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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.

PETITIONER'S REPLY

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Petitioner, Stephen C. Stanko, submits the following in reply to Respondent's Return to Petition for a Writ of Certiorari. Many of Respondent's contentions were anticipated and address in the Petition itself and Petitioner will avoid rehashing them here. This Reply will, instead, focus on Respondent's misinterpretation of the record and law relevant to Petitioner's claims.

I. Respondent's Return Misrepresents the Standard for Identifying a Knowing, Voluntary, and Intelligent Waiver of a Conflict of Interest and the Legal Standard for Demonstrating Ineffective Assistance of Counsel When Counsel Operated Under an Actual Conflict of Interest.

Apparently conceding an actual conflict of interest existed in attorney William Diggs' continued representation after Petitioner alleged Diggs' ineffective assistance of counsel in Petitioner's first capital trial, Respondent's Return incorrectly argues that Petitioner knowingly, voluntarily, and intelligently waived any such conflict of interest. *See* Return to Petition for a Writ of Certiorari, at 8-13 [hereinafter Return]. Respondent fundamentally misapprehends the standard for a valid waiver of a conflict of interest by focusing only on the fact that Petitioner indicated he wanted Diggs to continue as his attorney and failing to acknowledge that Petitioner made such assertions without being informed of the nature of the conflict under which Diggs operated and the potential consequences of the conflict.

Respondent relies heavily on the fact that this Court previously ruled Petitioner waived any conflict of interest existing at trial. Return, at 7. This argument ignores that this Court found the conflict issue was not preserved for review on direct appeal and was not asked to review the actual nature of the conflict of interest. This Court found the issue was not preserved for direct review because Petitioner "did not object to the appointment of Diggs as counsel." *State v. Stanko (Stanko II)*, 402 S.C. 252, 269-70, 741 S.E.2d 708, 717 (2013); *see also See Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) ("[D]efense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."). This Court, nevertheless, reviewed the issue

to consider whether any conflict that existed was waived. This review was based on the inadequate briefing submitted by Petitioner's appellate counsel that did not address that nature of the conflict of interest – that Diggs would be tempted to present the same case in Petitioner's second trial to avoid providing support for Petitioner's ineffective assistance of counsel claims. Instead, 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. Thus, this Court has never before been asked to rule on the actual nature of the conflict and whether it was validly waived.[1]

To demonstrate a knowing, voluntary, and intelligent waiver of the right to conflict-free counsel, 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 v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979); *see also Thomas v. State*, 346 S.C. 140, 144-45, 551 S.E.2d 254, 256 (2001) (recognizing waiver requires the defendant "knows the precise form of conflict of interest that eventually results"). In order for a defendant to make such a waiver, he must be informed of and understand the true nature of the consequences of the conflict of interest. "[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.2d 1042, 1049-50 (4th Cir. 1992); *Thomas*, 346 S.C. at 145, 551 S.E.2d at 256.

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[1] Appellate counsel eventually described the actual nature of the conflict in a petition for rehearing, *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.

Respondent relies on several statements made by Petitioner indicating he wanted Diggs to continue as his attorney to argue Petitioner understood the nature of the conflict and waived it. *See* Return, at 9-12. On the contrary, Petitioner's statements clearly show Petitioner did not understand the nature of the conflict or its potential consequences. For example, 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," App. 3066, and "[i]f he did commit errors . . . 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?'" App. 3080. Petitioner's statements reveal that he believed Diggs would reconsider his defense presentation from the first trial. This belief is the exact opposite of the actual nature of the conflict and its likely consequences. Instead, Diggs would be tempted to present the same defense and avoid correcting prior mistakes 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.[2] *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").

Petitioner had no understanding of the potential consequences from the conflict because, as the record clearly demonstrates, no one ever explained them to him. In a pre-trial hearing, the trial court told Petitioner the court was not asking him to waive any ineffective assistance of counsel claims against Diggs. App. 3081. In discussing the issue, Diggs varied between stating he had no position on the conflict, App. 3096, to denying there was a potential conflict altogether.

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[2] Despite Diggs' assertion that he would not allow the ineffective assistance of counsel claims affect his representation, App. 3096-97, Diggs would have been tempted to avoid damage to his reputation by presenting the same defense. *See Zuck*, 588 F.2d at 440 ("Despite the noblest of intentions, the defense attorneys here may have been tempted to be less zealous than they should have been in the presentation of Zuck's case.")

App. 3083. In Petitioner's PCR hearing, Diggs explicitly acknowledged that he never read the PCR application or the amended PCR application prior to the trial in Horry County, App. 4252, 4255, and therefore could not have adequately discussed the potential consequences of the conflict with Petitioner.[3] Additionally, Diggs acknowledged that he did not discuss "any details" of the PCR application or resulting conflict with Petitioner. App. 4253. As the Fourth Circuit recognized in *Hoffman*, "[a] defendant cannot knowingly waive what he does not know." *Id.* at 289. Respondent improperly asserts that Petitioner was somehow aware of the nature of the conflict without ever being informed of it by counsel or the court. Indeed, it is clear Diggs neither acknowledged nor informed Petitioner about the nature of the conflict or its risks.[4] This Court "cannot insist on greater appreciation of the risk of conflict on the part of a layman" than counsel. *Id.*; *see also 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").

Respondent further asserts there is no support for Petitioner's assertion that the conflict adversely affected counsel's performance,[5] stating "[t]here is no support [in] either law or fact for

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[3] Respondent asserts that second chair counsel, Brana Williams, testified at the PCR hearing that the conflict issue was discussed ad nauseam. Return, at 12. Williams, however, acknowledged that she never reviewed the PCR application or its amendments, App. 4432, and was therefore unable to adequately inform Petitioner of the nature of the conflicts or risks associated with Diggs' continued representation.

[4] Diggs' advice about the conflict likely would have been insufficient even if he did acknowledge the conflict and corresponding risks. 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).

[5] 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 v. Sullivan*, 446 U.S. 335, 348 (1980).

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." Return, at 13. This Court, however, has recognized that counsel's failure to pursue a course of action can demonstrate the effect of a conflict of interest. *See Jordan v. State*, 406 S.C. 443, 450, 752 S.E.2d 538, 541 (2013). In *Jordan*, the attorney representing co-defendants failed to pursue a third-party guilt defense that would have implicated the other co-defendant. *Id.* Failure to pursue the defense was the "best illustrat[ion]" of the effect of the conflict. *Id.* Here, the record is clear that Diggs never considered changing the defense presented on Petitioner's behalf, even after the first trial resulted in a death sentence.[6] App. 4247 (Q: "[D]id you consider changing the strategy at all for the second trial? A. No."). Diggs knew the original defense theory failed to persuade jurors in the related Georgetown County case and professional standards 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. Despite that, Diggs did not consider changing his strategy effecting the exact risk that was associated with the conflict of interest. This record clearly demonstrates that Diggs operated under a conflict of interest that affected his representation and, because Petitioner was never made aware of the risks associated with the conflict, the conflict was never waived. This Court should grant certiorari to fully address the issue.

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[6] If additional evidence of what trail counsel should have done differently is required, PCR counsel were severely limited in their ability to present such evidence. PCR counsel diligently attempted to investigate and present additional evidence supporting what Diggs should have presented in the alternative to the theory he presented at both trials. However, as discussed in Section II below, PCR counsel were severely limited in their ability to do so because they were denied funding for any expert assistance to develop and present such evidence.

II. The PCR Court Improperly Denied Expert Funding by Fundamentally Misinterpreting the PCR Funding Statute and Imposing an Impossible to Meet Burden on Petitioner to Demonstrate the Reasonable Necessity of Funding.

Respondent ignores the PCR court's erroneous reading of the PCR statute. Though funding denials generally are reviewed under an abuse of discretion standard, *see State v. Yates*, 280 S.C. 29, 35, 310 S.E.2d 805, 809 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), in PCR appeals, this Court reviews "questions of law *de novo*" and "will reverse the decision of the PCR court when it is controlled by an error of law." *Jordan*, 406 S.C. at 448, 752 S.E.2d at 540 (internal quotes marks omitted).

In order to obtain funding in a capital PCR action, the statute requires the applicant to show only that investigative and expert services "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1) (incorporated by S.C. Code § 17-27-160(B)). The PCR court erroneously interpreted the statute, 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.*

App. 4837 (emphasis added). As set forth in the Petition for Writ of Certiorari, this interpretation is contrary to the interpretation of all other circuit courts in South Carolina and is unworkable due to the requirement that experts conduct their evaluation prior to authorization of – and thus without assurance of – payment. *See* Petition for Writ of Certiorari, at 34-37. In light of this clear error of law, this Court should reverse the PCR court's denials of funding and require adherence to the statutory language in addressing funding requests.

Rather than defend the PCR court's restrictive view of when funding is available to a death-sentenced inmate seeking post-conviction relief, Respondent asserts Petitioner failed to present sufficient facts supporting his funding requests. Return, at 17-25. This is easily rebutted by the

record, which reveals that Petitioner filed multiple detailed pleadings laying out specific factual reasons each funding request was reasonably necessary. Petition for Writ of Certiorari, at 37-45.

Respondent also asserts that the experts requested by Petitioner were not reasonably necessary because multiple experts testified at trial.[7] This argument fails as a matter of law and fact. As this Court recognized in *Weik v. State*, 409 S.C. 214, 761 S.E.2d 757 (2014), calling experts at trial does not inundate a capital case from a later finding of ineffective assistance of counsel and the need for additional investigation and expert evaluation in PCR proceedings. Recognizing that Weik's trial "counsel introduced *psychological* testimony regarding Petitioner's mental illness [but] failed to present even a skeletal version of Petitioner's *social history*," *id.* at 235, 761 S.E.2d 768, this Court found Weik's trial counsel were ineffective for their omissions at trial. Here, Diggs selected his defense theory early on in the investigation of this case and did not consider alternatives or ask his experts to evaluate Petitioner for anything outside of the pre-selected unreasonable psychopathy theory. Accordingly, PCR counsel were required to conduct that investigation and evaluation in order to evaluate and present evidence of trial counsel's

[7] Respondents cite the non-capital case of *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996), in support of the contention that expert funding may be denied when experts were retained at trial. Unlike in *Thames*, where the petitioner merely asserted the psychiatrists who examined her prior to a plea had not spent sufficient time with her in order to evaluate her mental state, Petitioner presented facts demonstrating that trial counsel unreasonably curtailed the experts evaluation, looking only for evaluations that would confirm the theory of psychopathy. Additionally, Petitioner presented facts identified in PCR counsel's investigation that demonstrated the need for new evaluations. *See* App. 4914-17 (requesting the services of a licensed social worker because the PCR investigation uncovered mitigating evidence of Petitioner's social and family history not presented at trial, including family and other witness interviews presenting a different portrait of Petitioner than that presented at trial and an affidavit from the mitigation investigator recommending a testifying social worker evaluate the mitigation information and describe how various events shaped his life); App. 4919-21 (requesting the services of a forensic psychologist because trial counsel settled on the psychopathy theory before conducting an adequate investigation and mental health evaluation and PCR investigation that revealed Petitioner's violent behaviors were our of character).

ineffectiveness.[8] ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4) cmt. ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."). Expert assistance was necessary for this evaluation and was improperly denied. *See Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992). Accordingly, the PCR court's legal error resulted in improper funding denials and deprived Petitioner of the ability to make his case that he was denied the effective assistance of counsel at the sentencing phase of his capital trial. This Court should grant certiorari to address the issue.

[8] Respondent asserts that Petitioner asked for funds that did not go to ineffective assistance of counsel claims, but rather to prove ineffective assistance of experts. Return, at 16. This is simply an incorrect reading of Petitioner's PCR Application and motions for funding which all relate to ineffective assistance of counsel claims stemming from trial counsel's ineffectiveness in identifying and adhering to an unreasonable defense theory. Given trial counsel's deficiencies, expert assistance is needed in order to present an alternative mitigation theory and prove prejudice resulting from trial counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to prove ineffective assistance of counsel).

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, 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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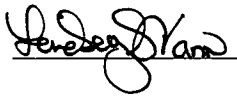

February 19, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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STEPHEN C. STANKO #6022,

PETITIONER,

V.

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RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Reply was served by first class mail, postage prepaid, this 19th day of February 2019, upon the following:

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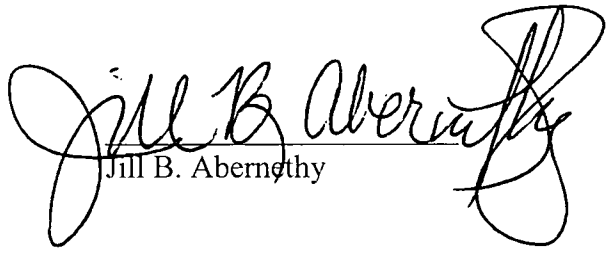

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