

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2017-002281  
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RECEIVED  
OCT 02 2013  
S.C. SUPREME COURT

STEPHEN C. STANKO #6022,

V.

STATE OF SOUTH CAROLINA,

PETITIONER,

RESPONDENT.

\_\_\_\_\_  
PETITION FOR REHEARING  
\_\_\_\_\_

Pursuant to Rule 221(a), SCACR, Petitioner Stephen C. Stanko respectfully moves this Court to reconsider its denial of Petitioner's Petition for a Writ of Certiorari in an Order dated September 19, 2019. Petitioner seeks rehearing because this Court may have overlooked: (1) the applicability of its recent decision in *Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019), to Petitioner's conflict of interest claim; and, (2) that the PCR court's erroneous denial of expert funding will leave the majority of Petitioner's claims to be developed and decided in the first instance in federal court, not the state courts. Petitioner, therefore, requests this Court reconsider its decision and grant certiorari for further review.

I. **THIS COURT’S RECENT DECISION IN *OSBEY V. STATE*, SUPPORTS A FINDING THAT PETITIONER DID NOT VOLUNTARILY WAIVE THE RIGHT TO CONFLICT-FREE COUNSEL BECAUSE HE WAS NEVER WARNED OF THE HARMS THAT COULD RESULT FROM THE CONFLICT.**

After the certiorari stage briefing was completed, this Court decided *Osbey v. State*, which held that the waiver of the right to counsel is not knowing and intelligent unless the defendant has been fully warned of the dangers of self-representation. 425 S.C. 615, 825 S.E.2d 48. The Court emphasized the “requirement of warning the defendant of the dangers of self-representation” in order for a waiver of counsel to be “knowing and intelligent” applies when a defendant waives the right to counsel by “affirmative verbal request” or “by conduct.” *Id.* at 620, 825 S.E.2d at 50-51. To the extent that *State v. Roberson*, 382 S.C. 185, 675 S.E.2d 732 (2009), conflicted “with the requirement that the defendant’s knowledge and understanding of the dangers of self-representation is a necessary predicate to any waiver of counsel,” the Court overruled *Roberson*. *Osbey*, 425 S.C. at 621, 825 S.E.2d at 51. The Court then reviewed the record and found that other than Osbey’s prior criminal charges, there was “nothing else in the record to indicate Osbey was aware of the dangers of representing himself” and found the record evidence was “an insufficient basis on which to find Osbey actually understood the dangers of self-representation.” *Id.*

While involving a different waiver (of the right to conflict-free counsel), Petitioner’s case is still analogous to *Osbey*. The record of this case reveals that no one ever explained to Petitioner the dangers of proceeding in his second capital trial with lead counsel who had a conflict of interest due to the then-pending PCR proceeding alleging ineffective assistance of counsel for presenting Petitioner as a psychopath in his first capital trial. *See* Petitioner for a Writ of Certiorari, at 24-27; *see also Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990) (“[A] defendant cannot knowingly and intelligently waive what he does not know.”). Without an explicit, on the record warning, there is “an insufficient basis on which to find [Petitioner] actually understood the dangers” of his counsel

operating under a conflict – i.e. that counsel would be tempted to present the same defense in Petitioner’s second trial and to avoid correcting prior mistakes in order to avoid damaging his professional reputation because making changes could provide evidence that his performance was deficient at the first trial. *Osbey*, 425 S.C. at 621, 825 S.E.2d at 51; *see also Halloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) (emphasizing the evil of conflicted counsel being in “what the advocate finds himself compelled to *refrain* from doing”). In light of this Court’s decision in *Osbey* more clearly defining the requirement that criminal defendants be explicitly warned of the dangers of proceeding without counsel and the factual inquiry into such a waiver, Petitioner requests the Court grant rehearing, grant certiorari and order further briefing and argument on this issue.

**II. THE PCR COURT’S IMPROPER DENIAL OF EXPERT FUNDING WILL LIMIT DEFERENCE AFFORDED BY THE FEDERAL COURT’S TO THE STATE COURT DECISION ON PETITIONER’S CLAIMS.**

The PCR court’s denial of expert funding based on a misinterpretation of the capital PCR funding statute denied Petitioner the ability to develop and present evidence in support of his federal constitutional claims. Contrary to the capital PCR funding statute that authorizes “reasonably necessary” expert funding, S.C. Code § 17-27-160(B) (incorporating S.C. Code § 16-3-26(C)(1)), the PCR court denied Petitioner’s expert funding requests, stating funding could only be authorized “after the services [of the expert] are performed and a beneficial result obtained.” App. 4837.

No other PCR judge has interpreted the statute in the unworkable way Judge Culbertson did in this case (i.e. requiring a PCR applicant to obtain expert services – without guarantee of payment – and that those services directly lead to a favorable decision in the applicant’s PCR proceeding before authorizing funding). In fact, Judge Culbertson previously interpreted the statute in accordance with the statutory language and contrary to the interpretation used in this case. *See Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016). In *Winkler*, Judge Culbertson authorized funding for consultation with a neuropsychologist to allow Winkler to investigate a claim that trial counsel were ineffective in

failing to obtain the services of a neuropsychologist. *Id.* at 660, 795 S.E.2d at 695-96. Denial of certiorari in this case leaves Petitioner as the only known PCR applicant denied expert funding based on this erroneous interpretation of the statute.

Through its erroneous denial of funding, the PCR court failed to comply with federal law that requires state courts afford petitioners with access to available evidence and a meaningful opportunity to present that evidence before the court can reasonably adjudicate the merits of a federal constitutional claim.<sup>1</sup> *See Coleman v. Alabama*, 377 U.S. 129, 129–30 (1964) (finding the state court adjudication of a federal constitutional claim inadequate where the state courts did not allow the petitioner to offer evidence in support of his claim). Meaningful access to evidence and a fair opportunity to present all relevant evidence necessarily includes adequate funding for investigative and expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985).

Given the denial of expert funding, the PCR court lacked the information required to fairly adjudicate the merits of Petitioner’s federal claims in an informed, objectively reasonable manner.<sup>2</sup> *See, e.g., Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (holding that the federal court should examine the facts and determine the truth of petitioners’ allegations, given that “the [state court] corrective process afforded to the petitioners . . . does not seem sufficient”); *Ex Parte Hawk*, 321 U.S. 114, 118 (1944) (“where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . a federal court should entertain his petition for habeas corpus,

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<sup>1</sup> Petitioner specifically presented the requirements for fully adjudicating a federal constitutional claim to the PCR court in the Memorandum in Support of Applicant’s Objection to Evidentiary hearing filed in advance of the evidentiary hearing before the PCR court. App. 4163-4173.

<sup>2</sup> The PCR court should have declined to adjudicate the merits of the claims related to the denied expert funding because Petitioner was prevented from supplying the court with the required evidence for proper adjudication of those claims.

else he would be remediless.”). The PCR court’s failure to fairly adjudicate the merits of Petitioner’s claims will limit the deference owed to the state courts’ decisions in future federal habeas proceedings and result in the federal courts taking primary responsibility for development and resolution of Petitioner’s claims.<sup>3</sup> *See* 28 U.S.C. § 2254(d) (deferring to state court rulings only when the claim was “adjudicated on the merits”); 28 U.S.C. § 2254(e) (allowing for federal evidentiary hearings where the petitioner was prohibited from developing a factual basis for a claim in state court due to reasons other than his own failure). This Court should, therefore, grant rehearing and certiorari, correct the PCR court’s erroneous interpretation of the capital PCR funding statute, and remand to the PCR court for further proceedings to allow for full consideration of the merits of Petitioner’s constitutional claims.

### CONCLUSION

For all of the reasons discussed above and in Petitioner’s Petition for a Writ of Certiorari, this Court should reconsider its denial of certiorari, grant certiorari, and ultimately, grant post-conviction relief or further proceedings in the circuit court with the assistance of experts.

Respectfully submitted,



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October 2, 2019

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<sup>3</sup> Petitioner asserted he could not adequately investigate or prove the following claims for relief without the assistance of expert services: (1) claims 10&11(b)(1) and (2), regarding trial counsel’s failure to properly litigate and support a change of venue motion; (2) claim 10&11(d), regarding the State’s use of false and misleading evidence of a PET scan analysis at trial; and, (3) claims 10&11(e)(1) through (4), regarding trial counsel’s ineffective assistance during the penalty phase of his capital trial. *See, e.g.*, App. 4163.

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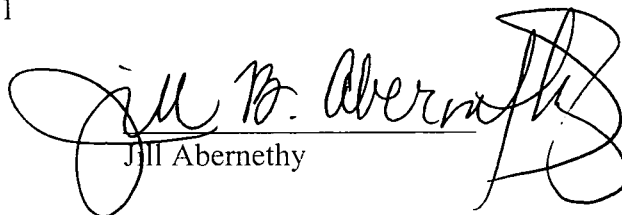
STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a copy of the Petitioner's Petition for Rehearing was served by first class United States mail, postage prepaid, this 2nd day of October, 2019, upon the following:

Caroline M. Scrantom  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Jill Abernethy