No. 15-

IN THE

Supreme Court of the United States

October Term, 2015

SAMMIE LOUIS STOKES,
Petitioner,

-v.s.-

STATE OF SOUTH CAROLINA
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

In 1991, attorney Thomas Sims successfully persuaded a jury to convict Sammie Louis Stokes of a violent assault. Stokes was absent from the courtroom throughout that proceeding and did not observe either the victim's testimony or Sims' advocacy of her and her story. Years later, Sims, now a defense attorney in private practice, was appointed to represent Stokes in a capital murder case. At the trial of that case, the State featured the victim of the prior assault as its first penalty phase witness. Notwithstanding his history as an advocate for the witness and the obvious connection between her story and the issues to be decided by the penalty phase jury, Sims did not inform Stokes or the trial court that a conflict had developed. Instead, he simply pressed ahead with a brief, inconsequential cross-examination that omitted any reference to the inconsistencies and implausible elements of the witness' account upon which an unconflicted questioner would have seized.

When these circumstances were later presented as a basis for post-conviction relief, the state court refused to acknowledge or apply the consensus rule that successive representation in "related" cases gives rise to an impermissible conflict, and maintained that Stokes' mere acquiescence to the representation after being reminded, long before trial and outside the record, that Sims had once sent him to prison amounted to a valid waiver of the right to conflict-free counsel.

The questions presented are these:

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

MISCELLANEOUS

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Petitioner, Sammie Louis Stokes, prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court.

CITATION TO OPINION BELOW

The order of the South Carolina Court of Common Pleas denying post-conviction relief and the order of the South Carolina Supreme Court denying a petition for certiorari seeking review of that judgment are both unpublished, but are included in the Appendix to this petition (cited herein as "Pet. App.").

JURISDICTION

The denial of the petition for a writ of certiorari by the South Carolina Supreme Court at issue here was announced on February 12, 2016. *See* Pet. App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

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

Petitioner, Sammie Louis Stokes, was convicted and sentenced to death in Orangeburg County, South Carolina in 1999. Stokes was represented at his capital trial by a former prosecutor who had won a criminal jury verdict against him in 1991 for an assault against Stokes' ex-wife. While that circumstance by itself did not necessarily give rise to a conflict of interest, there was more. When the penalty phase of Stokes' capital trial got under way, his ex-wife—the victim of the earlier assault—was the first witness the prosecution called to the stand in support of a death sentence. During his brief, *pro forma* cross-examination, Stokes' prosecutor-turned-defense-counsel conspicuously pulled his punches, bypassing readily available opportunities for impeachment and never letting on that he had previously persuaded a different jury to accept the very story, told by the very witness, he was now obligated to confront and discredit. Because counsel had also never disclosed his prior relationship with and advocacy for this witness to the capital trial judge, there was no discussion of the issue at trial, and no waiver by Stokes.

Once the facts concerning trial counsel came to light, Stokes sought state post-conviction relief (PCR). In the PCR proceedings that followed, there was no dispute over whether the same

lawyer had prosecuted then defended Stokes, over the featured roles Stokes' ex-wife had played in both trials, or over the substance or strength of the impeachment opportunities counsel failed to pursue. It was also undisputed that the trial judge had not been made aware of any of these facts, and that the trial record contains nothing resembling a waiver colloquy.

The PCR evidentiary hearing evidence instead focused on whether defense counsel had nevertheless obtained a constitutionally valid off-the-record waiver of Stokes' right to conflict-free representation. On that question, defense counsel and his co-counsel (who had said literally nothing on the record at trial), testified that, some time prior to trial, they had reminded Stokes that the lawyer appointed to defend him had previously sent him to prison, asked Stokes whether he had a "problem" with that, then accepted his answer that he did not. Neither attorney, however, had any recollection of advising Stokes that his ex-wife would be a witness for the prosecution, or that cross-examining her would require his defense lawyer to become the adversary of a victim he had previously—and successfully—championed as a prosecutor. Likewise, no evidence indicated that counsel revisited the matter with Stokes once it became clear that the *possibility* of a confrontation with the victim from the earlier case had ripened into a *certainty*.

On the basis of this record, Stokes asserted both that counsel labored under an actual conflict that adversely affected his performance, and that the information provided to Stokes, according to counsel's own account, was insufficient to support a constitutionally valid waiver as a matter of law. With regard to the existence of a conflict, Stokes provided the state PCR court with detailed briefing explaining the consensus rule that successive representation cases tend to fall into two outcome-determinative categories: a larger category comprised of cases in which

the successive proceedings are "unrelated," such that counsel's mere participation in both creates no conflict; and a smaller category of cases, like this one, in which the successive proceedings are or become "related" through the appearance of common witnesses or the repetition of common issues, such that counsel's participation on both sides generates an actual conflict. As to the possibility of a waiver, Stokes alerted the state court to the settled constitutional standard for a knowing, voluntary and intentional relinquishment of a known right, and explained how the evidence in this case was incapable of meeting it.

The PCR court denied relief by signing an order drafted entirely by the State with no input from the court itself. That order assiduously ignored the body of law distinguishing between "related" and "unrelated" cases, and instead insisted that this case was governed by *State v. Childers*, 645 S.E.2d 233 (S.C. 2007), a non-capital state court decision involving successive representation in *unrelated* proceedings. The order also included an alternative determination that Stokes' acquiescence to continued representation after being told his lawyer had previously prosecuted him amounted to a waiver of his right to conflict-free counsel. In making this determination, the PCR order treated trial counsel's account as conclusive proof of a waiver, but did so without ever acknowledging or applying the settled constitutional rules that actually govern the waiver of conflict-free counsel, under which trial counsel's testimony—even if taken as true—was insufficient in multiple respects.

After receiving the order denying relief, Stokes filed a timely petition for a writ of certiorari to the South Carolina Supreme Court. That petition was denied without comment on February 12, 2016. *See* Pet. App. 1a.

I. Relevant facts.

A. Crimes, arrest, and appointment of counsel.

In early 1998, Stokes was finishing a prison sentence when his cellmate, Roy Toothe, approached him about a plan to murder Toothe's girlfriend, Connie Snipes. App. 966-67.[1] At the time, Snipes was living with Toothe's mother, Pattie Syphrette. App. 966. Syphrette wanted Snipes killed because she disapproved of Snipes' treatment of her children, who were Syphrette's grandchildren; The South Carolina Department of Social Services (DSS) had already taken custody of one child, and its investigation was ongoing. App. 966-67. Stokes agreed to the plan. App. 967.

Stokes was released from prison in early May, 1998. App. 784, 967. Shortly thereafter, Syphrette contacted Stokes and set her plan in motion. App. 971. To lure Snipes to a secluded area, Syphrette asked her to assist in the murder of one Doug Ferguson. Snipes agreed. App. 1661. Stokes and Syphrette then picked up Snipes and another man, Norris Martin, and drove to a wooded area where Snipes expected to find Ferguson. App. 1661. After Stokes, Martin, and Snipes walked some distance into the woods, the true purpose of the venture was revealed to Snipes, and she was then sexually assaulted and shot. App. 890-94, 973, 1662.

Days later, a farmer happened upon Snipes' body and notified authorities. App. 812-16. At the crime scene, investigators found items belonging to Norris Martin, including a state-issued identification card. App. 821, 823-24. After interviewing Martin and obtaining other information linking Syphrette to the crime, the police made their way to her house. App. 842, 845. While the police were headed to her home, Syphrette was in the process of killing Doug

[1] "App." refers to the Appendix submitted to the South Carolina Supreme Court in conjunction with Stokes' petition for certiorari seeking review of the PCR court's judgment.

Ferguson.[2] Just before the police arrived, Syphrette and Stokes wrapped Ferguson's face with duct tape, and he suffocated. App. 1209, 1310-12. Stokes and Syphrette were arrested a short time later.[3]

Attorneys Thomas Sims and Virgin Johnson were appointed to defend Stokes. The trial court held a formal appointment hearing at which attorneys Sims and Johnson placed their qualifications on the record. App. 1505-07. Describing his criminal law experience, Sims emphasized his handling of "major criminal prosecutions" in the First Circuit Solicitor's office from 1982 until 1993, but said nothing about any individual cases in which he took part as the prosecutor. App. 1505-06. Satisfied with counsel's qualifications, and unaware of any countervailing circumstances, the trial court designated Sims as lead counsel. App. 1507.

B. Sims' 1991 prosecution of Stokes.

Just over seven years before his appointment as Stokes' lead defense counsel for the Snipes capital murder trial, Sims, then an assistant prosecutor, signed an indictment against Stokes for assault and battery with intent to kill. App. 1696-97. The victim was Stokes' ex-wife, Audrey Smith. App. 1697. On March 12, 1991, Sims appeared at the trial on that indictment as the only representative for the State; he presented all of the evidence, which consisted primarily of testimony from Audrey Smith; he made all of the arguments to the judge and jury; and he secured a conviction for aggravated assault and battery. *See* App. 2396-2537. Stokes himself appeared in the courtroom only briefly, before the trial began. After the trial judge denied his

[2]Syphrette wanted Ferguson dead because he knew too much about the Snipes homicide. Syphrette had originally approached Ferguson about taking part in killing Snipes, but he had refused, and Syphrette feared he would go to the police and implicate her. App. 1308, 1331.

[3]Stokes pled guilty to the Ferguson murder and was sentenced to life in prison without the possibility of parole.

request for time to locate and hire a private attorney, Stokes declined to be present for the actual trial proceedings, and therefore observed none of the prosecution's case against him, and none of Sims' activities as the prosecutor. App. 2408-09, 2428-29. Stokes also declined to be present for the reading of the verdict or for sentencing.[4] App. 2533-34.

The 1991 assault prosecution arose out of a domestic violence incident. In testimony elicited by Sims, Audrey Smith claimed that she and Stokes had sex in an empty schoolyard, then walked to a nearby field where Stokes choked her until she lost consciousness. App. 2437-41. Some time later, Smith, still lying in the field, woke up, walked to a nearby house, and called 9-1-1. App. 2441. Smith also claimed that before they walked to the field, Stokes had her read a letter in which he expressed an intent to kill her, and that Stokes then told her he had changed his mind. App. 2439.

In a cross-examination spanning approximately twenty transcript pages, defense counsel raised doubts about Smith's claims by establishing a series of inconsistencies between the testimony she had given at a preliminary hearing and the story she told at trial. *See* App. 2443-2462. Additionally, defense counsel called two other witnesses who saw Stokes and Smith just before the alleged assault and described the couple as having appeared normal. App. 2492-94, 2498-2500. In response to this challenge to Audrey Smith's credibility, Sims devoted much of his closing argument to convincing the jury that Smith had been truthful, and that her version of events was accurate. App. 2519. As shown by the jury's guilty verdict, Sims' advocacy on behalf of Audrey Smith was successful.

[4]It was during the resulting ten year prison term that Stokes became acquainted with Roy Toothe and Patty Syphrette.

C. Stokes knew little, and the 1999 trial judge knew even less.

It is undisputed that neither Sims nor anyone else ever informed the 1999 trial court that Sims had personally prosecuted Stokes in 1991, and the record of pre-trial and trial proceedings associated with the Snipes case contains no mention of the issue. With no knowledge of his own about the possibility that lead defense counsel was (or could be) burdened by a conflict of interest, the trial judge made no inquiry, conducted no colloquy, and secured no waiver.

Sims' casual approach to the issue was also reflected in the advice he gave to Stokes. According to Sims and his co-counsel Johnson, Sims did little more than remind Stokes in general terms that he had been a prosecutor, and that he had once prosecuted Stokes.[5] While Sims and Johnson both recalled these communications to Stokes, neither had any recollection of informing Stokes of the ways in which Sims' work as the prosecutor at the Audrey Smith assault trial could affect his representation if Smith were to appear as a State's witness at the Snipes capital murder trial. In fact, when questioned directly on that point, Sims insisted he had no memory of advising Stokes about the nature or consequences of a possible confrontation with Smith at the 1999 capital trial:

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[5] *See* App. 1863 (Sims: "[W]e did discuss with Mr. Stokes, my role, who I was, and what my role had been in the previous matter with him."); *id.* at 1864 (Sims, explaining his rationale for reminding Stokes of who he was: "For him to know fully who I was, what was there before him, and it was in my mind that if I tell you that, you know, hey, you know who I am. I'm the one who prosecuted you, sent you to jail, do you still want me as your lawyer, and he says, yes."); *id.* at 1892 (Sims' advice to Stokes about 1991 prosecution was limited to reminder that Sims had prosecuted Stokes, and that Stokes had gone to prison as a result); *id.* at 1896 (Sims: "Let me put it this way, [Stokes] knew that I had been the prosecutor. He knew that I had been the one to prosecute him, and, of course, my practice would have been to say, look, you have any problems with that?"); *id.* at 1910 (Johnson: "Only thing I can remember is. . . [Sims] said. . . you know I put you in jail or I prosecuted you and [Stokes] said yes. And it went through the questions of do you have a problem with me representing you. . . do you want somebody else and he said no.").

Q: And so you certainly wouldn't have discussed with [Stokes] the possibility of you cross-examining the witness that you didn't think was going to be able to testify, right; we're talking about Audrey Smith?

A: I don't know. I can't say that I did or did or did not.

Q: You don't have any recollection about talking to Mr. Stokes about Audrey Smith taking the witness stand and you cross-examining her?

A: No, I don't.

. . .

Q: But you wouldn't have told [Stokes] that Audrey Smith was going to testify and you were going to cross-examine her, because you did not think she was going to testify, right?

A: I have no recollection that I either did or did not.

App. 1903-04; *see also id.* at 1912.

For his own part, Stokes himself had no independent factual basis from which to surmise what a confrontation between Sims and Smith might look like. Because he had been absent from the 1991 trial, Stokes had not seen or heard the direct or cross-examinations of Smith, and he had not watched Sims urge the jury to believe Smith during his closing argument. The PCR evidence further showed that Stokes was never afforded an opportunity to consult with a different lawyer who might have informed him of the brewing conflict and how it could be expected to manifest itself at trial. *See* App. 1892-93. In short, Stokes' only possible source of information concerning the relationship between the 1991 and 1999 trials, both of which featured Smith and Sims, was Sims himself. As Sims' own testimony makes clear, that information was never delivered.

D. Sims' misapprehension of basic capital punishment law, and resulting failure to appreciate the gravity of the issue.

Appreciation of the conflict danger in this case required knowledge of the rule that the details of prior criminal convictions are admissible at the penalty phase of a capital trial, and recognition of the certainty that, pursuant to that rule, Audrey Smith would be permitted to testify as a penalty phase witness for the prosecution. *See State v. Plath*, 313 S.E.2d 619, 623 (S.C. 1984) (outlining the universal rule that "a defendant's record of previous criminal convictions has always been deemed relevant to the process of imposing sentence"). As both his actions at trial and his testimony at the PCR hearing indicate, Sims did not know the rule, and instead maintained an erroneous belief that evidence of a defendant's character or prior convictions—*i.e.*, the kind of evidence Smith would provide—is inadmissible at a capital sentencing trial.[6] At the time of Stokes' trial, Sims conducted extensive research and prepared written and oral arguments that the 1991 conviction was inadmissible under various rules of evidence. App. 1090-91, 1608, 1876-77. He filed a pretrial "Motion to Prevent Use of Prior Bad Act," in which he argued that evidence of a defendant's prior bad acts was admissible only to impeach a defendant who chose to testify, and that the "facts underlying such convictions, not to mention facts which have been alleged but never proven, have been excluded from evidence." App. 2541-42. Neither the trial judge nor the Solicitor were persuaded by these arguments. App. 1638.

Undeterred, Sims continued to make sweeping statements about the inadmissibility of

[6]Sims' failure to recognize or respond appropriately to the risk of conflict was corroborated by the PCR hearing testimony of experienced criminal defense attorney Jeff Bloom. Bloom gave a detailed account of a series of pre-trial conversations in which he urged Sims to acknowledge the conflict and bring it to the attention of the trial judge, while Sims maintained that there was nothing to worry about. *See* App. 1848-54.

prior convictions at the penalty phase. In fact, his misapprehension of the scope of a capital penalty phase remained apparent until just moments before Audrey Smith took the stand for the prosecution. Relying on two non-capital South Carolina cases, Sims invoked the general rule that in order to admit evidence of prior crimes, there must be some connection to the charged crime. App. 1090-91. As the prosecutor correctly pointed out, however, the rule Sims cited did not apply at the penalty phase of a capital trial, and the law had consistently allowed the admission of evidence of a defendant's character and propensity for violence in such a proceeding. App. 1091-92.

Sims' PCR testimony continued to reflect his belief that there was a plausible legal basis for preventing Audrey Smith from testifying about the facts underlying Stokes' 1991 conviction. App. 1889.[7] In that testimony Sims admitted he had been confident during trial that the State could be precluded from introducing evidence of the prior conviction, and he agreed that he would have expressed this confidence to Stokes. App. 1889, 1903. Even at the PCR hearing nearly a decade later, Sims adhered to his belief that the prior conviction and the evidence supporting it were inadmissible. *See, e.g.*, App. 1900 (reiterating his view that classification of prior conviction as felony is relevant to admissibility at penalty phase of a capital trial).

E. Audrey Smith's appearance at the capital sentencing trial.

As dictated by settled law, the trial judge rejected Sims' arguments against admission of

[7]Elsewhere in his PCR testimony, Sims responded to questions from respondent by suggesting that he had anticipated that the trial court would admit the evidence of Stokes' prior conviction, and that Smith would be permitted to testify about the underlying facts of that conviction. App. 1868, 1906. These suggestions contradict other portions of his PCR testimony cited in the text, and cannot be squared with his consistent course of conduct prior to and during the trial itself. In any event, if Sims actually *did* expect Smith to appear and testify, then his failure to recognize and deal with the manifest conflict of interest that loomed ahead was even less defensible.

the 1991 conviction and Audrey Smith's story supporting it. App. 1092. Moments later, the prosecution called Smith as its lead-off penalty phase witness, to show that Stokes was dangerous, violent, and deserved the death penalty. App. 1113, 1447-50. On the witness stand, Smith gave approximately sixteen pages of direct testimony detailing two assaults she claimed to have suffered at the hands of Stokes, one of which was the 1990 incident for which Sims had been the prosecutor. While Smith's story generally followed the version Sims had elicited from her at the 1991 assault trial, there were material differences in the details. For example:

- On cross-examination at the 1991 trial, Smith was forced to concede that she had initiated contact with Stokes after moving back to Branchville and breaking up with her boyfriend. App. 2460-62. This fact was not mentioned at the 1999 capital trial.

- At the 1991 trial, Smith acknowledged that after she read Stokes' letter, he told her that he had changed his mind and did not intend to kill her. App. 2439, 2449. In her 1999 testimony, Smith made no mention of Stokes changing his mind. App. 1122-23.

- At the 1991 trial, Smith was confronted with an inconsistency between her preliminary hearing testimony and her trial testimony, and was forced to resort to a claim that the preliminary hearing transcript must have been incomplete. App. 2450-51. Neither the inconsistency nor the criticism of the transcript appeared at the 1999 capital trial.

- At the 1991 trial, Smith testified that Stokes took her into the field to look for a "box." App. 2440. At the 1999 capital trial, Smith claimed Stokes had actually been looking for guns. App. 1125.

- At the 1991 trial, Smith testified that after Stokes placed a cord around her neck, he asked, "Is it tight?," to which she replied, "Yeah." App. 2440-41. In 1999, Smith simply said that "he put it around my neck and I passed out." App. 1126.

In contrast to the twenty-page cross-examination of Smith conducted by Stokes' public defender at the 1991 trial, Sims' cross-examination at the capital trial covered a mere two pages of the transcript. *See* App. 1142-44. While Smith had provided Sims with multiple opportunities

to challenge the details of her claims, and in so doing to raise significant doubts about her portrayal of what had transpired between her and Stokes, Sims made use of none of them. He did not expose Smith's own role in reinitiating contact with Stokes; he did not highlight the changes in her testimony (all of which favored the prosecution); and he did not confront her with the fact that she had been forced to deny the accuracy of a court transcript in an effort to defend testimony Sims himself had elicited from her at the 1991 trial. Instead, Sims merely asked Smith to confirm that she had not heard from Stokes since his release from prison in 1998, that it had been some time since Stokes had written to her, and that Stokes had been jealous and possessive. App. 1142-44. Sims then sat down, putting a quick end to his unexpected and awkward confrontation with the woman whose story he had convinced a jury to believe eight years earlier.

REASONS THE WRIT SHOULD BE GRANTED

The state court's decision below rests upon two errors of law which place it in square conflict with Sixth Amendment rules laid down by this Court and with the considered judgments of lower courts around the nation. First, in contrast to the other courts that have considered the issue, the state court here refused to acknowledge that successive participation by counsel on opposite sides of related cases gives rise to a conflict of interest that violates the Sixth Amendment. Second, the state court's finding that Stokes waived his right to conflict-free counsel flies in the face of this Court's well-settled jurisprudence.

I. A LAWYER'S SUCCESSIVE PARTICIPATION, FIRST AS PROSECUTOR OF A DEFENDANT IN ONE CASE, AND LATER AS DEFENSE ATTORNEY FOR THAT SAME DEFENDANT IN A RELATED CASE, VIOLATES THE SIXTH AMENDMENT GUARANTEE OF CONFLICT-FREE COUNSEL.

A. The law governing conflicts of interest.

The Sixth Amendment guarantees that the accused in a criminal case be afforded counsel

whose ability to act on his client's behalf is unimpaired by a conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). Our justice system presumes that counsel will act as an accused's advocate, and this Court has emphasized that "'[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *see also Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Nowhere is the fundamental safeguard of conflict-free counsel more essential to ensure the proper functioning of our adversarial system, and to maintain the public confidence through the appearance of impartiality, than in the trial of a capital case. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Conflicts of interest can take a variety of forms. A conflict of interest exists when an "advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway*, 435 U.S. at 490; *see also Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979) (noting that a conflict of interest exists "when a defense attorney places himself in a situation 'inherently conducive to divided loyalties'") (quoting *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974)). Although conflicts of interest often occur when an attorney represents multiple clients, a conflict may also exist between an attorney's private interests and those of the client. *See e.g., United States v. Magini*, 973 F.2d 261, 263-64 (4th Cir. 1992). To establish entitlement to relief, a defendant need not demonstrate prejudice if an actual conflict of interest exists. *Cuyler*, 446 U.S. at 349; *see also Glasser v. United States*, 315 U.S. 60, 76 (1942) (noting that the right to

conflict-free counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"). An actual conflict exists—and thus, prejudice need not be demonstrated—when that conflict adversely affects counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Successive engagement as prosecutor and then defense lawyer carries inherent risks which, in certain circumstances, create an actual conflict. While it is sometimes permissible for counsel who prosecuted an individual to later represent that same individual in a different, wholly unrelated proceeding,[8] counsel's representation of an individual he previously prosecuted in the same matter or, as is the case here, in a different but related matter, is *universally* prohibited. *United States v. Ziegenhagen*, 890 F.2d 937, 940 (7th Cir. 1989) (holding that an actual conflict exists where counsel was involved in a prior, related prosecution and that prejudice may be presumed); *People v. Martin*, 168 A.D.2d 794, 798 (N.Y. App. Div. 1990) ("The fact that [counsel] had previously prosecuted defendant should have alone . . . been sufficient to establish a conflict of interest."); *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); *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); *People v. Hoskins*,

[8]*See e.g., Maiden v. Bunnell*, 35 F.3d 477, 481-82 (9th Cir. 1994); *Childers*, 645 S.E.2d at 235; *Hendricks v. State*, 128 P.3d 1017, 1021-22 (Mont. 2006); *State v. Cobbs*, 584 N.W.2d 709, 711-12 (Wis. Ct. App. 1998); *Smart v. Maass*, 939 P.2d 1184, 1186 (Or. Ct. App. 1997). Note that courts that have not found successive representation to create an actual conflict have recognized that had there been a connection between the prior prosecution and subsequent defense, including a resulting sentencing enhancement, an actual conflict may exist. *Maiden*, 35 F.3d at 480-81; *Smart*, 939 P.2d at 1186.

392 N.E.2d 405, 408 (Ill. App. Ct. 1979) (finding counsel had a conflict because he previously prosecuted defendant in a case for which probation was revoked due to the case at issue); [9] *see also Stouffer v. Reynolds*, 168 F.3d 1155, 1161 (10th Cir. 1999) (recognizing that successive representation as in *Ziegenhagen* can create an actual conflict, but failing to find such a conflict in the case at issue); *Veney v. United States*, 738 A.2d 1185, 1193 (D.C. 1999) ("An actual conflict in successive representation may arise where the subject matter of the previous representation is substantially related to the case being tried, the attorney reveals privileged communications of the former client stemming from the previous representation, or the attorney's loyalties are otherwise divided.").

The consensus among courts that have addressed these circumstances is that a conflict of interest exists—and a new trial is therefore required—where an attorney serving as defense counsel previously prosecuted his client in a different but related case, and counsel's participation in the earlier prosecution was substantial and personal. Cases are considered "related" when the prior conviction is used in the subsequent case as evidence against the defendant. *See e.g.*, *Ziegenhagen*, 890 F.2d at 940-41 (attorney appeared for prosecution to recommend sentence length for two convictions used to enhance punishment for subsequent conviction rendered with same attorney then acting as defense counsel); *Worthen*, 715 P.2d at 81 (attorney prosecuted defendant twice and both resulting convictions were used to enhance punishment for later offense at which the same attorney served as defense counsel); *Wareham*,

[9] *See also United States v. Sheppard*, 121 Fed. Appx. 508, 510 (4th Cir. 2005) (granting an evidentiary hearing where defendant's appellate counsel initially appeared on behalf of the prosecution in the same matter); *Skelton v. State*, 672 P.2d 671, 671 (Okla. 1983) (reversing because defendant's trial counsel originally appeared on behalf of the state at arraignment and preliminary hearing in same matter); *People v. Kester*, 361 N.E.2d 569, 572 (Ill. 1977) (holding that counsel had a conflict because he previously appeared for the prosecution in the same case).

143 P.3d at 307 (attorney prosecuted defendant on matter used to enhance sentence in later proceeding at which same attorney served as defense counsel); *Hoskins*, 392 N.E.2d at 407-08 (attorney prosecuted defendant and secured probationary sentence, which was later revoked for charges on which same attorney represented defendant). Counsel's participation in a "related" prior prosecution is regarded as sufficiently personal and substantial to generate an impermissible conflict if he appeared on behalf of the government in the earlier proceeding and would be required to challenge the outcome of that earlier proceeding in his new capacity as defense counsel.[10] This is so because the close relationship between proceedings places counsel in the impossible position of having to attack his own work product and the credibility of a former client or complainant. *See Ziegenhagen*, 890 F.2d at 940 (noting that a conflict arises when a "defense attorney [is] required to make a choice of advancing his own interests to the detriment of his client's interests"); *Wareham*, 143 P.3d at 307 (noting that "defense counsel should not be placed in the position where zealous representation of a current client forces him to attack his own previous success prosecuting the same client"); *see also United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991) (stating that a conflict may exist when counsel "harbor[s] substantial personal interests which conflict with the clear objective of his representation of the client"). Counsel in such circumstances also confront the choice of having to inappropriately rely upon or ignore confidences obtained while serving in their former capacity. *See, e.g.*, *United States v. Nicholson*, 475 F.3d 241, 249-52 (4th Cir. 2007); *Pinkney v. United States*, 851 A.2d 479, 487-88 (D.C. 2004).

[10]By contrast, there is no substantial or personal relationship between proceedings if counsel merely served as a prosecutor in the relevant government agency at the time that the defendant was prosecuted. *Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997).

Personal and substantial participation as prosecutor and then defense counsel in related cases is regarded as intolerable both because of the influence—tangible and intangible—that the successive roles have on the representation, and because of the unseemly shadow such representation casts across the integrity of a criminal proceeding. *See Holloway*, 435 U.S. at 489 ("[R]epresentation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing.") (emphasis added); *Kester*, 361 N.E.2d at 572 (noting that in successive, related cases, counsel is "subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner," and this influence can be expected to generate a "subliminal reluctance" to attack prior work).

B. Sims labored under an actual conflict of interest that adversely affect the representation.

Sims' successive engagement, first as the prosecutor at Stokes' 1991 assault trial at which Smith was the key witness, and later as defense counsel tasked with confronting Smith at Stokes' 1999 capital trial, created a clear and manifestly impermissible conflict of interest. Sims' participation in the 1991 prosecution was both personal and substantial; as described above, he not only signed the indictment against Stokes, he also appeared as the sole representative of the prosecution at the jury trial, and fought hard for Smith's credibility when it was attacked by Stokes' public defender. It is equally clear that the two proceedings became related when the prosecution made the 1991 assault conviction and the live testimony of Smith a featured component of its case for a death sentence at the 1999 trial. These facts alone are sufficient to dictate a finding that Sims' representation violated the Sixth Amendment, and that a new trial must be ordered. *See Ziegenhagen*, 890 F.2d at 940; *Worthen*, 715 P.2d at 81; *Wareham*, 143 P.3d at 306-07.

That Sims' role as prosecutor and advocate for Smith in 1991 was irreconcilable with his duty as lead defense counsel for Stokes in 1999 is confirmed by his handling of the issues relating to the 1991 case at the 1999 capital trial. While he managed to avoid alerting the trial judge to the full measure of his involvement in the 1991 case, Sims' ill-conceived arguments against admissibility could not shield him from a confrontation with the conviction he secured at the 1991 trial, or with the live testimony of Smith herself. And when that confrontation occurred, Sims reacted in precisely the manner a conflicted lawyer would: by foregoing the robust cross-examination that could have been carried out, and confining himself instead to a brief, anemic, and half-hearted exchange of meaningless questions and answers.[11] By making the "choice of advancing his own interests to the detriment of his client's interests," consciously or not, Sims allowed the circumstances to adversely affect his representation of Stokes, and in so doing cemented the conflict he should have seen coming and taken steps to avoid months earlier. *See Mickens*, 535 U.S. at 171; *Ziegenhagen*, 890 F.2d at 940.

It must also be emphasized that this case differs from the other cases cited herein in an important respect. Whereas the conflicted attorneys in those cases compromised their representation of defendants facing prison time, the conflict in this case manifested itself in the sentencing phase of a death penalty trial. This not only raised the stakes of Sims' gamble that he could avoid a run-in with Smith, it also meant that when his gamble failed—as it did—Sims was not only confronted with the *result* of his prior prosecution, but also with the very *witness* whose

[11]Sims' failure to use what was available to him during the cross-examination stands in sharp contrast to his handling of the Norris Martin cross-examination, where Sims appeared to regard no detail as too small or trivial to warrant inquiry. *See* App. 905-31 (guilt phase); App. 1170-86 (penalty phase). The source of the disparity in Sims' approaches is self-evident: he was free to attack Martin's credibility as any zealous advocate would, but his hands were tied by the conflict during the Smith examination.

story he had embraced and vouched for as an officer of the court in 1991. The result was a clearer, more tangible manifestation of conflict than is ordinarily necessary to support a grant of relief, and a death sentence imposed under circumstances that defy the fundamental expectation that a man on trial for his life will be represented by loyal, conflict-free counsel.

C. The state court refused to acknowledge or give legal effect to the obvious relationship between the 1991 and 1999 proceedings.

The primary determination underlying the state court's denial of relief is that the appointment as defense counsel of an attorney who previously prosecuted the defendant does not give rise to a *per se* conflict of interest. *See* Pet. App. 36a-39a. That is true, but it is also irrelevant since this case involves more than mere successive representation in unrelated matters.

To avoid that reality, the state court maintained that "there was no connection between the former offense and the instant case." Pet. App. 39a. Rather, according to that court, "[t]he only matter was the existence of the conviction—a proven fact —as evidence in aggravation and the fact that Audrey Smith testified in the penalty phase about the circumstances of the conviction." *Id.* On their face, these two statements are irreconcilable. When the prosecution decided to feature as prominent pieces of its 1999 case for death both the facts of the 1991 conviction and Smith's testimony detailing the underlying offense, it necessarily established a "connection" between the two proceedings. And when Sims came face to face with Smith—who appeared at the 1999 trial to tell a version of the very story Sims himself had elicited and vouched for in 1991—the relationship between the two cases became undeniable. The state order's suggestions to the contrary are conclusory because they have to be; one cannot discuss the actual circumstances of Sims' roles in the two proceedings without acknowledging the

predicament in which he found himself. Because this case presents an important opportunity to confirm the principle that representation in successive, related cases creates an undeniable conflict, this Court should grant certiorari.

II. THE STATE COURT'S FINDING THAT STOKES WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL DEFIES THIS COURT'S LONGSTANDING WAIVER JURISPRUDENCE.

A. Stokes did not waive, and could not possibly have waived, his right to conflict-free counsel.

A defendant may waive his right to conflict-free counsel, but any such waiver "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). Whether a waiver has occurred "depends 'in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Minnick v. Mississippi*, 498 U.S. 146, 159 (1990) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When the existence of a waiver is disputed, it is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brewer v. Williams*, 430 U.S. 387, 404, (1977) (quoting Johnson, 304 U.S. at 464). In considering the proof offered by the state, a reviewing court must "indulge in every reasonable presumption against waiver." *Brewer*, 430 U.S. at 404; *United States v. Wade*, 388 U.S. 218, 237 (1967)) ("This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.").

In the context of a potential (or in this case, actual) conflict of interest, any waiver purporting to be valid must be preceded by specific advice to the defendant regarding his right to effective representation, the details of his attorney's possible conflict, the potential perils of the

conflict, and an opportunity to discuss the matter with outside counsel. *See*, *e.g.*, *Pinkney*, 851 A.2d at 488-89 ("[B]efore a waiver is accepted, the trial court should conduct, on the record, an inquiry sufficient to establish that the defendant is aware of the right to conflict-free representation; understands the nature of the risks and the potential adverse effects of foregoing that right; and knows that, if convicted, he or she will not be able to complain on appeal that the defense at trial was compromised by the conflict.") (internal quotation marks omitted); *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993) ("The record should show, in some way, that the defendant was aware of the conflict of interest; realized the conflict could affect the defense; and knew of the right to obtain other counsel."); *United States v. Swartz*, 975 F.2d 1042, 1048-49 (4th Cir. 1992) (noting what is required for a valid waiver of the right to conflict-free counsel to be found); *Zuck*, 588 F.2d at 440 ("To show a waiver of the right to conflict free counsel, the State must show that the defendant "(1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and (3) was aware of his right to obtain other counsel.").

A valid waiver of a conflict also requires "at least some affirmative effort by the trial court to inform the defendant of the way the conflict might operate to impact deleteriously upon the reasoned and competent presentation of his or her defense." *United States v. White*, 706 F.2d 506, 509 (5th Cir. 1983); *see also Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) ("To discharge this duty [of determining whether a waiver is valid] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."); *Maiden*, 35 F. 3d at 481 n.5 (holding that the defendant's "brief" acknowledgment during colloquy that defense

counsel previously prosecuted him, and that the defendant nevertheless desired that counsel remain on the case, was insufficient to constitute valid waiver). Additionally, because conflicts are inherently fluid, a waiver at the commencement of representation may not "serve to waive all conflicts of interest that arise throughout the course of that defendant's criminal proceedings." *Swartz*, 975 F.2d at 1049 (finding that defendant's waiver did not extend to the sentencing phase of trial when defense counsel chose to purse a new strategy and argument).

In this case, none of the essential elements of a valid waiver are present. To begin with, it is undisputed that the trial record contains no mention of Sims' 1991 prosecution of Stokes, let alone a discussion or colloquy with Stokes about the effects of Sims' prior engagement on his representation in connection with the 1999 capital trial.[12] *See* App. 1822 (counsel for respondent conceding the point at the outset of the PCR hearing: "I cannot find in the record that there was any reference specifically to Mr. Sims prosecuting Mr. Stokes previously.").

Furthermore, Sims did not understand or appreciate the nature of his conflict, and therefore could not possibly have provided Stokes with the advice necessary to make an informed waiver. As demonstrated by his statements at trial and his testimony at the PCR hearing, Sims steadfastly believed that Stokes' 1991 conviction and the evidence supporting it were inadmissible at the penalty phase of the 1999 capital trial. Operating on this firmly held yet hopelessly misguided belief, it would have been impossible for Sims to have provided Stokes with an accurate or frank assessment of the nature and possible effects of his conflict.

Sims' and Johnson's PCR hearing testimony confirms that no such assessment was ever

[12]Sims did disclose on the record that he personally signed Stokes' 1991 indictment. App. 1637-38. However, this disclosure was made only in response to the introduction of the indictment as evidence, and Sims' ensuing failure to reveal his additional role as the trial prosecutor in the 1991 case was misleading.

made available to Stokes. As described above, Sims and Johnson testified consistently that their advice to Stokes about Sims' past prosecution of Stokes consisted of nothing more than a reminder that he had been a prosecutor, and had once prosecuted Stokes, and an inquiry about whether Stokes had a "problem" with that. App. 1896, 1910. Neither attorney had any recollection of specifically informing Stokes that the 1991 conviction was likely to be admitted, that Audrey Smith was likely to testify for the prosecution, or that Sims would face an obvious conflict if called upon to challenge Smith's story on Stokes' behalf. App. 1903-04 (reproduced *supra* at 12); *see also id.* at 1913-14. Having omitted these key facts, neither Sims nor Johnson were in any position elicit a waiver from Stokes, or to decide for themselves—and their client, and the trial court—that a valid waiver had been secured. *See Wheat v. United States*, 486 U.S. 153, 163 (1988) ("Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them."); *see also*, *e.g.*, *Morris v. Beard*, 633 F.3d 185, 198 (3d Cir. 2011) ("[W]e question whether an attorney who admittedly did not understand or appreciate the magnitude of his conflict could adequately convey the information necessary for his client to make an informed waiver.").

The significance of these omissions by trial counsel was amplified by Stokes' own ignorance of what had occurred at the 1991 assault trial, *e.g.*, how Audrey Smith had testified, how her story had been challenged by his public defender, or how then-Assistant Solicitor Sims had conducted himself at the 1991 proceeding. And like his attorneys, Stokes also had no knowledge that either the 1991 conviction or, more importantly, the testimony upon which it rested, would be admitted at the 1999 trial. In fact, even crediting Sims' claims that he would

have told his client that the "issue" of the 1991 conviction's admissibility could have gone either way at trial, the information provided to Stokes was materially misleading. In truth, there was no "issue"; both the conviction and Smith's testimony about the underlying incident were unquestionably admissible under long-settled law. Absent that information—which Sims could not have provided since he did not know it himself—Stokes could not possibly have appreciated the perils of the confrontation that lay ahead, and was consequently ill-equipped to weigh the risks of proceeding with Sims against any benefits he may have perceived. In short, by counsel's own account, Stokes was not told of, and did not otherwise know of, most of the information that would have been essential to a valid waiver of Sims' conflict of interest. Because he was not so informed, the record in this case cannot possibly support a finding of a "knowing, intelligent" waiver "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

B. Stokes' Sixth Amendment rights were violated when a waiver was found based on the record presented here.

According to the order signed by the PCR court, "there was a knowing waiver of a conflict of interest." Pet. App. 40a. Yet nowhere does that order acknowledge either the legal standard for finding such a waiver, or the well-settled rules for applying that standard. In fact, the closest the order comes to suggesting a waiver standard is its reference to several sources discussing circumstances under which conflicts may or may *not* be waived. *See* Pet. App. 40a-41a. Such sources, however, if followed, would in fact be sufficient to find that no valid waiver occurred here.

For example, the PCR order quotes the Comment to the South Carolina Rules of Professional Conduct, Rule 407, 1.7, as providing that, "when a disinterested lawyer would

conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Pet. App. 40a. In this case, a disinterested lawyer *would* so conclude; indeed, attorney Jeff Bloom did so more than once in his pre-trial communications with Sims. By this authority, Sims had no business even "ask[ing] for" Stokes' consent to the representation.

The considerations the PCR order draws from a civil case, *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1991), and A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), likewise undercut the proposition that a valid waiver occurred. For example, as described above, the record provides no basis for concluding that Stokes was "in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the . . . representation." *United Sewerage Agency*, 646 F.2d at 1350 (quoted in PCR Order, Pet. App. 40a-41a). The record similarly gives no indication of "appropriate client consent" to Sims' "cross examination [of Audrey Smith as] an adverse witness." A.B.A. Formal Ethics Opinion, 92-367 (also quoted in the PCR Order). Pet. App. 41a. On the contrary, the most powerful message emanating from the record in this case is that neither Sims nor Johnson nor Stokes understood or appreciated the nature, extent or seriousness of the conflict at a time when a valid waiver could theoretically have been made.

The reason that the PCR order fails to acknowledge or articulate the settled standard for waiver of the Sixth Amendment right to conflict-free counsel becomes clear after a review of the reasoning actually set forth in support of the waiver finding. According to the order, Stokes waived his fundamental constitutional right—silently, and off-the-record—simply by failing to affirmatively request new counsel after being informed that Sims had been a prosecutor, and had

once sent Stokes to prison. By implication, the order treats as irrelevant Stokes' undisputed ignorance of (a) the fact that Audrey Smith would testify for the prosecution; (b) the fact that Sims would cross-examine Smith when she testified; (c) how Sims had conducted himself as the prosecution's advocate for Smith and her story at the 1991 trial; (d) whether Sims' successive roles would impair his advocacy, consciously or unconsciously; (e) what Stokes' own rights were under state and federal law; and so on. As authorities cited in the order itself make clear, that is simply not how waiver law works. *See United States v. Perez*, 325 F.3d 115, 127 (2d Cir. 2003) ("Although [a waivable] conflict might require a defendant to abandon a particular defense or line of questioning, he can be *advised as to what he must forgo*; he 'can then seek the *legal advice of independent counsel* and *make an informed judgment* that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel.'") (emphasis added) (quoting *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir.1993)); *Cobbs*, 584 N.W.2d at 711 ("The waiver [of a conflict] must be knowing and voluntary."); *Cobbs*, 584 N.W.2d at 711 ("'The judge should ensure that the defendants *understand the potential conflicts* . . . . [T]his determination [to allow representation] *should not be made unless it is clear the defendants have made a voluntary and knowing waiver* of their right to [conflict-free] counsel.'") (citation omitted) (emphasis added).

The order also faults Stokes for failing to take the stand at the PCR hearing "to contradict the testimony of either Mr. Johnson or Mr. Sims," which assertedly left him unable to "satisfy [his] burden of proof under these discrete circumstances." Pet. App. 26a; *see also* App. 2392-93 (discussing and defending this finding). This criticism rests on a fundamental mistake of law. There was no imperative for Stokes to "contradict" Sims' or Johnson's testimony since, even

when taken as true, it fell far short of a sufficient factual basis for a valid waiver of the right to conflict-free counsel. Once the PCR court had heard from Sims and Johnson, and had been provided with the record of the 1991 trial demonstrating that Stokes had not been present to observe Smith's testimony or Sims' performance as the prosecutor, it had all it needed with which to apply the rules of waiver. The requisite analysis does not begin with a presumption of waiver that must be rebutted by a prisoner. Instead, the inquiry proceeds from the opposite direction, and requires the reviewing court to determine whether the record reflects "an intentional relinquishment or abandonment of a known right or privilege," *Johnson*, 304 U.S. at 464, and to make that determination while "indulg[ing] every reasonable presumption against the waiver of fundamental rights," *Glasser*, 315 U.S. at 70 (refusing to find that defendant, himself an "experienced attorney," "tacitly acquiesced" to conflicted counsel's representation by failing to timely object). As demonstrated above, the record in this case simply does not satisfy the standard for a valid waiver. The finding that an uninformed, unaware defendant can waive the right to conflict-free counsel silently and off-the-record cannot be sustained, and this Court should grant certiorari to so hold.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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BY:_____
ATTORNEYS FOR PETITIONER

May 11, 2016.

The Supreme Court of South Carolina

Sammie Louis Stokes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-000635
Lower Court Case No. 2001-CP-38-01240

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

February 12, 2016

cc:
Keir M. Weyble, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
SAMMIE LOUIS STOKES, #5069 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 01-CP-38-1240 ORDER OF DISMISSAL

This matter comes before this Court by an initial application filed October 17, 2001. An amended application was filed by his court-appointed counsel, Robert Lominack and Keir Weyble of Columbia, South Carolina. The Respondent made a Return to the initial application on July 3, 2002. The matter was initial set for a hearing on September 13, 2004. On August 9, 2004, the Applicant made an amended application. The matter was initially continued by Order of Continuance dated August 26, 2004 to allow the South Carolina Department of Disabilities and Special Needs complete an evaluation of the Applicant on whether he possessed the disability of mental retardation. On October 22, 2007, the Department submitted a report to this Court that opined the Petitioner was not mentally retarded.

On June 4, 2009 a status conference was held in Richland County. During the conference, the Applicant's counsel advised the Court that it was abandoning the issue concerning lethal injection. Upon inquiry, the Court was also advised that it was abandoning the issue concerning mental retardation raised in the amended application. The Court scheduled a hearing for August

5, 2009 in Orangeburg County. The Respondent made a Return to the Amended Application on August 5, 2009.

On August 5, 2009 a hearing was convened in Orangeburg County before this Court. The Applicant was present and represented by appointed counsel Weyble and Lominack. The Respondent was represented by Donald J, Zelenka. Testimony was received from prior appellate counsel Joseph Savitz (PCR Tr.p. 19-39), Jeffrey Bloom (PCR Tr.p. 40-48), prior trial counsel Thomas Sims (PCR .Tr.p. 49-98) and Virgin Johnson (PCR Tr.p. 100-108).. The Applicant did not testify. At the conclusion of the hearing, it was agreed that simultaneous briefing would occur after receipt of the transcripts. On December 28, 2009, Applicant's counsel advised Respondent's counsel that he was abandoning allegation 9(a) and only proceeding on allegations 9(b), 9(c), and 9(d). Post hearing memorandum were prepared and sent on February 16, 2010 by both parties.

This Court has reviewed the evidence, pleadings and memorandum of law. It is constrained to make the following findings of fact and conclusions of law and dismiss and deny the application, as amended, in its entirety, pursuant to S.C. Code § 17-27-80, 160.

I.

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 in the death of Connie Lee Snipes. The State sought the death penalty in the case. The Applicant was represented by Thomas R. Sims 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.

ROA, p. 1500 - 1508. The second, on October 14, 1999, concerned pretrial motions before Judge Paul Burch. ROA 1510-1642.

The trial began on October 25, 1999 and ended on October 31, 1999. Judge Paul M. Burch presided at the pretrial hearings and at trial. Following the guilt phase of the trial, the jury found Mr. Stokes guilty of all charges. Following the sentencing phase, Mr. Stokes exercised his statutory right to make a closing argument. The jury found four aggravating circumstances and recommended death, which Judge Burch affirmed. He also sentenced Mr. Stokes to 30 years for first degree criminal sexual conduct, and to five years for conspiracy. Mr. Stokes later pleaded guilty to murdering Mr. Ferguson, for which he received a life sentence.

The Direct Appeal

The Applicant appealed to the South Carolina Supreme Court. On appeal, he was represented by Joseph L. Savitz of the South Carolina Office of Appellate Defense. In his Final Brief of Appellant, he asserted the issues on appeal as follows:

I. The judge erred by refusing to allow the defense to introduce the portion of appellant's letter to the police the state had redacted, which indicated that the decedent had willingly accompanied appellant, Syphrette and Martin as the member of a conspiracy to kill Doug Ferguson.

II. The judge erred at sentencing by refusing to allow appellant to tell the jury during allocution that he had asked God to forgive him for his crimes.

State v. Stokes, Final Brief of Appellant, p. 3. The Respondent restated the issues as:

I. The trial judge properly denied the defense request to admit statements redacted from a letter introduced by the State because the statements were unnecessary and irrelevant to a fair and complete determination of the defendant's guilt.

II. The trial judge properly barred the defendant from arguing religious matters during his statutory closing argument.

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..

STATE'S VERSION OF THE FACTS

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.

In the letter, Mr. Stokes confessed that he had agreed to kill Ms. Snipes for $2,000 at the request of his cellmate, James Roy Toothe, and Mr. Toothe's mother, Pattie Syphrette. Ms. Snipes and her two children by Mr. Toothe, Brian and Nicole, lived with Ms. Syphrette. Apparently, the desire to have Ms. Snipes killed originated in Ms. Snipes' behavior regarding Mr. Toothe and the children, especially when she caused Nicole to be taken by the Department of Social Services. *See* Stokes Confession (Court's Exhibit 4), R. pp. 1658-59.

On May 22, Mr. Stokes called Ms. Syphrette. She said that Ms. Snipes "got to go and tonight." The reason she gave for the sudden urgency was that DSS had given her an ultimatum: to evict Snipes from her home or face losing the remaining grandchild, Brian. *Id.* at 1661-62. Then, as related by Mr. Stokes, the situation developed as follows:[1]

> I said well, I talked with Norris and everything is straight on his end. She said I'll pick you up at Woody's Pawn Shop at 9:30 P.M. *She said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She said I wish that were true so we could do all both of them. She said that Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway. I know you've been talking*

[1]Although the original confession was transcribed as one long non-paragraphed statement, paragraphs are asserted into this passage for ease of review.

to her on the phone when Roy calls and I wasn't home.[2] You just better not flip on me for her. I laughed and said see yall at 9:30 P.M.

They both showed up at 9:30 at Woody's and I went to the passenger side and Connie got out. I said what's up girl, pulled her to me and hugged her tight. She said ain't nothing. So I got in and we drove off. *While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better.*[3] I just laughed and looked at Pattie.

We got to Branchville and rode straight through town and came up through shake-rag and came on a back street, but you can still see the town. I spotted Norris or thought I did, but it wasn't him. So we went to his apartment and Connie went and knocked on the door, but there wasn't no answer. We drove back down town the same back route. That's when I spotted Norris coming out the store walking over to two parked cars with a bag in his hand. So we stopped and was trying to decide who should go call him. So Connie said fuck it, I'll go get him and she got out and walked down the road and called Norris. They both came back and got in. I asked him what's up bro and he said that he came down town to get some beer.

So we went down that dirt road passed Owen's home and I told Pattie to stop. Norris and I got out and I asked him was he ready to handle the business. He said yeah, but let's go back to my apartment so I can get the pussy first. I said we can't go there because people is out walking about in the projects. I said well I know that I can get the pussy because she likes me anyway. I said you want Pattie. He said I'd rather have the other one first. Well I was thinking right there, I know she isn't going to be willing to do it with him. So I said well once you get her in your spot, handle your business. I asked him where did he want to go and he said I'll show you. So we got back in the car and he showed us the spot.

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[2] This phrase was redacted from the Confession published to the jury during the guilt phase. *See* R. at 969, ll.16-17.

[3] This phrase also was redacted from the Confession published to the jury during the guilt phase. *See* R. at 969, ll.22-23.

> Then once we got there I got the gun out from behind the seat and passed it to Norris. Then we all got out and Pattie opened the trunk and tried to pass me the shovel, but I wouldn't take it. Then she gave it to Norris. Then Connie say let's go and Pattie said, I'll stay here and watch the car just in case anybody comes, I'll say I'm tricking and we all laughed. Then Connie and Norris walked off and Pattie said is he going to fuck her too. I said yes. Then she said you better not.
>
> I ran and caught up with them and we walked over some bushes and broken limbs and got to the back of the field or on the side. That's when Connie said well where is he at. I said baby, I'm sorry, but it's you that Pattie wants dead and Connie said [oh] my god, that fat bitch. She said, yall don't trust her because she will only turn on yall too. I said she is paying us $2,000. Connie said that fat bitch hasn't got two cents. Then Connie said please don't kill me
> ....

Stokes Confession, R. pp. 1662-63.

Then, Mr. Martin had sex with the victim. *Id.* At trial, Mr. Martin testified that afterwards, Mr. Stokes took a knife and stabbed the victim in the chest, cut the nipple off of her right breast, then penetrated her anally while she was screaming from the injuries he inflicted on her. R. at 1155, l.4-1157, l.2[4]. Afterwards, Ms. Snipes was shot twice in the head; one shot struck her jaw and the other--fatal--shot struck her in the back of the head. *Id.* at 853, l.4-854, l.10. Although it is medically impossible to tell which shot came first, Mr. Martin testified that the defendant fired both shots, and that the victim was screaming after the first shot. *Id.* at 893, l.5-22. Mr. Stokes stated that both he and Mr. Martin each fired one shot, but that Mr. Martin fired the first shot and he fired the second one. Stokes Confession, R. p.1663. Mr. Martin testified that Mr. Stokes scalped the victim and tossed her hair into the woods, *id.* at 1160, ll.13-23, then cut

[4]This testimony was elicited during the sentencing phase, and not during the guilt phase.

her vagina out. *Id.* at 1160, l.24-1161, l.10. A pathologist confirmed these injuries. *Id.* at 1218, l.8-1221, l.13.

On May 28, 1998, Mr. Stokes was at Ms. Syphrette's house with Faith Lapp, Ms. Syphrette, and Brian. *Id.* at 1330, ll.20-23. Ms. Syphrette left to get Mr. Ferguson and bring him to the house. *Id.* at 1334, ll.10-19. Ms. Lapp testified that, while they waited, Mr. Stokes told her that if she said anything, he would do to her what he did to Ms. Snipes and, "if he couldn't get to [her], he was going to get to my family and then he said that he was going to have to come back in twenty years and get the baby." *Id.* at 1335, ll.6-11.

When Mr. Ferguson arrived, he sat down on the couch. *Id.* at 1340, l.9; Stokes Confession, R. p. 1667. Mr. Stokes, who had been hiding in an adjacent bedroom, came out and asked, "[D]o you know me." R. at 1340, l.15-1341, l.16. Mr. Ferguson kept saying no. *Id.* at 1341, ll.16-17; Stokes Confession. Then, Mr. Stokes said, "Motherfucker, you're going to know me." *Id.* at 1341, ll.19-20. Lapp testified that, at that point, she took Brian out of the room while Mr. Stokes and Ms. Syphrette wrapped duct tape around Mr. Ferguson. *Id.* at 1342, ll.19-25. In his confession, Mr. Stokes stated that he punched Mr. Ferguson while he lay on the floor. Stokes Confession, R. p.1668. The pathologist described how they wrapped the duct tape around Mr. Ferguson:

> The unusual thing about his body was that he was wrapped in duct tape. His ankles were taped together, his wrists were taped together and his arms were taped together and then that was taped to his chest and then his face and head was [sic] fully taped.

R. at 1194, ll.4-11. Because they wrapped tape around his nose, his mouth, and his entire head, Mr. Ferguson could not breathe and he died from suffocation. *Id.* at 1206, ll.1-9.

II. Allegations

Prior to the entry of the stay and assignment order on October 17, 2001, appellate counsel for Mr. Stokes initially filed an application for post-conviction relief in Orangeburg County. In the application, it was alleged that he received "ineffective assistance of counsel" and that it was based upon a "failure to present mitigating evidence." On May 6, 2002, the Respondent received the "First Amended Application for Post-conviction Relief." In the 2002 Application, made by current counsel, Stokes alleged the following:

> 9(a) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution. Williams v. Taylor,* 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).
>
> 10(a) Trial counsel unreasonably failed to submit the autopsy data generated by the state's medical examiner to a qualified, independent pathologist for review. As a result, counsel were unprepared and unable to challenge the state's version of how the crime occurred, and what actions, if any, were taken by Applicant in connection with the vents surrounding the victim's death. But for trial counsel's deficient performance, there exists a reasonable probability that the result of Applicant's trial would have been different.
>
> 9(b) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution.*
>
> 10(b) The facts supporting the claim are as follows:
>
> 1. Trial counsel failed to investigate and present available mitigating evidence during the sentencing phase of Applicant's trial. Had counsel investigated and presented mitigating evidence, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1894); *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

2. During closing argument, the prosecutor argued that life in prison without parole would reward Applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock Applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument violated Applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of Applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

On August 9, 2004, Respondent received a pleading styled "Amended Application for Post-Conviction Relief" dated August 6, 2004. In the application, he raised the following:

1. *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, as a result of trial counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument.* 9(a)

   a. The facts supporting the claim are as follows: During closing argument, the prosecutor argued that life in prison without parole would reward applicant, because the prison system would exert no control over his behavior. The prosecutor inaccurately argued that the prison system could only take away canteen privileges or lock applicant down for a short time if he misbehaved. In the end, the prosecutor, based on this inaccurate portrayal, argued that the death penalty was the only punitive sentence. Although the prosecution's argument

violated applicant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as applicable state law, trial counsel raised no objection. Had counsel properly objected to the prosecution's inaccurate and prejudicial closing argument, there is a reasonable probability that the result of applicant's sentencing proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970); *State v. Reed*, 293 S.C. 414, 362 S.E.2d 13 (1987). 10(a)

2. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to determine what statutory mitigating circumstances were supported by the evidence and his failure to hold a charge conference prior to instructing the jury in the sentencing phase of the trial.* 9(b)

   a. Prior to instructing the jury at the sentencing phase of the trial, the trial judge was required to make an initial determination of which statutory mitigating factors were supported by the evidence and then to conduct a charge conference. *State v. Victor*, 300 S.C. 220, 387 S.E.2d 248 (1989). In this case, the trial judge failed to follow the clear rule set out in *Victor*. Furthermore, this failure to apply existing state law deprived applicant of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 7 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Appellate counsel failed to raise this claim on direct appeal; had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(b).

3. *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was denied as a result of appellate counsel's failure to raise on direct appeal the trial judge's failure to submit for the jury's consideration a statutory mitigating circumstance.* 9(c)

   a. S.C. Code § 16-3-20(C) provides that the trial judge "shall include in his instructions to the jury for it to consider...the following...mitigating circumstances which may be supported by the evidence." In this case, the trial judge failed to instruct the jury on § 16-3-20(C)(b)(3) (the victim was a participant in the defendant's conduct or consented to the act), despite the fact that there was evidentiary support for this mitigating circumstance. *See State v. Pierce*, 289 S.C.

430, 346 S.E.2d 707 (1986) (trial judge required to instruct the jury on statutory mitigating circumstances), *overruled on other grounds, Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Rogers*, 338 S.C. 435, 521 S.E.2d 101 (2000). Appellate counsel failed to include this claim on direct appeal had counsel done so, there exists a reasonable probability that the result of applicant's appeal would have been different. *See Douglas v. California*, 372 U.S. 353 (1963); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). 10(c)

4. *Applicant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of his representation by counsel who labored under an actual conflict of interest.* 9(d)

   a. The facts supporting the claim are as follows: From approximately 1981 until 1992, Thomas Sims, who would subsequently be appointed as lead defense counsel for applicant, was employed as an assistant solicitor in the First Circuit Solicitor's Office. In his capacity as assistant solicitor, Mr. Sims prosecuted applicant for a violent offense against his ex-wife. Largely on the strength of applicant's ex-wife's testimony, elicited at the trial by Assistant Solicitor Sims, a jury found applicant guilty of aggravated assault and battery, for which he received a substantial prison sentence. Later, in the capital trial challenged in this application, the prosecution began its sentencing phase presentation with evidence, again offered by applicant's ex-wife, of the offense for which Mr. Sims had previously prosecuted applicant. On cross-examination of the complaining witness, Mr. Sims did not explore several lines of inquiry which, had they been explored, would have mitigated the seriousness of the offense described by the witness and undermined the accuracy of her account. The record of proceedings before the trial court in this case contains no discussion or waiver of the conflict of interest arising out of Mr. Sims' successive involvement as prosecutor then defender of applicant. *See, e.g., Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001); *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Zeigenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989); *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979). 10(d)

5. *Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation.* 9(e)

   a. The facts supporting the claim are as follows: Applicant suffers from significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as evidenced by a full scale IQ that is below the accepted threshold for mental retardation, and

by historical information indicating that his adaptive skills are deficient. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). 10(e)

6. *Pursuant to Article I § 11 of the South Carolina Constitution and the Sixth and Fourteenth Amendments to the Untied States Constitution, the trial court lacked jurisdiction to sentence applicant to death as a result of the omission from the indictments of the aggravating factor(s) essential to expose him to punishment greater than life in prison.* 9(f)

   a. The facts supporting the claim are as follows: Applicant was separately indicted for murder, conspiracy, criminal sexual conduct, and kidnapping. Applicant's eligibility for a sentence of death rested on the jury's finding of four statutory aggravating circumstances: murder during the commission of kidnapping; murder during the commission of criminal sexual conduct; murder for hire; and commission of murder as the agent of another. None of the indictments alleged that the victim's murder occurred "during the commission of" either criminal sexual conduct or kidnapping. Likewise, none of the indictments made any reference to murder for hire or commission of murder as the agent of another. *See* S.C. Code § 16-3-20; *Ring v. Arizona*, 122 S.Ct. 2428 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *State v. Brown*, 24 S.C. 224 (1886). 10(f)

7. *Applicant's sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution.* 9(g)

   a. The facts supporting the claim are as follows: The lethal injection procedures and protocols followed by the South Carolina Department of Corrections fail to ensure, *inter alia*, that qualified personnel perform the tasks necessary to carry out a lethal injection without causing unnecessary pain and suffering, or that appropriately humane chemicals are administered during the execution process. Because of these and other deficiencies, South Carolina's methods for carrying out sentences of death by lethal injection are inconsistent with evolving standards of decency. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *In re Kimmler*, 136 U.S. 436 (1890). 10(g)

During the status conference on June 4, 2009, counsel for the Applicant advised the Court and opposing counsel that he was withdrawing amended ground 7 set out as 9(g) [Applicant's

sentence of death by lethal injection cannot be carried out because the procedures and policies for executing such a sentence presently followed by the State of South Carolina will result in unnecessary pain, torture and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution].[The Respondent had made a motion to dismiss the allegation on August 25, 2004 under SCCP 12(b)(1) and 12(b)(6) as beyond the jurisdiction of the court in a state post-conviction relief proceeding under *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000)].

During the proceeding on June 4, 2009, counsel for the Applicant also advised the Court and opposing counsel that he was abandoning ground five - allegation 9(e) [*Applicant's sentence of death may not be carried out consistently with the Eighth and Fourteenth Amendments to the United States Constitution because he has mental retardation]*. [The October 22, 2007 submission by the South Carolina Department of Disabilities and Special Needs opined that Stokes did not meet the diagnostic criteria for mental retardation].

Finally, during post-hearing briefing, the Applicant abandoned allegation 9(a). [*counsel's failure to object to the solicitor's mischaracterizations of life in prison during closing argument]*.

III.

GENERAL LAW RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to

deprive the defendant of a fair trial. 466 U.S. at 687. Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." Id. Rather, the court must place itself in the shoes of Stokes' attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland 's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Stokes bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-64, 2068, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." Id. at 689, 104 S.Ct. at 2065. Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. See Id. And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S.Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See Id. at 691-92, 104 S.Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different." See id. at 694, 104 S.Ct. at 2068.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S.Ct. at 2066; see Satcher v. Pruett, 126 F.3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066)).

9 (A) - Ineffective Assistance in Failing to Object to Penalty Phase Closing Argument.

In his first amended allegation, Stokes, through counsel, contends that counsel should have objected to the prosecution penalty phase argument about the impact of a life sentence in the Department of Corrections. This issue was specifically abandoned in the post-hearing briefing. This Court dismisses the ground for lack of prosecution.

9(b) - Ineffective Assistance of Counsel on Appeal - Failure to Hold A Charge Conference on Mitigating Circumstances.

9(c) - Ineffective Assistance of Counsel on Appeal - Failure to Brief Failure to Instruct on Statutory Mitigating Circumstance (b)(3) - the victim was a participant in the defendant's conduct or consented to the act.

In specification 9(b) and 9(c), the Applicant asserts that appellate counsel Joseph Savitz, Chief Attorney of the South Carolina Office of Appellate Defense was deficient in failing to present two separate grounds in the appeal - the alleged failure to hold a charge conference on the record and the particular failure to instruct on the statutory mitigating circumstance 16-3-20(C)(b)(3) that "the victim was a participant in the defendant's conduct or consented to the act." This Court concludes that appellate counsel cannot be found deficient because neither issue was preserved for review by objection or ruling by the trial court. He has failed in his burden of proof on the initial prong under Strickland v. Washington, 466 U.S. 668(1984). These claims must be dismissed.

Standard of Review for Ineffective Appellate Counsel Claims

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302

S.C. 535, 397 S.E.2d 523 (1990); Tisdale v. State, 357 S.C. 474, 475, 594 S.E.2d 166, 167 (2004) ; Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)(following Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. Id. at 285 (applying Strickland).

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, 463 U.S. at 754, 103 S.Ct. 3308. "Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. Holladay v. State, 629 So.2d 673 (Ala.Cr.App.1992), McCoy v. Lynaugh, 874 F.2d 954, 965-66 (5th Cir.1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. Smith

v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)." Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App.1998).

> " '[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.'

Jones v. Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). [5]

In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal ..., reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). see also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, " '[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring

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[5]The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. " 'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ' Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002): Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."). See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by this Court. See, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

WHAT THE RECORD SHOWED

The record reveals that at the outset of the penalty phase, Judge Burch made inquiry of the state and defense of the aggravating and mitigating factors it intended to pursue. Counsel Sims advised Judge Burch at that time that:

> ....under section B(3), ***the victim was a participant in the defendant's conduct or consented to the act, we think there is ample evidence in the record that the victim participated up to a point by being involved in the actions of the defendant at the time and we would think that it would be a mitigating circumstance.*** Your honor, we also intend to – what we consider to be mitigating, his adaptability to prison and there would be a third matter (which concerned the medical condition of Stokes).

ROA 1083, ll. 1-22. (Emphasis added).

In counsel Sims' opening penalty phase opening statement, he discussed their intent to present adaptability to prison evidence, but did not present any statement concerning the victim's involvement or provocation factor. ROA 1109.

Prior to the penalty phase closing arguments after the evidence was presented, Judge Burch declared that: "I'll review my checklist." ROA 1429. During the closing arguments, the solicitor made general references to evidence in mitigation concerning adaptability to prison. ROA 1446, 1451. Stokes made a personal statement of remorse. ROA 1459-1460. Counsel Sims made his argument concerning former warden James Aiken's testimony that Sims would never be a free man and in a maximum security prison and the factors for a maximum security prison. ROA 1466-1467.

Pre-charge objections were made which did not include either of the presently challenged issues. ROA 1468. During the jury charge, Judge Burch addressed mitigation circumstances. ROA 1479-1481. In particular, he stated: " Now there are such things as statutory mitigating circumstances which are not alleged or brought forth in this case and then there are what we call non-statutory mitigating circumstances ..." ROA 1480, ll. 3-6. Judge Burch did not instruct the jury to consider any specific statutory mitigating circumstance.

After the instructions, there were no objections to the failure to instruct any particular statutory mitigating factor nor the failure to hold an on the record charge conference. ROA 1486 (no objection to the charge by the defense).

During the PCR hearing, former appellate counsel Joseph Savitz declared that he reviewed the trial record, but did not highlight any portion where there was a discussion concerning whether the victim was provoked or was a participant in the crime. PCR Tr.p. 24. He concluded that he could not recall what he was thinking when he was preparing the brief, but suggested that it was something similar to what he had argued in *State v. Humphries*, *State v. Victor* and *State v. Evans*. He asserted that it was his opinion that trial judges should do more and specifically make inquiry as to each mitigating factor on the record. However, Savitz conceded that the Court ultimately said it was not required. PCR Trp. 25. He could not recall why he would not have argued to have the matters addressed on the record as he had been arguing in the same time period - albeit unsuccessfully. PCR 25.

On cross-examination, Savitz admitted that when he raised non-objected statutory mitigating factors that it was usually related to issues of intoxication. PCR 26. He admitted that he had reviewed the trial judge's instructions prior to briefing. PCR 27. He admitted that he realized that the judge did not instruct on any specific statutory factors. PCR 27, l. 13. He recognized that the trial judge further concluded that there were no mitigators in the case. PCR 27-28. Mr. Savitz further admitted that he reviewed the objections made to the jury instructions and determined that no objection had been made to the failure to give statutory mitigating circumstances. PCR 28, l. 8. He further was aware that there was no objection to the failure to have an on the record discussion concerning the mitigators. PCR 28, l. 9-12.

Counsel Savitz further admitted that he was aware of the existence of a statutory mitigating factor of the victim was a participant in the crime or consented to the act at the time of the briefing. PCR 28. Further, he acknowledged that he was aware of the existence of evidence in the record and the fact that the judge did not give the instruction. PCR 28-29.

However, Savitz questioned whether in *State v. Humphries* the Supreme Court had held that a failure to object to a trial court's failure to give an instruction did not preserve the issue for appeal. PCR 29. He felt that the Supreme Court did not resolve this procedural bar until the *Kamell Evans* case when he was arguing for a procedure to require the judge to go through each specific mitigating factor on the record. PCR 29. In admitted hindsight, Savitz stated that the judge has the discretion to hold a charge conference any time he wants to and admits that Judge Burch did hold a charge conference and mentioned the mitigator during the conference. However, Savitz stated that it was never mentioned again after the beginning of the penalty phase. Savitz suggested that he missed this issue and would have raised it had it seen it because this was an issue he was raising at the time in other cases. PCR 30. However, he recognized that he probably would not have won the issue, but thought that the law was uncertain at the time he briefed the appeal. PCR 30.

Savitz admitted that in *State v. Humphries* in 1993 the Supreme Court held that a failure to make a specific request for a statutory mitigating circumstance waived the right to raise the omission on appeal . He stated that he may have been missing the message that the Court was sending, because he still raised the issue in *Kamell Evans* contending that the law was uncertain concerning preservation of the issue. PCR 31-32. He admitted that in *Evans*, the Supreme Court made clear that a request for the factor had to be made to preserve the issue when it was not charged. PCR 33. However, he had no idea why he did not raise the issue in *Stokes* appeal brief. PCR 33, l. 5.

Counsel Sims conceded that he did not object to the failure to give the particular statutory mitigating circumstance instruction. PCR 65.

ANALYSIS

This Court concludes the Applicant has failed to show either deficient performance or prejudice under *Strickland v. Washington*. Appellate counsel Savitz cannot be *Strickland* deficient in failing to raise these two particular issues because neither issue was presented to the trial court by a timely objection on the record. Absent a specific request by counsel to charge a mitigating circumstance at trial, the issue of whether the mitigator should have been charged is not preserved for appellate review. *State v. Evans (Kamell),* 371 S.C. 27, 32, 637 S.E.2d 313, 315 (2006).

In *State v. Victor,* 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989), the Supreme Court set forth the proper procedure for submission of statutory mitigating factors to the jury in the penalty phase of a capital case:

> Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

See, *State v. Stanko*, 376 S.C. 571, 577-578, 658 S.E.2d 94, 97 - 98 (S.C.,2008) (not preserved).

One of the earlier cases addressing this assertion was handled by appellate counsel Savitz prior to his handling in the instant case resulted in rejection of the argument as not preserved. *State v. Humphries,* 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996). The Court has constantly rejected this claim absent request and objection , except in the intoxication evidence area which was corrected in *Evans*. The recent cases have stated that absent a request by counsel to charge a mitigating circumstance at trial, the issue whether the mitigator should have been charged is not preserved for

review. *See State v. Vazquez,* 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005); *State v. Bowman,* 366 S.C. 485, 494, 623 S.E.2d 378, 383 (2005); and *State v. Sapp,* 366 S.C. 283, 621 S.E.2d 883, n. 3 (2005).

In the instant case, trial counsel did not request an instruction on the particular statutory mitigator and did not object to the failure to give an instruction of the mitigating factors. ROA 1486-87. Since there was no objection, nothing was preserved for the appeal. Reasonable appellate counsel cannot have raised the issue on appeal since there was no objection. This Court concludes that appellate counsel Savitz was not deficient in failing to brief an unpreserved claim.

Further, there was nothing in the record to show that the trial court failed to hold a charge conference. Similarly, there was no showing that the defense objected to the lack of a charge conference to preserve the issue for an appeal. Appellate counsel cannot be found to be deficient when the issue was not raised at trial.

Since there is no showing that the trial court refused to hold a charge conference or that the defense objected to the failure to instruct on the particular mitigating factor, reasonable appellate counsel could not have been required under the Constitution to assert these unpreserved claims, particularly in 2000 when the appellant's brief was written after the decision in *Humphries.* His claims set forth in these two specifications must be dismissed. [6]

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[6]This Court does not need to address whether there was any evidence of the statutory mitigating factor that "the victim was a participant in the defendant's conduct or consented to the act" under Section 16-3-20(b)(3), because the specific request was not made by trial counsel and a Sixth Amendment claim of ineffective assistance of trial counsel is not raised. However, even if asserted as a trial counsel claim under the Sixth Amendment, the "prejudice" prong cannot be satisfied where the evidence revealed that the victim's death was the idea and the plan by the Applicant was to create a subterfuge. Simply put, Connie Snipes did not consent to the violence that was about to strike her involving the violent rape, stabbing, maiming and ultimately shooting. There is no reasonable probability that the result would have been different had request for the instruction

9(d) - Conflict of Interest - Thomas Sims as Prosecutor in 1991.

The Applicant in this specification asserts that counsel Thomas Sims had an actual conflict of interest in representing Stokes because he had previously personally prosecuted Stokes on Indictment 91-GS-38-0190 involving the December 2, 1990 incident involving the assault on Audrey Smith that 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. The record also reveals that Sims signed the indictment for assault and battery with intent to kill and personally handled the trial. Further, the evidence of the 1991 conviction and sentence was introduced by the State in the penalty phase in State Exhibit One in the chart [ROA 1110-1111] and also through the penalty phase testimony of Audrey Smith. It should be noted that counsel Sims cross-examined Smith in the matter. The record reveals that there is no indication on n the record before the jury that Sims had prosecuted Stokes.

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.

How This Issue Was Presented

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been made or if the instruction had been given. Any suggestion otherwise is groundless in light of this horrific factual record of malice against the victim.

Judge Shuler appointed Thomas Sims after initially appointing Virgin Johnson. A pretrial hearing was held on January 19, 1999 in Stokes presence by Judge Shuler. During the qualification, Sims noted that he was in the Solicitors Office from 1982 -1993. ROA 1502-1504. No objection is made to the representation by either Sims or Stokes. Nothing is stated on the record about Sims 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. In the penalty phase of the trial, the Solicitor indicates that he is presenting the chart, State Exhibit One, rather than the indictments to remove any potential prejudice. ROA 1085.

The Stokes-Audrey Smith Trial

This Court has before it the transcript of the March 12, 1991 trial of Stokes for the incident against Audrey Smith. Plaintiff Exhibit 1. 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 trial, Stokes was represented by Reddick Bowman. However, Stokes chose to waive his presence in court during the trial. 1991 Tr.p. 4-14. 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. 1991 Tr.p. 43. 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. 1991 Tr.p. 44. He later took out an extension cord and put it around her neck and held it tight until she became unconscious. 1991Tr.p. 46. She later woke up in the field and called 911 from a nearby house. 1991 Tr.p. 46-47.

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. 1991 Tr.p. 48-49. 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. 1991 Tr.p. 50. 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. 1991 Tr.p. 52-53. A little while after the friends left, she stated that they had sex. 1991 Tr.p. 53. She stated sometime after that he put the cord around her neck but she could not be definite about the time. 1991 Tr.p. 54.

Counsel Bowman then inquired of her concerning matters presented at a preliminary hearing. 1991 Tr.p. 56. 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. 1991 Tr.p. 59. She admitted that she was afraid of Stokes who did not let her talk to his friends, however, she did not scream in fear that date nor have any conversation with his friends. 1991 Tr.p. 60-61. She stated that they would not have help her anyway because they were his friends. 1991 Tr.p. 62.

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. 1991 Tr.p. 67-68.

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. 1991 Tr.p. 71-72.

Audrey Smith's Testimony in the 1999 Penalty Phase

In the State's case in aggravation in 1999, Solicitor Bailey put in record the following criminal record concerning Stokes:

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.

ROA. 1110-1111.

The state also presented the testimony of Audrey Smith, the Applicant's ex-wife who testified about incidents where Stokes assaulted her. The incidents included a November 1987 incident when Stokes held a knife to her throat which resulted in a tussle and her hands getting cut when she tried to grab the knife and held her hostage and threatened to kill her children and brother if she made a sound. ROA 1115-1117. She later attempted to call for her brother after he placed her in a ditch and Stokes stabbed her three times in the back and then he fled. ROA 1118-1119. She then stated she went to the hospital. ROA 1119. He was convicted in March due to that assault.

Ms. Smith next described an incident on December 2, 1990. ROA 1119. Stokes had gotten out on an early release program. Smith was staying at her mother's home. Stokes came by and they went for a walk up the hill implicitly to get something that a lady was making for him. However, he forced her to have intercourse with him and then went to the high school and gave her a letter that stated he was going to kill her that night. ROA 1120-21. She said they walked away and that Stokes

declared that he was looking for guns that he left in a field. Unable to find the guns, Stokes pulled out an extension cord with knots on it and put the cord around her neck and she passed out. When she awoke, she was bleeding and fled to the emergency room. ROA 1125. She stated that she was in the hospital for 3 to 4 weeks. ROA 1125. She stated that this included being in the regular part of the hospital for 8 days and then being placed in the Rose Center, a place for people with mental and emotional problems for 11 to 12 days to deal with returning to Branchville. ROA 1126. Smith testified that as a result of this assault on March 31, 1991, Stokes received aa ten year sentence. Id.

Smith testified that while being locked up he wrote her a series of threatening letters towards her or anyone who may attempt to aid her. State Exhibit 2, 3, 4, 5, 6, 7, 8. ROA 1127- 1138. She denied that she had ever done anything to cause him to stab her or attempt to strangle her. ROA 1138.

On cross-examination, defense counsel Simms had her confirm that Stokes had no direct contact with her after he got out of prison and had not come around or called her in 1998. She stated that it had been a couple of years since Stokes had written her. ROA 1139-1140. She asserted that Stokes had told her when they were having problems that he was on drugs and jealous, and possessive of her. ROA 1140 - 41. She confirmed that in a number of the letters Stokes wrote that he was asking to be able to talk and write him and that he was trying to get his head straight. Id.

On re-direct examination, she stated that she had to go to Branchville Police Department and the Parole Department to get the letters stopped. ROA 1141. [7]

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[7] The State also put into evidence various prison violations. 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.

ANALYSIS

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

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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.
ROA 1142-43.

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. ROA 1144. 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. ROA 1145 - 46. State Exhibits 10, 11, 12, 13. The photos revealed sutures and a number of cuts on Williams face. ROA 1147-49. There were 10 sutures. 1149-1150.

He stated that he was not aware of any other fights between Williams and Stokes. ROA 1151.

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, 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. ROA 1278-79. He described seeing Stokes hitting Windburn in the head numerous times. ROA 1279. It required Windburn being sent to the hospital. ROA 1279. 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. ROA 1283, l. 17-25. He stated there was nothing unusual about the punishment. ROA 1283-84.

On re-direct, this incident was described as a major infraction. ROA 1284.

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.

Testimony of Counsel

Counsel Thomas Sims testified at the hearing that he did recall representing the state in the 1991 Stokes prosecution. PCR 51. He stated that he signed the indictment and handled the prosecution, but did not recall the details at this time. PCR 52. He stated that he subsequently entered private practice after losing his race for Solicitor against Walter Bailey. PCR 52. He stated that he had no further involvement with Audrey Smith after the 1991 prosecution in any civil matter. PCR 53-54. Sims stated that he was appointed by Judge Shuler . He stated that during the qualification hearing, his prosecution trial experience was presented, but he did not specifically state that he had previously prosecuted Stokes at that time. He stated that the question was never asked. PCR 55.

Importantly, Sims stated that he discussed his prior prosecution with 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.

PCR 55. 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 said to Stokes:"if you want another lawyer you can get one." PCR 55. However, he testified that the discussion 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."

Sims opined that it was clear from his discussions that Sammie could have said he didn't want you as his layer and he said he wanted him to continue. PCR 56. In support of this understanding, Sims noted that after the trial and sentencing, after the Smith testimony and death sentence, that Stokes contacted him and told him that his appellate lawyer thought that they were going to win the case and that Stokes stated that he wanted Sims as his lawyer again "because you're top flight...I want you back." PCR 57. In fact, Sims did continue to represent Stokes on the remaining charges. PCR 57.[8]

Sims was firm in his recollection that Stokes never indicated any desire to have him removed as his layer in the case. PCR 58.

Counsel Sims stated that he was aware that the prosecution was providing him information concerning the statutory aggravating circumstances. PCR 58-59.He stated that he was aware that they planned to use letters that he had written his girlfriend and Stokes prior convictions . PCR 59. Sims stated that they talked about the matters in 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 and that Audrey Smith would testify in the penalty phase. PCR 59-60. He stated that he reviewed these matters with Stokes. PCR 60. 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. PCR 60.

Counsel Sims stated that he cross-examined Smith in the penalty phase. PCR 60. He denied that the fact that he had previously prosecuted Stokes for the same incident affected the manner that he handled the testimony. He stated that if he thought that he could not have represented Stokes to

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[8] Counsel Sims recollection of Mr. Jeffrey Bloom's role and advice was different that Mr. Bloom's. Particularly, he recalled contacting Mr. Bloom to assist , but that he was involved in a major trial in Aiken and would not not able to assist. PCR 57. Sims had no recollection of any discussion with Bloom concerning the conflict of interest issue. PCR 58.

the best of his ability that he would not have been in the case. PCR 61. He declared that there was nothing that he learned in the earlier prosecution that inhibited his defense. PCR 61.

Counsel did not recall whether they made any formal motion about the earlier prosecution in the 1999 trial, but thinks it was more fully developed in the record in the second case. Sims asserted that Virgin Johnson, his co-counsel, never expressed any concern about Sims continuing in the case. PCR 61.

On cross-examination, Sims stated that he research the admissibility of prior convictions prior to trial. PCR 68-69. He noted that other issues they researched concerned kidnapping, criminal sexual conduct and mitigation. PCR 71. He noted that he looked at *State v. Lyle* and Rules 404(b), 608 and 609. PCR 72. Counsel Sims stated that he attempted to present an argument in an attempt to keep out the prior convictions in the penalty phase, trying to rely upon these rules. PCR 74-80. Counsel stated that he was trying to keep out the evidence of the prior convictions. PCR 80.

Counsel Sims stated that he made sure that Stokes knew that he was the person who prosecuted him and had sent him to jail previously. PCR 83. He stated that they talked about the indictment that he had signed also. PCR 83. However, he stated that he could not stated that he asked him if he still wanted him on the case. PCR 83-84.

Counsel Sims again confirmed that he had no recollection of any discussion with Jeff Bloom concerning a conflict of interest. PCR 84. However, counsel Sims thought that there was a discussion with a judge at some time concerning the prior prosecution. PCR 85.

Counsel Sims, on redirect, confirmed that he anticipated that Audrey Smith would testify in the penalty phase. PCR 87. 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. PCR 87, ROA 1636.[9] It was agreed his name would be removed from any document being presented to the jury. PCR 87. See also, ROA 1085. Counsel Sims stated that he wanted to be sure that there were no slips ups in trial court concerning his name on the indictment. PCR 88.

Counsel Sims clarified that Stokes knew that he had been the one to prosecute him and his practice was to state that did he have any problems with that . Further, he recalled that after the trial Stokes wanted Sims to represent him again. Sims felt that Stokes knew that if he had any problem, he only had to speak up and let them know. PCR 88-90. He stated that Mr. Johnson was present during the discussions. PCR 89. Sims stated he knew that the state intended to introduce prior bad act evidence, that this information was included in his evidence in aggravation and that the state would try to introduce it. PCR . 89-90. Counsel stated that he expected the material to be introduced. PCR 93-94, 98. He re-confirmed that he anticipated the 1991 conviction evidence to be introduced prior to its introduction. PCR 98.

Co-counsel Virgin Johnson testified concerning his representation of Stokes in 1999. He stated that he was initially first chair, but when Mr. Sims was appointed, he became second chair. PCR 101. Johnson stated that at some point during the preparation he learned that Sims had prosecuted Stokes previously. Johnson stated that recalled Sims discussing the prior prosecution with Sammie at the beginning of his representation. He recalled Sims telling Stokes that he put him in jail and that Sammie recalled that Sims had been the prosecutor. PCR 102. Johnson stated that they went through questions of do you have a problem with me representing you, do you think - -

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[9]It is therefore evident to the State and Judge, as well as Sims about the potential introduction of the Audrey Smith evidence on October 14.

you know do you want somebody else and he [Stokes] said no. PCR 102, l. 8-13. Johnson confirmed that Stokes never requested other counsel be appointed throughout the trial. To the contrary, he asserted that their relationship was good throughout both trials. He also recalled after the conviction while the matter was on appeal, Stokes expressed a desire to have Sims represent him. PCR 102.

Johnson recalled Audrey Smith testifying at the trial concerning the prior assaults. Johnson recalled the fact that Stokes was told prior to the trial that the evidence of the prior conviction could possibly be presented. PCR 103. 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. PCR 104. He stated that Sims did his very best. The prior prosecution did not have any effect. PCR 104.

Johnson stated that in the discussions, we discussed the fact that it could be prejudice related to Audrey Smith's testimony. PCR 105. [10]

1. No Per Se Conflict of Interest.

This Court concludes, independent of the apparent waiver of the conflict of interests, there is no *per se* conflict based upon the prior prosecution involving a different crime. In *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233, 235 (S.C. 2007), the Supreme Court of South Carolina

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[10]In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. 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 . 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. 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. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.

As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. This Court has determined that Mr. Sims testimony is credible.

affirmed the state's lower appellate court on the conflict issue concluding that defense counsel prior prosecution of the defendant did not require removal as a conflict of interest. The 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 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, 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 did not claim an actual conflict, or move to be relieved based on his perception of a conflict. *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 the trial. In short, neither case law nor fact support Petitioner's position.

This Court distinguishes any reliance upon *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), provides that Petitioner was not required to show prejudice where his right to choice of counsel was violated. This Court does not disagree with that reading of the case; however, this is not a choice of counsel matter, and *Gonzalez-Lopez* is neither relevant or dispositive to the issue here. Stokes was represented by an appointed counsel and did not request the services of another whom he could retain or who would waive compensation. The particular right of counsel of choice evaluated in *Gonzalez-Lopez* was not invoked in the instant case involving court appointment. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 126 S.Ct. at 2561. Clearly, the resolution of the issue in *Gonzalez-Lopez* is not applicable to the present case with its differing factual underpinning. In fact, in regard to the factual basis posed by Petitioner, this Court finds that two of Petitioner's critical factual assertions lack support in the record.

The record is void of any attempt by the Applicant 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 the record 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. Similarly, in *Cobbs*, a former prosecutor had 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.

In this case, with at least a six (6) year lapse between Sims being a prosecutor, any divided loyalties argument must fail. Additionally, there was no connection between the former offense and the instant case. The only matter was the existence of the conviction - a proven fact - as evidence in aggravation 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 whom he never represented. There were no divided loyalties in the matter.

The simple fact of the former prosecution did not provide proof of a 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).

This Court alternately finds that there was a knowing waiver of a conflict of interest. SCACR, Rule 407, Rule 1.7(b)(1-2), wherein it essentially states that a lawyer should not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless:

1.) the lawyer reasonably believes the representation will not be adversely affected; and

2.) the client consents after consultation.

However, the comments to Rule 1.7 recognize that a client may consent to representation notwithstanding the conflict. However, it notes: "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Further, the comments noted that "there may be circumstances where it is impossible to make the disclosure necessary to obtain consent."

In United Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1991), the court set out factors which may be used in

1.) the nature of the litigation;

2.) the type of information the lawyer may have access;

3.) whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the representation; and

4.) the issues in dispute.

See generally, Jarvis and Tellum, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflict. 33 Williamette L. Rev. 14t (1997).

In A.B.A. Formal Ethics Opinion, 92-367 (Oct. 16, 1992), the committee opined that cross-examination of an adverse witness who is a client creates a disqualifying conflict, in the absence of appropriate client consent, depending upon the nature and degree of the conflict. As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

As stated above, in most cases when a defendant is faced with a situation in which his attorney has an actual or potential conflict of interest, it is possible for him to waive his right to conflict-free counsel in order to retain the attorney of his choice. U.S. v. Schwarz, supra., citing U.S. v. Kliti, 156 F.3d 150, at 153 (2d Cir. 1998) and U.S v. Blau, 159 F.3d 68 at 7 (2d Cir. 1998). Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because

the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver.

Not all conflicts may be waived, however. An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. See Kliti, 156 F.3d at 153; Levy, 25 F.3d at 153. Under such circumstances, the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel. See Levy, 25 F.3d at 153.

In Schwarz, the Second Circuit described the distinction between waivable and unwaivable conflicts citing United States v. Fulton, 5 F.3d 605 (2d Cir.1993). Fulton involved the representation of a defendant by an attorney who had been accused of participating in criminal activity related to the crimes for which the defendant was on trial. See id. at 607-10. The district court had advised the defendant of the conflict and had obtained a waiver. See id. at 608. On appeal, the defendant argued that the waiver was ineffective. See id. at 612.

The Second Circuit agreed and noted that, "[i]n such cases, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant." Id. at 613. The Court distinguished between conflicts that implicate the attorney's self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are "of a different character" than the latter. Id. The Court concluded that because the conflict at issue there resulted in counsel's "[a]dvice as well as advocacy [being] permeated *by counsel's self interest*, and [because] no rational defendant would knowingly

and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation," the conflict was not waivable. Id. (Emphasis added).

Although the particular conflict at issue in Fulton belonged to that narrow category of conflicts that courts have deemed to be *per se* violations of the Sixth Amendment right to counsel, see id. at 611-12; Solina v. United States, 709 F.2d 160, 168-69 (2d Cir.1983), Fulton 's rationale with respect to when an *attorney's self-interest* renders a conflict unwaivable is equally applicable to the unusual facts of Schwarz. The lawyers's representation of Schwarz was in conflict not only with his ethical obligation to the PBA as his client, but also with his own substantial self-interest in the two-year, $10 million retainer agreement his newly formed firm had entered into with the PBA. Like the conflict in Fulton, Worth's conflict "so permeate[ed] the defense that no meaningful waiver could be obtained." Fulton, 5 F.3d at 613. The Court held that: "[w]e must assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, Worth would sacrifice Schwarz's interests for those of the PBA. Indeed, we think it likely that these very concerns motivated the government to argue to the district court at the *Curcio* hearing that the conflict created by the PBA retainer could not be waived. Thus, we conclude that the conflict between Worth's representation of Schwarz, on the one hand, and his ethical obligation to the PBA as his client and his self interest in the PBA retainer, on the other, was so severe that no rational defendant in Schwarz's position would have knowingly and intelligently desired Worth's representation. Cf. id. ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); cf. also United States v. Arrington, 867 F.2d 122, 129 (2d Cir.1989) (upholding district court's disqualification of attorney "saddled" with serious conflict where allowing waiver would have required defendant to "forego[ ] the

presentation of ... evidence that would [have been] of great assistance")." The Schwarz court found that the conflict was unwaivable.

Schwarz is distinguishable from the present case. In Schwarz, the government charged the defendant, a police officer, with assaulting a victim in a bathroom at a police precinct. Id. at 79-80. There, the law firm of defendant's trial counsel had a $10,000,000 retainer agreement with the police officers' union, the Patrolman's Benevolent Association (the "PBA"). Id. at 91. During the criminal proceedings, the victim filed a civil lawsuit against the PBA alleging that the PBA through its agents and its president conspired to injure him and then covered it up. Id. The Second Circuit found an actual conflict existed between trial counsel's personal interest and professional obligation to the PBA and his representation of the defendant. Id. at 91-92. In particular, the defendant's interest in making a defense that would implicate another police officer in the assault--a strong, obvious interest--diverged with trial counsel's interest in refraining from any conduct that could harm the PBA, for example--making an argument that supported the conspiracy theory in the victim's civil lawsuit. Id. at 91-92.

In Schwarz, trial counsel had a personal interest and professional obligation to another client that differed from his criminal client. Also, trial counsel refrained from making a particular defense in the criminal case because it ran counter to another client's interest.

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. As such, Schwarz does not support the defendant's position. See U.S. v. Peterson, 233 F.Supp. 2d 45 (E.D.N.Y. 2002).

In clarifying the narrow approach of the unwaivable conflict issue and application of Schwarz, the Second Circuit recently stated:

> As we made plain in Fulton, however, *lesser conflicts,* such as an attorney's representation of two or more defendants *or his prior representation of a trial witness, are generally waivable.* See United States v. Fulton, 5 F.3d at 613. *Although such a conflict might require a defendant to abandon a particular defense or line of questioning, he can be advised as to what he must forgo*; he "can then seek the legal advice of independent counsel and make an informed judgment that balances the alteration in the trial strategy against the perceived effect of having to get a new and perhaps less effective defense counsel." United States v. Fulton, 5 F.3d at 613. In the multiple representation situation, the defendant "can be advised by independent counsel of the dangers" of such matters as "one defendant's cooperating with the government," and make a knowing and intelligent decision that he wishes to continue to be represented by his attorney despite the attorney's representation of another accused. Id. Where the defendant can rationally opt to retain counsel of his choice despite a conflict, the court conducts a Curcio hearing to determine whether the defendant knowingly and intelligently waives his right to conflict-free representation. See, e.g., United States v. Leslie, 103 F.3d 1093, 1098 (2d Cir.), cert. denied, 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997); United States v. Levy, 25 F.3d at 153.

U.S. v. Perez, 325 F.3d 115 (2d Cir. April 4, 2003) (attorney's status as potential witness at defendant's trial was conflict of interest that was waivable).

This case is similar 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 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.

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. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed. [11]

CONCLUSION

For all the foregoing reasons, the entire Application for Post-Conviction Relief must be denied and dismissed. This Court finds that the Applicant has failed in his burden of proof in this proceeding. Therefore, this Court is constrained to deny the application for post-conviction relief in its entirety.

AND IT IS SO ORDERED this 21 day of October, 2010.

L. CASEY MANNING
Presiding Judge

[11] This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

Orangeburg County, South Carolina