic Psychologist and Licensed Social Worker)

[4] Although not framed as an ineffective assistance of counsel allegation, trial counsel clearly delineated during cross-examination that Dr. Spicer appeared unfamiliar with the continuous performance test and PET methodology utilized by Petitioner's own experts. (App. 2482-2509). In fact, trial counsel testified at PCR that he anticipated Dr. Spicer's testimony and spearheaded his contrasting theory during his direct examination of Dr. Wu during the guilt phase. (App. 4280-83; *see* App. 2213-22). And since Dr. Spicer offered no diagnosis, a surrebuttal was not warranted. *Contra United States v. Barnett*, 211 F.3d 803, 822 (4th Cir. 2000) (surrebuttal denied in error where State's rebuttal expert diagnosed capital defendant, for the first time during trial, as a psychopath, and the surrebuttal evidence would not have been cumulative or repetitive).

Petitioner requested funding for a forensic psychologist, claiming "a competent and reliable mental health evaluation has never been completed" and trial counsel orchestrated an "inadequate mental health evaluation." (Cert. Pet. 40-42). Petitioner also requested funding for a licensed social worker "to expend up to 200 hours to conduct a social history evaluation and prepare to present Petitioner's social history to the PCR court." (Cert. Pet. 37-40).

The PCR court declined to find funding for a forensic psychologist reasonably necessary because Petitioner failed to provide facts in support of an indication that Petitioner suffered from any mental illness other than what seven experts testified to at his criminal trial, wherein Petitioner pursued an insanity defense. (App. 4804-05,'4836-37). As stated by the PCR court: "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 this first place." (App. 4837, *see also* 4984 n.7). The PCR court granted leave to present additional facts in support in a new request for funding, (App. 4805 n.4), which Petitioner failed to do. Similarly, the PCR court declined to find funding for a licensed social worker reasonably necessary because Petitioner's argument "that criminal trial counsel 'missed something'" was unsupported in the context of the funding motion. (App. 4901; *see also* 4984 n.7). In so finding, the PCR court did not abuse its discretion.

First, the PCR court did grant funding for a mitigation investigator, (App. 4802-03), and a fact investigator (App. 4831-4836). However, Petitioner furthered no funding request for either a forensic psychologist or a licensed social worker with facts obtained as a result of these funded investigations. Petitioner thus failed to demonstrate how funding for the presentation of a social history differing from the one presented at trial was reasonably necessary. Likewise, Petitioner failed to put forth any facts uncovered during their investigation that indicated Petitioner may be

a candidate for a mental health diagnosis that differed from those presented at trial.

Second, Petitioner indeed received the benefit of examination upon examination of a number of qualified psychiatric experts at trial. Petitioner presented at trial a well-credentialed physiological psychologist (Dr. Albiniak), a well-credentialed psychiatrist and neuropsychiatrist (Dr. Sachy), a well-credentialed neuropsychologist (Dr. Gur), a well-credentialed expert in PET scan imaging and neuropsychiatric disorder (Dr. Wu), and still another well-credentialed psychiatrist (Dr. Thrasher) and well-credential psychologist (Dr. Einhorn). Each testified in support of the defense pursued at trial. (*See* App. 1993, 2046, 2118, 2178, 2207, 2277). A qualified social historian also presented Petitioner's social history. (App. 2913-32). It would be difficult to fault trial counsel for relying on such experts, as counsel is under no obligation to second-guess the contents of expert reports. *See Byram v. Ozmint*, *supra*; *Wilson v. Greene, supra*; *see also Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir. 2009) (counsel has no duty to present all psychiatric evidence and decision not to present additional psychiatric evidence may be reasonable). Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998).

Given this record, counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to question the trustworthiness of his experts' conclusions. Neither reasonable counsel nor PCR counsel need 'shop' for contrary expert opinions. *Thames v. State*, *supra*; *Jones v. State*, *supra*; *see also Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008). Petitioner put forward no specific, articulable facts in support of its funding requests to support a finding

that the expert services of either a forensic psychologist or licensed social worker were reasonably necessary. None of the facts cited in Petitioner's requests differed from those presented in mitigation at trial. At best, Petitioner sought "a fancier mitigation case" at PCR than was presented at trial, which does not compel funding for expert and investigative services. *Jones v. State*, 332 S.C. at 339, 504 S.E.2d at 827. Thus, the PCR court did not abuse its discretion in denying these funding requests, and certiorari to review this action is not warranted.

CONCLUSION

Respondent requests this Court deny the petition for a writ of certiorari for the reasons discussed herein.

Respectfully submitted,

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January 16, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
(Capital PCR Action)
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO, #6022,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Lindsey S. Vann. Esq. and Emily C. Paavola, Justice 360, 900 Elmwood Ave, Suite 200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served this 16th day of January, 2019.

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