No. 15-9329

IN THE

Supreme Court of the United States

October Term, 2015

SAMMIE LOUIS STOKES,
Petitioner,

-vs.-

STATE OF SOUTH CAROLINA
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KEIR M. WEYBLE*
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211
803 734 1330

Attorneys for Petitioner
*Counsel of Record

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ARGUMENT IN REPLY

In arguing that the judgment below does not merit this Court's review, Respondent's Brief in Opposition (BIO) ignores the well-developed body of law regarding related successive representation and the fact that the position South Carolina has taken is in contradiction to every other court that has considered the matter. Instead, Respondent focuses on irrelevant facts and confuses the legal issues at hand. Petitioner, Sammie Louis Stokes, submits this Reply to demonstrate the inadequacy of Respondent's defense of the judgment below and to underscore the need for resolution of the conflict of interest issues set forth in the Petition.

I. RESPONDENT HAS IGNORED THE BODY OF JURISPRUDENCE GOVERNING RELATED SUCCESSIVE REPRESENTATION AND SOUTH CAROLINA'S DEVIATION FROM IT.

Stokes' Petition sets forth a detailed explanation of the distinction between successive representation in related and unrelated cases, the legal authorities from multiple jurisdictions

recognizing the heightened risk of conflicts in the former category as compared to the latter, and the reasons why this case represents a classic instance of related-case conflict. Respondent's BIO focuses on the fact that no *per se* conflict exists when defense counsel represents a defendant whom he has previously prosecuted. BIO at 19. That may well be true, but it is not relevant in this case. The issue here arises out of successive representation in *related* cases. Respondent largely ignores that distinction and in doing so disregards decades of jurisprudence developed on the issue in courts across the nation.

To the extent Respondent bothers to engage on the related/unrelated distinction, it devotes most of its effort to the contention that this case belongs in the "unrelated" category because Audrey Smith's testimony was not offered to establish a statutory aggravating circumstance. BIO at 18. If South Carolina were a "weighing" state, that point might have some force, but it is not. *See, e.g., Brown v. Sanders*, 546 U.S. 212, 216-19 (2006) (describing distinctions between "weighing" and "non-weighing" states). Instead, South Carolina's statutory aggravating circumstances serve only the limited function of rendering a defendant death-eligible, while the "selection" step of the capital sentencing process is informed by *all* of the evidence, including a wide range of background and character information. S.C. Code Ann. § 16-3-20(B); *see also, e.g., State v. Simmons*, 599 S.E.2d 448, 453 (S.C. 2004) ("In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court held that in states such as ours where aggravating and mitigating factors are not weighed 'pursuant to any special standard,' a death sentence may be upheld even where one aggravator has been invalidated if there is a valid aggravator remaining."). Smith's testimony fell squarely within the category of evidence South Carolina juries are routinely permitted to consider on the post-eligibility question of a

defendant's selection-stage death-worthiness. Thus, regardless of its lack of relevance to a statutory aggravating factor, Smith's unchallenged (and apparently embellished) tale of terror at the hands of Stokes would have been rightly viewed by the jurors as both admissible and highly probative on the ultimate question of whether to sentence Stokes to life or death.

Given both the undeniable relevance of Smith's penalty phase testimony and the equally undeniable relationship between the 1991 assault case that attorney Sims prosecuted and the 1999 murder case he purported to defend, the consensus of the case law outlined in the Petition dictates the conclusion that Sims labored under an actual conflict. *See e.g.*, *State v. Wareham*, 143 P.3d 302, 306-07 (Utah Ct. App. 2006) (holding that counsel had a conflict because he previously prosecuted the defendant for an offense used to enhance the sentence in the current case); *Worthen v. State*, 715 P.2d 81, 81 (Okla. Crim. App. 1986) (holding that counsel had a conflict because he previously prosecuted the defendant for offenses used to enhance the sentence in case at issue); *People v. Hoskins*, 392 N.E.2d 405, 408 (Ill. App. Ct. 1979) (finding counsel had a conflict because he previously prosecuted the defendant in a case for which probation was revoked due to the case at issue).[1] Nothing in the BIO challenges either the correctness of the consensus rule as a proper reflection of Sixth Amendment principles or the applicability of the rule to the actual facts and circumstances presented by this case.

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[1] Respondent cites *Hernandez v. Johnson*, 108 F.3d 554 (5th Cir. 1997), in support of the contention that there was no conflict here. BIO at 22-23. *Hernandez*, however, is clearly distinguishable from this case. There, defense counsel previously served as the county district attorney at the time of the defendant's prior convictions, but made no appearance in any cases involving the defendant. *Hernandez*, 108 F.3d at 558-59. Here, Sims both prosecuted and defended Stokes in proceedings involving a common and critical witness.

II. This Court's recent decision in *Williams v. Pennsylvania* further underscores the need for corrective action in this case.

In *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899 (2016), this Court observed that where a judge previously served as the prosecutor in a case, he or she may be "'so psychologically wedded' to his or her previous position as a prosecutor that [he or she] 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* at 1906 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)). Although *Williams* addresses the duties of former prosecutors acting as judges rather than as defense counsel, the principles which guided the Court in that context apply with equal force here: even decades later, there is still the risk that a former prosecutor may have a "motive to validate and preserve" his or her prior result, even if inadvertently. *Williams*, 136 S. Ct. at 1907.

Such was the case here. Faced with the witness whose cause and credibility he previously championed, Sims ignored multiple significant exaggerations and inconsistencies in Smith's testimony. *See* Pet. at 12. A lawyer with no prior personal or professional investment in Smith and her story would have seized the opportunities she presented on cross examination. Sims' decision not to do so was a classic manifestation of what this Court has called a conflict's adverse effect and should be recognized as sufficient to establish a violation of the Sixth Amendment. *See Mickens v. Taylor*, 535 U.S. 162, 174 (2002).[2]

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[2] Respondent argues that Stokes has failed to show a "plausible alternative defense strategy." BIO at 26. Under this Court's precedent, however, no such showing is required. *See Mickens*, 535 U.S at 171-72 (noting that the required showing is that the conflict adversely affected counsel's performance). Nevertheless, Stokes has clearly shown that the reasonable strategy here would have been to thoroughly discredit the story of the prosecution's lead penalty phase witness.

III. Respondent disregards the significant defects in the lower court's waiver finding.

Respondent's attempt to defend the waiver finding in this case entirely ignores the constitutional requirements for a valid waiver of the right to conflict-free counsel. Just as it did in the order it wrote for the state PCR court, Respondent maintains that the conflict issue was settled once and for all the moment Stokes expressed a willingness to keep Sims as his lawyer after being reminded that Sims had prosecuted him in the 1991 case. BIO at 32. That assertion is irreconcilable with basic principles of waiver law and with the record in this case.

As noted in the Petition and acknowledged by Respondent, a defendant's waiver of the right to conflict-free counsel "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). If there is any question as to whether a proper waiver occurred, the burden is on the state to prove that an intentional waiver occurred after the defendant was informed of his rights. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). As further noted in the Petition and by Respondent, courts must "indulge in every reasonable presumption against waiver." *Id.*; BIO at 33.

Contrary to Respondent's suggestion, the mere fact that Sims had previously prosecuted Stokes did not even begin to capture the nature of the resulting conflict. Respondent acknowledges that Sims told Stokes only that he had previously prosecuted him. Respondent further acknowledges that Stokes was never told that he could request another attorney. BIO at 13. While it is true that Stokes was aware that Sims had previously prosecuted him, there is no evidence suggesting Stokes knew that the prior conviction would be used in the penalty phase at

trial or that Smith would testify.[3] Nor is there any suggestion that Stokes—who was not in the courtroom during the 1991 trial at which Smith was the star witness and Sims was the sole prosecutor—had any idea what a competent cross examination of Smith would have included or how Sims' ability and willingness to conduct such an examination might have been impaired. At bare minimum, knowledge of those matters was essential to an informed waiver, yet as the record undeniably demonstrates, Stokes was in the dark about each one of them. *See* Pet. at 27. Respondent does not contest the accuracy or relevance of any of these essential facts, which establish conclusively that the waiver finding in this case is unsustainable as a matter of law.

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[3] Respondent argues that Petitioner was made aware that Smith would testify and that evidence of this awareness exists because Counsel Johnson testified that Petitioner was told prior to trial that the conviction could possibly be presented. BIO at 14-16. However, Johnson testified that counsel may not have been aware that Smith would testify until "just before" it occurred. App. 1911.

CONCLUSION

WHEREFORE, for these additional reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

KEIR M. WEYBLE
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211
803 734 1330

BY:
ATTORNEYS FOR PETITIONER

August 30, 2016.

No. 15-______

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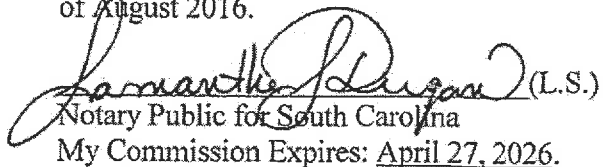
ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF SERVICE

I certify that copies of the reply in support of petition for writ of certiorari in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Donald J. Zelenka, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 30th day of August, 2016. Counsel is also today, August 30, 2016, sending a copy of the petition for writ of certiorari and appendix to opposing counsel by e-mail to: dzelenka@scag.gov.

Robert M. Dudek
Chief Appellate Defender

SWORN TO BEFORE me this 30th day of August 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.