ALAN WILSON
ATTORNEY GENERAL

July 15, 2016

Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: Sammie Louis Stokes v. South Carolina
No. 15-9329

Dear Mr. Harris:

Enclosed please find the original and ten (10) copies of the **Brief in Opposition to Petition for Writ of Certiorari** in the above-referenced case for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Keir M. Weyble, Esquire
Robert M. Dudek, Chief Appellate Defender
Trisha Allen, Victims Assistance

No. 15-9329

In The
Supreme Court of the United States
October Term, 2015

SAMMIE LOUIS STOKES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

PETITIONER'S QUESTIONS PRESENTED

I. WHETHER IT IS A VIOLATION OF THE SIXTH AMENDMENT GUARANTEE OF CONFLICT-FREE COUNSEL FOR A LAWYER WHO PREVIOUSLY PROSECUTED A DEFENDANT TO REPRESENT THAT SAME DEFENDANT IN A SUBSEQUENT AND RELATED CAPITAL TRIAL?

II. WHETHER A VALID WAIVER OF THE RIGHT TO CONFLICT FREE COUNSEL CAN BE FOUND WHERE THE TRIAL RECORD CONTAINS NO MENTION OF A CONFLICT OR WAIVER, AND THE POST-CONVICTION RECORD DOES NOT ADDRESS, LET ALONE SATISFY , THE CONSTITUTIONALLY REQUIRED ELEMENTS OF A VALID WAIVER?

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BRIEF IN OPPOSITION

The Respondent State of South Carolina makes a brief in opposition to the petition for writ of certiorari to the Supreme Court of South Carolina and requests that certiorari be denied.

CITATION TO ORDERS BELOW

The Order of the South Carolina Supreme Court denying the petition for writ of certiorari, Samuel Louis Stokes v. State of South Carolina, Appellate Case No. 2013-000635, Order (S.Ct.S.C. February 12, 2016), is unpublished. The order of dismissal of the Court of Common Pleas for Orangeburg County in Sammie Louis Stokes, #5069 v. State of South Carolina, 01-CP-38-1240, Order of Dismissal dated October 21, 2010 is unpublished and located at App. 2139-2184. The order denying the Rule 59 motion on February 19, 2013 is unpublished and located at App. 2371-2395.

JURISDICTION

This Court's jurisdiction is invoked by Petitioner pursuant to 28 U.S.C.A. § 1257(a). The denial of the petition for writ of certiorari pursuant to S.C.A.C.R. Rule 243 was issued on February 12, 2016.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." This case also involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

PRIOR PROCEDURAL HISTORY

On May 17, 1999, an Orangeburg County Jury indicted Sammie Louis Stokes for murder, kidnapping, first-degree criminal sexual conduct, and criminal conspiracy involving the death of Connie Lee Snipes. The State sought the death penalty in the case, asserting five statutory aggravating factors to allow for a death sentence. App. 1681-82. These included murder was committed while in the commission of criminal sexual conduct in any degree, murder was committed while in the commission of kidnapping, murder was committed for himself or another for the purpose of receiving money or a thing of monetary value, the offender caused or directed another to commit murder or committed murder as an agent or employee of another person, and two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct and subsequently murder was committed while in the commission of physical torture. Id., App. 1479. See S.C. Code Ann. § 16-3-20(C)(a)(1)(a), 16-3-

20(C)(a)(1)(b), 16-3-20(C)(a)(2); 16-3-20(C)(a)(3); 16-3-20(C)(a)(4); 16-3-20(C)(a)(6).[1] The Petitioner was represented by court-appointed counsel Thomas R. Sims [2] and Virgin Johnson.

There were two pretrial hearings. The first, on January 19, 1999, before the Honorable Duane Shuler, concerned the qualification of defense counsel and a request for an evaluation. App. 1499-1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. App. 1509-1642.

The trial began on October 25, 1999 and ended on October 31, 1999. Judge Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Stokes guilty of all charges. Following the sentencing phase, Stokes exercised his statutory right to make a closing argument. The jury found four statutory aggravating circumstances to allow for a death sentence -murder was committed while in the commission of criminal sexual conduct in any degree, murder was committed while in the commission of kidnapping, murder was committed for himself or another for the purpose of receiving money or a thing of monetary value, the offender caused or directed another to commit murder or committed murder as an agent or employee of another person. App. 1683. The jury recommended death, which Judge Burch affirmed. App. 1683, 1686-87. He also sentenced Stokes to 30 years for first-degree criminal sexual conduct, and to five years for conspiracy. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

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[1] None of the statutory aggravating factors which authorized a death sentence concerned the existence of the 1991 conviction for assault and battery of a high and aggravated nature. See S.C. Code Ann. § 16-3-20(C)(a).

[2] It is conceded that Sims prosecuted Stokes in March 1991 resulting in a conviction for assault and battery of a high and aggravated nature on Indictment 91-GS-38-190 involving Audrey Smith. Stokes received a sentence of 10 years on that crime.

The Petitioner appealed to the South Carolina Supreme Court. The South Carolina Supreme Court denied the appeal in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) on May 29, 2001. On July 2, 2001, a petition for rehearing was denied.

The State Postconviction Proceeding

The Petitioner filed a state postconviction relief action. One of the claims was that one of his two appointed counsel, Thomas Sims, had a conflict of interest because he had prosecuted Stokes in March 1991 resulting an assault and battery of a high and aggravated nature conviction. Stokes contended that because the 1991 conviction and testimony from the victim of that crime were introduced in the penalty phase of his trial, Sims had an actual conflict of interest that Stokes did not waive. The state postconviction relief hearing judge determined that there was no actual conflict of interest because Sims's earlier prosecution of Stokes. Judge Manning alternately concluded that based upon Stokes's conversations with his two appointed counsel any conflict was waived. App.p. 2139-2184, 2371-95.

Stokes appealed and filed a petition for writ of certiorari in the Supreme Court of South Carolina raising the conflict of interest issue. The Court denied the petition for writ of certiorari on February 12, 20-16.

STATE'S VERSION OF THE FACTS OF THE CRIME

In the direct appeal, the Supreme Court of South Carolina set out the following facts:

> Stokes was hired by Patti Syphrette to kill her daughter-in-law, 21–year–old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30 pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin. The four of them then drove down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead ..."

> According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the head, and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.
>
> Snipes' body was found by a farmer on May 27th, and Martin's wallet was found in the field near it. Martin was interviewed by police the following morning, after which police went to the Orangeburg home of Pattie Syphrette's husband Poncho; by the time police arrived at the home on May 28, 1998, Stokes and Syphrette had already murdered Doug Ferguson by wrapping duct tape around his body and head, suffocating him.

State v. Stokes, 345 S.C. 368, 371-72, 548 S.E.2d 202, 203-04 (2001).

Not long after his arrest, Mr. Stokes wrote a letter to the police confessing his involvement in Ms. Snipes' murder. At trial, the State introduced the letter as evidence and supplemented it with other testimony, including that of Mr. Stokes' cohort, Norris Martin.

ARGUMENTS WHY CERTIORARI SHOULD BE DENIED

I. Certiorari is not warranted where the fact that appointed counsel Thomas Sims had previously prosecuted the Petitioner in 1991 was known by Stokes and after discussion with Sims and independently appointed counsel Virgin Johnson waived his right to have different counsel appointed requesting to go forward with Sims.
   a. The PCR Court reasonably concluded that there was no actual conflict of interest in his present representation of Petitioner and that alternately there was a waiver of any conflict of interest.
   b. Petitioner failed to demonstrate that a plausible defense strategy was available but was not pursued because of a conflict with Sims's other alleged interests.
   c. Petitioner failed to show that there was an actual conflict of interest that adversely affected counsel's performance.

Stokes contends that that appointed defense counsel Thomas Sims had an actual conflict of interest in representing Stokes in 1999 because Sims had personally prosecuted Stokes in 1991. The 1991 prosecution involved Indictment 91-GS-38-0190 about the December 2, 1990

assault on Audrey Smith. It resulted in a 1991 conviction for assault and battery of a high and aggravated nature and sentence of 10 years after a jury trial before Judge John H. Smith. However, Stokes was aware early in the representation that Sims had prosecuted him in 1991 and expressed a desire to proceed with Sims in discussion he had with Sims and independently appointed co-counsel Virgin Johnson. This decision was made by Stokes with an awareness that the State would likely (and did) present evidence concerning the 1991 conviction and the 1990 assault against Audrey Smith in the sentencing phase. Stokes was consistent in his desire to have Sims represent him.

The fact of the 1991 conviction and sentence was introduced by the State in the penalty phase in State Exhibit One in the chart [App.p. 1112-13] and through the penalty phase testimony of Audrey Smith, who counsel Sims personally cross-examined. The record also reveals that there is no indication on the record before the death penalty jury that Sims had prosecuted Stokes. The 1999 record also reveals that Sims signed the indictment for assault and battery with intent to kill and personally handled the 1991 trial, but that information was kept from the jury. Steps were taken by defense counsel and solicitor with the 1999 trial court's knowledge to remove Sims' name from any 1991 indictment to be potentially introduced to the jury. App. 1087, 1895-1896. See also App. 1637-39 (October 14, 1999 Pretrial Motion Hearing) (issue of removing Sims's name from indictment and using summaries before Judge Burch). However, the actual indictment was never introduced at the sentencing proceeding.

Petitioner contends that the PCR court erred in concluding that there was no actual conflict of interest because it viewed the potential conflict from a standard of an "unrelated" case as opposed to a "related" case, even though the 1999 prosecution involved an entirely separate and unrelated incident involving the death of Ms. Snipes. Petitioner contends that the PCR

court's finding that there was a waiver of a conflict of interest was deficient because it did not acknowledge the constitutionally valid elements of a knowing waiver and a failure on the part of the initial order to specifically cite federal constitutional cases concerning knowing and voluntary waivers, such as Boykin v. Alabama, 395 U.S. 238 (1969), Glasser v. U.S., 315 U.S. 60 (1942) and Johnson v. Zerbst, 304 U.S. 458 (1938). Contrary to the claims, the state court decision was a reasonable application of this Court's precedent.

Judge Manning in an order denying the motion to alter concluded that Stokes ignored the conclusions that implicitly acknowledged this constitutional waiver standard in the following findings and conclusions:

> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that **Stokes knowing[ly] and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial.** Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

App.p. 2163, Order, p. 25. (emphasis added).

> This Court concludes as a matter of law that Thomas Sims's prior prosecution of Stokes does not create an actual conflict of interest and/or require a new trial. First, this Court finds as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and **Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter. Further, this Court finds credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter.**

App.p. 2168-69, Order, p. 30-31. (emphasis added). "This Court alternately finds that there was a knowing waiver of a conflict of interest." App.p. 2177. Order, p. 39.

The PCR judge further relied upon SCACR Rule 407, Rule 1.7 (b). The hearing court specifically found: "[H]ere, Stokes was aware that Sims had prosecuted him in 1990-1991. He

was aware - based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. This Court finds that the Petitioner waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." App.p. 2183, Order, p. 45. See Order Denying Rule 59 Motion, App.p. 2377-2379.

Respondent respectfully submits that certiorari is not warranted where the PCR court reasonably concluded under the particular facts that there was no conflict of interest in Sims representation and that Stokes waived any conflict or right to different counsel. There is probative evidence to support the findings and conclusions.

How the Issue Was Presented in 1999

Judge Shuler appointed Thomas Sims after initially appointing Virgin Johnson. Judge Shuler held a pretrial hearing on January 19, 1999 in Stokes presence. During the qualification, Sims noted that he was in the Solicitors Office from 1982 -1993. App.p. 1505-06. No objection is made to the representation by either Sims or Stokes. Nothing was stated on the record at that time about Sims's prior prosecution of Stokes in the earlier matter involving Audrey Smith. A review of the trial record reveals no further on the record inquiry concerning the prior representation. During the later October 1999 pretrial hearing before Judge Burch, a different judge than handled the appointment, there is a discussion on the record about the fact that Sims name is on an indictment and that an alternate chart will be used that does not indicate that Sims was the prior prosecutor of Stokes. App. 1637-39.

In the penalty phase of the 1999 trial, the Solicitor indicates that he is presenting the chart, State Exhibit One, rather than the indictments to remove any potential prejudice. App.p. 1087.

State's Penalty Phase Evidence

In the State's penalty phase case 1999, Solicitor Bailey put in record the following criminal record concerning Stokes using a chart:

March 9, 1998 Assault and Battery of A High and Aggravated Nature - 8 years and 5 years probation.

August 31, 1990 - Paroled from conviction.

March 13, 1991 - Assault and Battery of a High and Aggravated Nature. 10 year sentence.

April 3, 1991 - Parole from first sentence revoked.

February 11, 1993 - Assault and Battery of a High and Aggravated Nature 3 years consecutive.

App.p. 1112-13. [State Exhibit 1].

Audrey Smith Testimony

The State then presented the testimony of Audrey Smith, the Petitioner's ex-wife who testified about a series of incidents where Stokes assaulted her. App.p. 1113-1145. The incidents included an earlier November 1987 incident when Stokes held a knife to her throat, which resulted in a tussle after forcing her to an attic loft. Her hands were cut when she tried to grab the knife while he held her hostage. Stokes threatened to kill her children and brother if she made a sound after her family had come downstairs. App.p. 1117-1119. After her family left the home looking for her, Stokes went with her outside asserting that he needed to get her out of the project. App. 1120. He put her in a ditch in the backyard of the project. After Stokes told her to not make a sound, she attempted to call for her brother. As a result, Stokes stabbed her three times in the back; one punctured her through her coat. App.p. 1120-21. At that point, Stokes ran off. She then stated she went to the hospital. App.p. 1121. She testified that he received an 8-year

sentence, but did not stay in prison long. App.1121. [*This November 1987 incident was not the prosecution by Sims*].

Ms. Smith next described an incident on December 2, 1990. App.p. 1121.[3] Stokes had gotten out of prison on an early release program from the 1987 crime. Smith was staying at her mother's home. Stokes came by and they went for a walk up the hill by an elementary school implicitly to get something that a woman was making for him. However, they had intercourse, although she protested that she did not want to do it out in the open. After that, they went to the high school and Stokes gave her a letter that stated he was going to kill her that night and then took it back from her. App.p. 1122-23. After he took the letter back, he asked her to go with him, they walked away to a cornfield, and that Stokes declared that he was looking for guns that he left in a field. She stated she was too afraid to run away. They then walked toward a wooded field and he declared that no one could her if she hollered because he had tested it. App. 1125-1126. Stokes pulled out an extension cord with knots on it and put the cord around her neck until she passed out. The victim awoke bleeding and fled to the emergency room. App.p. 1127. She was in the hospital for 3 to 4 weeks. App.p. 1127-1128. Smith testified that because of this assault on March 31, 1991, Stokes received a ten-year sentence. Id.

Smith testified that after he was in prison Stokes wrote her a series of threatening letters towards her or anyone who may attempt to aid her. App.p. 1129-1141. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. App.p. 1141.

On cross-examination, defense counsel Sims had her confirm that Stokes had no direct contact with her after he got out of prison from the 1991 conviction and had not come around or called her in 1998. Smith confirmed it had been a couple of years since Stokes had written her. App.p. 1142-43. She verified that Stokes had told her when they were having problems that he

[3] This was the 1990 incident the Sims prosecuted in 1991.

was on drugs and jealous, and possessive of her. App.p. 1143-44. She acknowledged that in a number of the letters Stokes wrote that he was asking to be able to talk and write her and that he was trying to get his head straight. Id.

On re-direct examination, Smith confirmed that she had to go to Branchville Police Department and the Parole Department to get the letters from Stokes stopped. App.p. 1144.[4]

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[4] The State also put into evidence various prison violations in the penalty phase. In particular, the state presented a chart [State Exhibit 9] which included the following:

July 1, 1998 - fighting without a weapon

January 4, 1992 - refusing or failing to obey promptly or properly a direct order.

January 22, 1992 - out of place, lying to employees.

January 26, 1992 - out of place.

February 26, 1992 - exciting or creating a disturbance, refusing or failing to obey promptly and properly a direct order.

April 11,1992 - out of place.

July 12, 1992 - possession of a weapon.

July 29, 1992 - fighting without a weapon.

December 3, 1993 - gambling.

July 28, 1993 - lying to employees.

App.p. 1145-46.

The state called Roy Stevens, a former criminal investigator at the South Carolina Department of Corrections who testified about the incident with Jackie Williams which resulted in the February 11, 1993 conviction for assault and battery of a high and aggravated nature. App.p. 1147. He stated that Stokes and Jackie Williams were inmates at Allendale Correctional Institution. He described and presented photographic evidence of Jackie Williams slashed face from a box cutter used by Stokes in a restroom fight. App.p. 1148-49. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. App.p. 1150-52. There were 10 sutures. App. 1152-53.

He stated that he was not aware of any other fights between Williams and Stokes. App.p. 1154.

The state also presented testimony concerning the Orangeburg- Calhoun Regional Detention Center. Evidence was presented from Keith Simmons, a former correctional officer that on July 27,

Postconviction Testimony of Defense Counsel

A. Thomas Sims Testimony

Counsel Thomas Sims confirmed representing the State in the 1991 Stokes prosecution. App.p. 1859. He stated that he signed the indictment and handled the prosecution, but did not recall the details at the time of the PCR hearing.[5] App.p. 1860. He stated that he entered private practice after losing his race for Solicitor against Walter Bailey. App.p. 1860. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any criminal or civil matter. App.p. 1861-62. Sims stated that Judge Shuler appointed him in 1999 after Virgin Johnson had been previously appointed. He stated that during the qualification hearing, his prosecution trial experience was discussed, but he did not specifically state on the record that he had previously prosecuted Stokes at that time. He stated that the question was never asked. App.p. 1863. See App. 1505-1511 (January 19, 1999 qualification hearing).

Importantly, Sims stated that he subsequently discussed his prior prosecution with Stokes and his appointed independent co-counsel Virgin Johnson:

1999, after 5 PM, a fight broke out between Stokes and another inmate Shawn Windburn, a houseman with small privileges. When food was being delivered to Stokes, they had words and Stokes started hitting on Windburn. App.p. 1281-82. He described seeing Stokes hitting Windburn in the head numerous times. App.p. 1282. It required Windburn being sent to the hospital. App.p. 1282. He said that Stokes was locked down as a result.

On cross-examination, he described that fights in the jail are not uncommon. However, Simmons stated that he personally placed Stokes in the cell, but that Stokes did not try to hit him nor be aggressive. He stated that the only thing that happened to Stokes was an incident report and that his canteen privileges and no visitations were allowed for five days. App.p. 1287, l. 17-25. He stated there was nothing unusual about the punishment. App.p. 1286-87.

On re-direct, this incident was described as a major infraction. App.p. 1287.

[5] The record of the March 12, 1991 trial reveals that although the Petitioner refused to come into the courtroom during the testimony, Stokes was in court at the beginning of the trial when then Solicitor Sims provided the judge with the charging indictment and Stokes made a personal plea for a continuance and request for new counsel. App. 2402, l. 1 - 2409, l. 6 (opening of trial and court inquiry of Stokes).

> . . .after going through the information we did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him. We discussed, me and Attorney Johnson. We did discuss it. He never expressed any desire not to have me as his attorney.

App.p. 1863. As to whether he could have another lawyer represent him, Sims stated that we talked about it, but could not state under oath that he specifically said to Stokes: "if you want another lawyer you can get one." App.p. 1863. **However, Sims testified that the discussion was that Stokes was told that Sims had prosecuted him and sent him to jail and "do you still want me as your lawyer, and he says yes." App.p. 1864, ll. 3-8.** [6]

Sims opined that it was clear from his discussions that Stokes could have said he did not want him as his lawyer. However, Stokes said he wanted him to continue. App.p. 1864, l. 2-21. In support of this understanding, Sims noted that after the 1999 trial and sentencing when Smith testified, Stokes contacted him during the appeal. Stokes advised Sims that his appellate lawyer thought that they were going to win the case and that Stokes told him that he wanted Sims as his lawyer again "because you're top flight...I want you back." App.p. 1865. In fact, Sims had continued to represent Stokes on the remaining charges after 1999 trial. App.p. 1865.

Sims was firm in his recollection that Stokes never indicated any desire to have him removed as his lawyer in the case. App.p. 1866.

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. App.p. 1866-67. Sims stated that he was aware that the State planned to introduce letters that Stokes had written his girlfriend and Stokes' prior convictions. App.p. 1867. Sims stated that they talked about the matters in

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[6] Counsel Sims recollection of Mr. Jeffrey Bloom's role and alleged recommendation about conflict of interest was different that Mr. Bloom's. Particularly, he recalled contacting Mr. Bloom to assist , but that Bloom was involved in a major trial in Aiken and would not be able to assist. App.p. 1865. Sims had no recollection of any specific discussion with Bloom concerning a conflict of interest issue. App.p. 1866. See Petition, p. 10, citing App. 1848-54. The PCR court concluded that Sims was credible. App. 2173, n. 10, 2385-2309. .

depth. Sims stated that he would look at the issue from both sides and try to develop a defense. He stated that he anticipated that both the conviction would be introduced and that Audrey Smith would testify in the penalty phase. App.p. 1867-68. He stated that he reviewed these matters with Stokes. App.p. 1868. As to the Smith incident, Sims stated that he knew it was coming in and that he needed to address it with a showing of remorse. App. 1868.

Counsel Sims stated that he cross-examined Smith in the penalty phase. App. 1868. He denied that the fact that he had previously prosecuted Stokes for the same incident affected the manner that he handled her testimony. He stated that if he thought that he had a conflict, moral or ethical issue or that he could not have represented Stokes to the best of his ability that he would not have taken the case. App.p. 1869, l. 3-17. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. App. 1869. He stated that he had no reservations about representing Stokes. App. 1869, l. 19-20.

Counsel Sims could not recall whether they made any formal motion about his earlier prosecution in the 1999 trial. Sims thought it was more fully developed on the record in the second case after the death penalty verdict where Sims continued to represent Stokes at Stokes' request. Sims confirmed that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. App.p. 1869.

On cross-examination, Sims stated that he researched the admissibility of prior convictions prior to trial. App.p. 1876-77. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. App.p. 1879. He stated that he looked at *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and Rules 404(b), 608 and 609. App.p. 1880. Counsel Sims specified that he developed an argument in an attempt to keep out the prior convictions in the penalty phase, trying to rely upon these rules. App.p. 1882-1888.

Counsel Sims confirmed that he made sure that Stokes knew that he was the person who prosecuted him and had sent him to jail previously. App.p. 1891. He stated that they talked about the 1991 indictment that he had signed. App.p. 1891. However, Sims stated that he could not recall if he personally asked Stokes if he still wanted him on the case. App.p. 1891-92.[7]

Counsel Sims again confirmed that he had no recollection of any discussion with Jeff Bloom concerning a conflict of interest. App.p. 1892. However, counsel Sims thought that there was a discussion with a judge at some time concerning the prior prosecution. App.p. 1893.

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. App.p. 1895. Sims further confirmed that this concern was raised with the trial court at the October 14 hearing because Sims's name appeared on the indictment. App.p. 1637-39, 1895.[8] It was agreed his name would be removed from any document being presented to the jury. App.p. 1895. See also, App.p. 1087, 1637-39. Counsel Sims stated that he wanted to be sure that there were no slips ups in trial court concerning his name on the indictment. App.p. 1896.

Counsel Sims made clear that Stokes knew that he prosecuted him and Sim's practice would have been to ask if the client had any problems with that. App. 1896, l. 15-19. In support of his continuing representation, Sims recalled that after the trial Stokes wanted him to represent him again on other charges. Sims felt that Stokes knew that if he had any problem, he only had to speak up and let them know. App.p. 1897-99. Sims stated that Mr. Johnson was present during these pretrial discussions. App.p. 1897. Sims stated he knew that the State intended to introduce

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[7] However, Virgin Johnson did recall that specific conversation they had with Stokes when Stokes confirmed he wanted Sims to stay on the case. App. 1910, l. 8-13.

[8] It is therefore evident in October 1999 before the trial that the State prosecutor and Judge Burch, as well as Sims, was aware about the potential introduction of the Audrey Smith evidence on October 14 and Sims involvement in that earlier prosecution. App.p. 1637-39.

prior bad act evidence, that this information was included in his evidence in aggravation and that the state would try to introduce it. App.p. 1897-98. Counsel stated that he expected the material to be introduced. App.p. 1897-98, 1906. He re-confirmed that he anticipated the 1991 conviction evidence to be introduced prior to its introduction. App.p. 1906.

B. Virgin Johnson's Testimony.

Co-counsel Virgin Johnson testified concerning his representation of Stokes in 1999. He stated that he was initially appointed first chair, but when Mr. Sims was subsequently appointed, he became second chair. App.p. 1909. Johnson stated that during the preparation he learned that Sims had prosecuted Stokes previously. Johnson recalled Sims discussing the prior prosecution with Stokes at the beginning of his representation. He described Sims telling Stokes that he put him in jail and that Stokes recalled that Sims had been the prosecutor. App.p. 1910. **Johnson recalled the important conversation between Sims and Stokes when they went through questions of do you have a problem with me representing you, do you think - - you know do you want somebody else and he [Stokes] said no. App.p. 1910, l. 8-13.** Johnson confirmed that Stokes never requested other counsel be appointed throughout the trial. To the contrary, in Johnson's opinion their relationship was good throughout both trials. He also recalled after the 1999 conviction while the matter was on appeal, Stokes expressed a continuing desire to have Sims represent him. App.p. 1910.

Johnson recalled Audrey Smith testifying at the trial concerning the prior assaults. Johnson remembered that Stokes was told prior to the trial that the evidence of the prior conviction could possibly be presented. App. 1911. Johnson stated that Stokes did not request that Sims be removed. Further, Johnson never saw Sims hesitate to act on Stokes behalf at any time. App.p. 1912. Johnson opined that Sims did his very best and opined the prior prosecution

did not have any effect. App.p. 1913. Johnson stated that in their discussions with Stokes, they discussed the fact that Sims prosecution in the Audrey Smith case could be prejudicial. App.p. 1913.[9] Particularly, Johnson confirmed that they discussed Audrey Smith's testimony, the Petitioner's statements, the discovery and what would come out at trial. App. 1913. However, Johnson stated that there was more they discussed about it, but could not remember everything word for word. App. 1913, 1915.

ANALYSIS

The PCR court reasonably concluded as a matter of law that Thomas Sims's prior prosecution of Stokes in 1991 did not create an actual conflict of interest and/or require a new trial on unrelated charges of murder and other crimes in 1999 arising from a 1998 incident. App.p. 2163, 2173. First, there is no *per se* conflict of interest in a former prosecutor defending a client for a different crime. Second, there is probative evidence to support the findings that counsel Sims and counsel Johnson had discussions with the Petitioner about his right to have

[9] In the PCR hearing, the Petitioner called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. App.p. 1851, PCR 41-43. However, unlike Sims testimony, Mr. Bloom suggested that he recalled a discussion about a potential conflict of interest which Bloom was concerned about based upon the prior prosecution. App.p. 1851, PCR 43. Bloom stated that he tried to emphasize this to Mr. Sims who Bloom contended did not fully understand why it would be a problem. Bloom contended that he told Sims that a t a minimum he must request a hearing before a judge on the issue in an ex parte setting and allow Stokes to express his desires to the court. App.p. 1852, PCR 44. Bloom stated that in his next telephone contact with Sims that he learned that Sims had not followed through with Bloom's suggestions. App.p. 1854, PCR 46. He stated that because of this he had to sever his professional relationship with him. App.p. 1854, PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. The PCR Court determined that Mr. Sims testimony was credible which was also addressed in the Order Denying the Rule 59 Motion to Alter. App.p. 2173, 2385-2390.

In his Petition, Petitioner complains about the fact-finding of Sims credibility concerning the discussion. Petition, p. 11, n. 9. As Judge Manning concluded in his order after a hearing on the motion, "[T]his Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue." App.p. 2390.

new counsel other than Sims because of the earlier prosecution. Third, there is evidence that Stokes advised them that he desired to have Mr. Sims continue to represent him upon the credible testimony of independent co-counsel Virgin Johnson. App.p. 1910, l. 8-13. There is credible evidence that Stokes, aware of the prior involvement of Sims in the 1991 Smith prosecution wanted to have Sims continue to represent him in this matter to support a waiver of any conflict. Finally, Counsel Sims was never part of the prosecution team in any manner concerning the charges related to the death of Connie Snipes or Doug Ferguson. Certiorari is not warranted.

1. No Per Se Conflict of Interest Due to the Prior Prosecution.

The PCR Court reasonably found, independent of the apparent waiver of the conflict of interests, there is no *per se* actual conflict of interest based upon the prior prosecution of Petitioner involving a different crime. The existence of 1991 assault and battery conviction and circumstances did not support any statutory aggravating factor or their existence that that allowed for the death penalty. In fact, as a matter of law and the jury's instructions, the 1991 evidence could not, be used for that purpose. App.1483, l. 20- 1484, l. 2 ("I instruct you that evidence of other crimes may only be considered by you as bearing on the characteristics of the defendant and that they may not be considered as evidence of any other statutory aggravating circumstances"). See State v. Young, 305 S.C. 380, 384, 409 S.E.2d 352, 355 (1991) (reversible error where limiting instruction not given). The 1991 conviction was only presented as a part of the Petitioner's evidence of his character and properly limited. The conviction and portion of Smith's testimony was not introduced as part of any recidivist statutory scheme burden of proof that would authorize an enhanced sentence. Respondent submits that the 1991 conviction was neither the same nor a "related" case for 6th Amendment purposes.

Respondent submits that the United States Supreme Court has never issued an opinion concluding that there is a *per se* conflict of interest in a similar setting where an appointed defense attorney who previously prosecuted the defendant he was representing on a different criminal case. To the contrary, this Court has only concluded the existence of actual conflict of interests in concurrent representation settings. In Cuyler v. Sullivan, 446 U.S. 335, 351 (1980), the Supreme Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing that (1) counsel was actively representing conflicting interests and (2) the conflict had an adverse effect on specific aspects of counsel's performance. If a defendant proves that such a conflict of interest exists, then prejudice is presumed. Thus, the U.S. Supreme Court has recognized Sullivan as "an exception" to the "general rule" that otherwise requires defendants to show prejudice under Strickland v. Washington, 466 U.S. 668(1984). Mickens v. Taylor, 535 U.S. 162, 166 (2002). However, the Court has not extended Sullivan beyond conflicts involving multiple concurrent representations at trial. Mickens, 535 U.S. at 174–76. Indeed, in Mickens, the U.S. Supreme Court explicitly stated that the extension of Sullivan beyond concurrent trial representation conflicts "remains, as far as the jurisprudence of this Court is concerned, an open question." Id. at 176.

Respondent submits that to hold that a *per se* actual conflict of interest exist by the fact of a former prosecutor representing a client who he had previously prosecuted for a different crime would create a "new rule of criminal procedure." To date the Court has only addressed the existence of an actual conflict of interest in matters of joint and concurrent representation. In Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), defense counsel had objected that he could not adequately represent the divergent interests of three codefendants. Id., at 478–480, 98 S.Ct. 1173. In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333

(1980), the respondent was one of three defendants accused of murder who were tried separately, represented by the same counsel.

The PCR court found no *per se* conflict relying upon State v. Childers, 373 S.C. 367, 645 S.E.2d 233, 235 (S.C. 2007). App.p. 2173-75. The Supreme Court of South Carolina affirmed the state's lower appellate court on the similar conflict issue concluding that defense counsel's prior prosecution of the defendant did not require removal as a conflict of interest. The South Carolina Court held:

> Childers asked the trial judge to relieve defense counsel based on defense counsel's prior prosecution of him and his perceived lack of defense counsel's trial preparation. Defense counsel told the trial judge he was ready and prepared to go to trial and he had no independent recollection of prosecuting Childers. Childers failed to show his counsel had any divided loyalties or an actual conflict of interest. See [State v.] Gregory, 364 S.C. [150] at 152, 612 S.E.2d [449] at 450 [2005] ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's."); See also People v. Abar, 290 A.D.2d 592, 736 N.Y.S.2d 155 (N.Y.App.Div. 2002)(finding there was no conflict of interest where defendant's public defender had previously prosecuted him on unrelated charges when she was employed as an assistant district attorney); State v. Cobbs, 221 Wis.2d 101, 584 N.W.2d 709 (1998)(concluding there was no actual or serious potential conflict where defendant's counsel had previously prosecuted defendant while working in the district attorney's office). The Court of Appeals correctly found the trial judge did not abuse his discretion by denying Childers' request to relieve counsel.

State v. Childers, 645 S.E.2d 233, 235 (S.C. 2007).

Given there was no evidence of conflict by any joint or simultaneous representation, or even serious potential conflict under the particular facts of this case, there could be no Sixth or Fourteenth Amendment error. See Mickens v. Taylor, 535 U.S. 162, 171(2002) ("we think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*-as opposed to a mere theoretical division of loyalties") (emphasis in original). The record clearly shows Counsel Sims did not claim an actual conflict, or move to be relieved based on his perception of any conflict because he did not feel constrained in any manner. App. 1869.

Compare Holloway v. Arkansas, 435 U.S. 475 (1978) (trial counsel advised the court of an actual conflict of interest and requested different counsel be appointed for co-defendants). Moreover, the record shows Petitioner relied upon counsel, and expressed no complaint of counsel, prior to or during the trial. In short, neither case law nor facts support Petitioner's position. Finally, the trial judge was made aware at an earlier hearing addressing the prior indictment and Sims name on it that he had prosecuted Stokes in the unrelated crime involving Audrey Smith in 1991.

The record is void of any attempt or desire by the Petitioner to have counsel Sims removed with the uncontradicted record that Stokes was aware of the prior prosecution by Sims. The record does not show Petitioner was "vehemently" opposed to counsel's representation because of Sims' former role as a prosecutor, nor does it show an actual conflict of interest. The state supreme court in Childers adopted the logic of other jurisdictions that hold such a situation does not show "competing interests" or "divided loyalties" that could form a basis for finding an actual conflict in representation. Childers, 645 S.E.2d at 235. In support of its decision, the state court cited with favor People v. Abar, 290 A.D.2d 592 (N.Y. App. Div. 2002), *affirmed* 786 N.E.2d 1255 (N.Y. 2003), and State v. Cobbs, 584 N.W.2d 709 (Wis.App.1998), *review denied* 222 589 N.W.2d 629 (Wis. 1998), both of which fully support the state court's findings. The court in Abar noted that "[a]lthough the transfer of a defense attorney to a District Attorney's office might well create a conflict of interest constituting a disqualification of the District Attorney's staff from prosecuting the defendant previously represented by the former defense attorney" the converse situation does not provide the same opportunity for "abuse of confidence" or the appearance of conflict. 290 A.D.2d at 593.[10] Similarly, in Cobbs, a former prosecutor had

[10] The Petitioner cites People v. Martin, 168 A.D.2d 794 (N.Y.App.Div. 1990). However, unlike Abar and Stokes case, there was a motion for substitute counsel due to his counsel prior prosecution. The New York court in Abar

also been appointed defense counsel. While a prosecutor, counsel had represented the state against Cobbs. The court found that the former representation had absolutely nothing to do with the present representation, and that counsel had broken ties with the office more than five years before the instant charge. The court concluded there was no conflict of interest. Such sound logic is persuasive in evaluating when confidences are placed in counsel, and when abuse may occur. See e.g. U.S. v. Fields, 483 F.3d 313, 351–52 (5th Cir.2007) (rejecting a conflict of interest claim where counsel was employed as a prosecutor fifteen years earlier; counsel had summarily signed off on a request to initiate delinquency proceedings against defendant); U.S. v. Villarreal, 324 F.3d 319, 327 (5th Cir.2003) (defense counsel's employment in the district attorney's office at time of defendant's prior conviction did not constitute a conflict of interest); Hernandez v. Johnson, 108 F.3d 554, 558–61 (5th Cir.1997) (rejecting the argument that counsel suffered a conflict of interest because he previously served as the district attorney when some of the defendant's prior convictions were obtained; counsel had also filed a motion requesting psychiatric evaluation of defendant, signed a motion to dismiss a related indictment after defendant pled guilty, and approved of defendant's plea bargain).

In Hernandez, the 5th Circuit found that the defense counsel's prior prosecution of the petition did not present a conflict of interest when he was the prosecutor who signed indictment introduced in the penalty phase of his client's trial. The Court rejected the claim that defense counsel's service as a prosecutor during the prior convictions was a conflict since the 1976 and 1978 convictions were pled in the indictment and introduced by the state at the penalty phase, the client's counsel faced a choice between challenging convictions obtained during his tenure as district attorney or not providing appellant with zealous representation. The Court rejected that

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finding no *per se* conflict by the prior prosecutor of unrelated charges distinguished Martin noting the defendant in ABar was well aware of the potential conflict from the beginning of the representation and unlike Martin, never requested substitute counsel nor voiced any dissatisfaction with counsel's representation.

assertion as a "mere possibility of a conflict" since it did not show he actively represented conflicting interests. However, Respondent notes that the defense counsel in Hernandez service as district attorney ended nine years before appellant's trial; he personally searched the records of the prior felonies before representing Hernandez to determine whether he was involved in those prosecutions and concluded there was no hindrance. Under these circumstances, where his defense counsel was only tenuously and nominally connected to the prior cases against Hernandez, and the Court further concluded it can hardly be said that he "actively" represented conflicting interests. Compare S.C.A.C.R. Rule 407, Rule 1.11(a) (a lawyer who has formerly served as a public officer or employee of the government: (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer . . ."). The prosecution of Stokes for the 1998 death of Ms. Snipes was not a matter Sims had previously "participated personally of substantially."

The Petitioner relies upon a categorical approach set forth in United States v. Ziegenhagen, 890 F.2d 937 (7th Cir. 1989). There, the defendant challenged his conviction on the ground that his appointed counsel had been the deputy district attorney who, twenty years earlier, had appeared at defendant's sentencing on an offense that was alleged in the instant prosecution as a prior conviction for purposes of the increased sentencing procedures of 18 U.S.C.A. § 924(e)(1). Id. at 938-39. The court held:

> In this case, the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was substantial enough to represent an actual conflict of interest. Although he was not the prosecuting attorney of record, he appeared at the sentencing hearing to recommend the length of sentence in the convictions for burglary and robbery, the convictions used to enhance Ziegenhagen's present sentence.

Id. at 940. The court concluded that defense counsel may have "decide[d] his defense strategy either at sentencing or on appeal on the basis of the conflict." Id.

The Ninth Circuit rejected Ziegenhagen's categorical approach. In Maiden v. Bunnell, 35 F.3d 477 (9th Cir.1994), the habeas petitioner challenged his conviction on the ground that his appointed defense counsel not only had been a prosecutor but had prosecuted petitioner three years earlier in a burglary case. The 9th Circuit found that the petitioner had failed to establish an actual conflict of interest by the representation by counsel who had previously prosecuted a burglary charge against the petitioner. The Ninth Circuit noted:

> Although the possibilities for actual conflicts are very real when attorneys "switch sides" in a subsequent criminal case involving the same defendant, such conflicts do not automatically occur. Determining whether an attorney has an actual conflict involves a closer examination of the facts of each particular case, with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize, or attack his or her own work product from the previous case.

Id. at 480-81. The court in Maiden did not find counsel's prior prosecutorial role to constitute a conflict, because there was no suggestion that the cases were substantially related or counsel divided his loyalties between his former and current roles. Id. It also found petitioner had not demonstrated any effect on counsel's handling of the case. Id. at 482.[11]

In this case, the state court found that with at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. App. 2176. Additionally, there was no connection between the former offense and the instant prosecution concerning the death of Connie Snipes. The only matter was the existence of the conviction - a proven fact - as evidence of his character and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction. There is no showing that the prior prosecution adversely affected his representation of Stokes based upon this state witness (Audrey Smith) - a person

[11] Delaware has not adopted the per se rule and concluded it was a minority rule. See Hitchens v. State, 931 A.2d 437, 2007, WL 2229020 (Del.Supr 2007). Similarly, Washington did not adopt the rule, finding it was "broader" than the controlling United States Supreme Court precedent requires. State v. Moore, 162 Wash. App. 1017 (2011).

whom Sims never represented. There were no divided loyalties in the matter. Unlike Ziegenhagen, the existence of the 1991 was not a "strike" nor did it prove the existence of a statutory aggravating factor that authorized a death sentence. Simply put, Sims was not placed in an ethical position to challenge his prior work nor constrained in any examination of Smith with whom he did not have a client relationship.

The former prosecution did not provide proof of an actual conflict of interest. Given the lack of an actual conflict, the Petitioner otherwise must show adverse effect to be entitled to relief. *Id.* This precisely follows the United States Supreme Court's well-defined precedent:

> ...the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). See also, State v. Wareham, 143 P. 3d 302 (Utah App. 2006) (attorney's prosecution of individual present no general bar to attorney's subsequent representation in a criminal defense capacity); Hendricks v. State, 128 P.3d 1017 (Mont. 2006) (*per se* ineffective assistance of counsel as a conflict of interest does not result when appointed counsel previously prosecuted defendant on another matter); Jackson v. State, 763 P.2d 388 (Okla Cr. 1988) (Defense counsel had prosecuted and convicted appellant in the prior conviction which was introduced at trial to enhance punishment. "Because appellant did not object at trial to his attorney's representation, and has failed to apprise this Court of any prejudice suffered as a result of his attorney's conflict, he has presented a mere possibility of conflict which is "insufficient to impugn [his] criminal conviction.").

In analyzing this issue, courts use the three-factor test described in Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001):

> First, the petitioner must identify a **plausible** alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. [To demonstrate objective reasonableness,] the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances. Finally, the petitioner must establish that ***the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.***

Stephens v. Branker, 570 F.3d 198, 209 (4th Cir. 2009) (emphases added) (citation and internal quotation marks omitted).

> A defendant has established an **adverse effect** if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions that are clearly suggested by the circumstances can indicate an **adverse effect**. An **adverse effect** can arise at any stage of the litigation including pretrial investigation or entry of a plea.

Mickens, 240 F.3d at 360 (citations and internal quotation marks omitted). Gonzales v. State, 412 S.C. 478, 495, 772 S.E.2d 557, 566 (Ct. App. 2015), reh'g denied (June 18, 2015).

The Petitioner has failed to show a plausible alternative defense strategy that Sims failed to pursue linked to the actual conflict from the 1991 prosecution. During the Rule 59 motion hearing, counsel for Stokes argued that the fact that counsel Sims had researched an argument to exclude the admission of evidence of the prior bad acts, including the conviction involving the Audrey Smith incident supported their showing that Sims did not appreciate and therefore did not fully discuss with Stokes the possibility that the Smith matter would be introduced by the State at the trial. This does not show the necessary assertion under Mickens of a "plausible alternative defense strategy." Rather it suggests that current counsel believe one of the strategies Sims was considering to seek to exclude damaging bad act evidence was useless rather than any suggested failure to pursue. The PCR Court rejected this claim. App.p. 2390-92.

Counsel Sims stated that he knew the evidence of the prior bad acts was likely to come in, although he did not want it to as a matter of law. App.p. 1868, l. 18. Further, the record did reflect that counsel conducted research on the admissibility of prior bad acts in the penalty phase of the trial. App.p. 1877-78. [The trial transcript of the October 25, 1999 trial shows counsel Sims argued at the outset of the penalty phase that the evidence of the prior acts should be excluded in the penalty phase pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and S.C.R.E. Rule 404(b). The Solicitor correctly argued that the very recent decision in State v. Hughes (Mar-Reece), 336 S.C. 585, 521 S.E.2d 500 (Oct. 4, 1999), which rejected a similar theory, defeated Sims's argument and the trial court agreed. App.p. 1090-92. Sims's argument at trial was essentially, whether crimes over 10 years old were too remote to be considered and whether the prior crimes were felonies versus misdemeanors. This argument was crafted by Sims from SCRE Rule 609 concerning impeachment use of convictions. App.p. 1885-86. Although this argument was inadequate under Hughes, supra, its lack of a sound basis in the law at the time of the trial had no effect on the conflict issue. Sims' actual expectation was that the evidence would be admitted, albeit over his objection.

At the PCR hearing, counsel Sims testified that he was aware of the state's intent to use the Audrey Smith indictment and conviction in the penalty phase. App.p. 1897-98. He stated that he had researched the matter and felt that they could probably try to keep it out the conviction, mainly because it was beyond the 10-year limit. However, he stated that he did not think that the evidence would be kept out, but he wanted it kept out. App.p. 1901, l. 4-9. Mr. Sims denied that he would have told Stokes that the evidence would not be admitted. To the contrary, he said he probably would have told him that most judges would not make the call to keep it out. App.p.

1901-02. To clarify, Sims stated that he fought to keep the evidence out, but agreed that he anticipated that the judge would let the evidence in. App.p. 1906, l. 3-12.

The Applicant's present argument suggests that counsel Sims did not perceive a potential conflict of interest because he believed that the evidence of the Audrey Smith incident and conviction could never be admitted. First, this suggestion is not linked to a plausible strategy not pursued because of a conflict under Mickens. Sims clarified that while he thought he had a viable argument to keep the evidence out, he expected the judge to admit the evidence. Further, Sims was cognizant at least two weeks before the trial that his own name was on the prior indictments and wanted to have his name removed before the indictments would be introduced. Contrary to the claim suggested by Applicant, Sims was not ignoring the potential admissibility of the evidence or the potential of Audrey Smith testifying about the incident and the letters that Stokes had sent to her in his assessment of his ability to represent Stokes. He had notice and anticipated the introduction of the evidence.

The Petitioner now purports to suggest that Sims did not pursue a vigorous cross-examination of Smith because of the 1991 prosecution. In the Petition before this Court, pages 12-13, Petitioner concedes that Audrey Smith's version of the 1990 assault generally followed the version of the 1991 trial. However, he now suggests that defense counsel should have pointed out on cross-examination of Smith certain facts from the 1991 trial. He suggests Sims should have developed, that Smith had initiated contact with Stokes after breaking up with her boyfriend (App. 2460-62); that after she read one of Stokes threatening letter about intending to kill her, he told her he had changed his mind[12] (App. 2439, 2499)(App. 1122-23); that she said Stokes took her into the field to look for a "box"(App. 2440), when in 1999 she said Stokes had been looking

[12] It is unclear how this would have added his defense of Stokes character when he got her to a field where he then attempted to strangle her with the extension cord and only suggested a subterfuge on his part.

for a gun (App. 1125) and a difference between in 1991 testifying that Stokes asked her if the cord around her neck was tight and she responded "yeah" (App. 2440-41) and in 1999 when she said "he put it around my neck and I passed out." (App. 1126).[13] These suggestions were not presented as a deficient performance issue before the hearing judge and without any inquiry of counsel Sims and Johnson as to their strategic reasons if any. Importantly, during the testimony, counsel Sims was never asked his reasons for failing to question Audrey Smith about these particular areas.[14] It is imprudent to speculate that these slight differences were excluded from

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[13] In the Petition, p. 19, Stokes now suggests that these factors would be a "robust" cross-examination of Smith. It is plain that Stokes' current characterization of Sims cross-examination of Smith as anemic and half-hearted compared to his admittedly robust examination in the guilt phase of Norris Martin speaks volumes about the different setting each witness was presented rather than the purported conflict of Sims. As to Martin, he was a guilt phase state witness purported to have been Stokes accomplice in the violence resulting in the death and violent action against Snipes. See App.p. 2068-2071 (summary of state's version). In contrast, Smith was a former wife-girlfriend of the Petitioner who was the actual victim of a crime the jury was aware Stokes had already been convicted. These comparisons in technique by Petitioner are disingenuous.

[14] *The Stokes-Audrey Smith 1991 Trial*

The PCR Court had as an exhibit the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. App. 2396-2340. The 1991 record reveals that Sims personally prosecuted the case and signed the indictment against Stokes. The victim, Audrey Smith, the ex-wife of Stokes was the primary witness. The crime involved a December 2, 1990 incident between them. At the 1991 trial, Stokes was represented by Reddick Bowman. However, Stokes chose to waive his presence in court during the trial. App.p. 2400-2409. Audrey Smith testified in the 1991 trial that Stokes had gone on a walk with her to a schoolyard and then took her clothes off and forced her to have sex with him after she refused. App.p. 2438. She stated that he had a letter that stated he was going to kill her that night and he told her that he had changed his mind. App.p. 2439. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. App.p. 2441. She later woke up in the field and called 911 from a nearby house. App.p. 2441-42.

During cross-examination by Mr. Bowman, Smith stated that when she woke up she reached for her shoes and hid when she saw some automobiles because she thought that Stokes was returning. App.p. 2443-44. She admitted that Stokes did not own an automobile, but had friends who did. She said he was supposed to arrive at 6 the evening before , but did not get there until 7 PM at Turnkey Apartments in Branchville. App.p. 2445. She stated that they traveled across the open field. She stated that they went up there at the schoolyard swinging and two of his friends came by. App.p. 2447-48. A little while after the friends left, she stated that they had sex. App.p. 2448. She stated sometime after that he put the cord around her neck but she could not be definite about the time. App.p. 2449.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. App.p. 2451. Smith stated that she thought she did say to the police that Stokes took the letter back from her because he feared that she would take it to the police. App.p. 2454. She admitted that she was afraid of Stokes who did not let her talk to his friends, however, she did not

Sims inquiry based upon his purported conflict. It is unclear why in that setting other counsel would be mandated under the 6th Amendment during the penalty phase to make similar development of the evidence from the 1991 case. A perceptive prosecutor would have likely welcomed this newly suggested approach of one of Stokes's earlier victims before the sentencing jury. Nevertheless, it is clear that the failure to ask these matters of Smith could not have been based upon a failure to pursue the theories "linked to the conflict." "He must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." United States v. Novaton, 271 F.3d 968, 1011 (11th Cir. 2001). He failed to do so.

Petitioner has not shown how the Sims representation of Stokes was "adversely affected" due to the prior employment. Cuyler, supra. First, there was no legal basis to exclude the 1991 conviction or the testimony of Audrey Smith from being presented, although Sims desired to do so. Sims desires were not based upon his prior employment, but only in the interest of his client. The jury, at no time, became aware that Sims was a prior prosecutor of Stokes. The Petitioner's newly suggested cross-examination development of slight inconsistencies and additions from the 1991 trial to Smith's 1999 testimony do not suggest that the alleged failure spring from any suggestion divided loyalty to the prosecution by Sims, but merely an apparent difference of strategy. These post-hoc suggestions are not "some plausible defense strategy or tactic [that]

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scream in fear that date nor have any conversation with his friends. App.p. 2455-56. She stated that they would not have help her anyway because they were his friends. App.p. 2457.

After Smith testified, Stokes remained outside of court due to his dissatisfaction with appointed counsel and the court's refusal to delay the matter to allow him to attempt to retain counsel. App.p. 2462-63.

Solicitor Sims next asked Smith on re-direct examination concerning why she did not request help from the two men at the schoolyard when they came up. She stated that she had not seen the threatening letter yet and that they were just sitting and talking then. App.p. 2467-68.

might have been pursued but was not, because of the conflict of interest." Hernandez v. Johnson, 108 F.3d 554, 560 (5th Cir. 1997). The existence of the 1991 conviction or Smith's testimony did not support any statutory aggravating circumstance, but was merely reflective of the defendant's character. It must be noted that had a significant criminal history and disciplinary record in additions to the 1991 conviction. The record supports co-counsel Johnson's assessment of Sims that he did not hesitate to act on Stokes behalf based upon his prior employment. App. 1911-12. Applying Cuyler and Mickens, it can be confidently stated that Stokes has not shown that Sims performance was adversely affected.

2. There was a Knowing Waiver of the Conflict of Interest.

The PCR Court alternately found that there was a knowing waiver of a conflict of interest. App.p. 2177. The PCR Court in its order concluded that:

> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial. Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

App.p. 2163, Order of Dismissal, p. 25. The PCR Court further found "as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter." App.p. 2168-69. See also App. 2392-93.

There was evidence at the PCR hearing to support this finding of a knowing waiver. App.p. 1863-65, 1897-98, 1909-1911. Counsel Virgin Johnson recalled that Stokes was told prior to trial that evidence of the prior conviction that Sims had prosecuted could possibly be

presented at the penalty phase of the trial. App.p. 1910-11. Johnson recalled the important conversation between Sims and Stokes when they went through questions of do you have a problem with me [Sims] representing you, do you think - - you know do you want somebody else and he [Stokes] said no. App.p. 1910, l. 8-13. Sims stated that he subsequently discussed his prior prosecution with Stokes and his appointed independent co-counsel Virgin Johnson about her prior role as the prosecutor in the 1991 Smith case and Stokes never expressed any desire not to have Sims as his attorney during the proceedings. App.p. 1863. As to whether he could have another lawyer represent him, However, Sims testified that the discussion with Stokes was that he was told that Sims had prosecuted him and sent him to jail and "do you still want me as your lawyer, and he says yes." App.p. 1864, ll. 3-8.

In its order, the PCR Court found the evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter and never requested to have Sims removed was credible. App.p. 2169. Evidence from Sims and Johnson support this conclusion.

It is well established that the Sixth Amendment right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). A defendant may waive his Sixth Amendment right to an attorney who is "free from conflicts of interest," Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), so long as his waiver is " 'knowing, intelligent, and voluntary.' " U.S. v. Brown, 202 F.3d 691 at 697 (4th Cir. 2000). See also Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). A waiver is only knowing and intelligent if made with "sufficient awareness of the relevant circumstances and likely consequences," Brady v. United States, 397 U.S. 742, 748, 90 S.Ct.

1463, 25 L.Ed.2d 747 (1970), and as such, a defendant must know the basis for, and potential consequences of, his chosen counsel's alleged conflict in order to make an "intelligent choice" whether to waive the conflict. United States v. Duklewski, 567 F.2d 255, 257 (4th Cir.1977); 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."). In practical terms, this means that a defendant's conflict of interest waiver is valid if he "waives the conflict with knowledge of the crux of the conflict and an understanding of its implications ... even if [he] does not know each detail concerning the conflict." Brown, 202 F.3d at 698 (emphasis omitted).

Resolution of the issue of waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.; see also Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Courts will, however, "indulge every reasonable presumption against the waiver of fundamental rights." Glasser v. United States, 315 U.S. 60, 70 (1942). Cf. United States v. Akinseye, 802 F.2d 740, 745–46 (4th Cir.1986) (concluding that a pre-trial waiver of a potential conflict of interest waives the actual conflict of interest that ripens, as the defendant was warned, from that potential during trial).

The Court has not specified the circumstances in which a court must override a defendant's otherwise valid conflict of interest waiver. Respondent submits that the Court need not settle on a precise formulation of the controlling principle for the purposes of this case; the facts alleged by Petitioner fail to demonstrate the existence of a conflict approaching either of these standards by the continued representation of counsel Sims with Stokes blessing in this and a subsequent trial.

In the instant case, Sims's earlier prosecution arose from an independent action and was unrelated to the present prosecution of Stokes. It was already a matter of record concerning the earlier conviction for the Audrey Smith incident. This case is distinguishable from cases where conflicts have been determined when a lawyer jointly represents a witness where an immunity agreement had been made to testify against his client. See Hoffman v. Leeke, supra. In Perillo v Johnson, 79 F3d 441 (5th Cir .1996), an attorney's concurrent representation of capital murder defendant and witness who had been granted transactional immunity in murder of which defendant had been convicted necessitated an evidentiary hearing to determine if conflict of interest entitled defendant to habeas corpus relief. But see, Cowell v Duckworth , 512 F. Supp. 371 (ND Ind. 1981) where in action brought by state prisoner seeking writ of habeas corpus, writ would be granted on ground of ineffectiveness of counsel retained by prisoner's wife to represent him where record established that defense counsel had actual conflict of interest between representation of defendant and two prosecution witnesses. This case is distinguishable from Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013). In Jordan, the Court found that the only evidence in the record was that the defendant and his co-defendant concerning a potential conflict of interest was that they were not informed of the precise nature of the conflict of interest from their joint representation.

Petitioner suggests that since there was no 1999 trial record of a waiver of any conflict of interest he is entitled to relief. However, when a trial court fails to make a proper inquiry, but the defendant did not object to the conflict at trial, the defendant's conviction will only be reversed if he or she can prove that an actual conflict of interest adversely affected his lawyer's performance. Cuyler, 446 U.S. at 348, 100 S.Ct. at 1718, 64 L.Ed.2d at 346.

Here, Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware - based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. He had independent counsel (Virgin Johnson) other than Thomas Sims who participated in the advice given to Stokes. Petitioner acknowledges to Sims and Johnson his desire to have Sims continue to represent him. The PCR Court found that the Petitioner waived his right to have counsel other than Thomas Sims represents him.

Respondent submits that certiorari is not warranted on the issue of conflict of interest. The PCR Court reasonably denied relief on this claim where evidence supports that the Petitioner knowingly waived his right to other counsel after being made aware of the fact that Sims had prosecuted him in 1991 and that he could have other counsel if he desired.

CONCLUSION

For all the foregoing reasons, Respondent submit that the Petition for Writ of Certiorari should be denied

Respectfully submitted,

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July 15, 2016

DONALD J. ZELENKA

No. 15-9329

In The Supreme Court of the United States
October Term, 2015

SAMMIE LOUIS STOKES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney, Donald J. Zelenka, a member of the Bar of this Court, hereby certifies that a true copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above referenced case has been served upon counsel for Petitioner by depositing one copy of same in the United States Mail, postage prepaid, to each attorney, addressed as follows:

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This 15th day of July, 2016

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