No. _____
(Capital Case)

IN THE
Supreme Court of the United States

STEPHEN C. STANKO, Applicant/Petitioner

v.

BRYAN STIRLING, Director, South Carolina Department of Corrections, and Lydell Chestnut, Deputy Warden Broad River Correctional Institution, Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED (CAPITAL CASE)

South Carolina sentenced Mr. Stanko to death in each of two trials, the first in Georgetown County, the second in Horry County. Before the Court is the federal habeas corpus application resulting from the Horry County judgment.

In the Georgetown County case, subsequently doubly disbarred trial counsel William Diggs pursued a strategy that was legally untenable and outside the professional norms of capital defense: a not guilty by reason of insanity (NGRI) defense predicated on anti-social personality disorder (ASPD) sabotaging available mitigating evidence, resulting in a conviction and death sentence. While Diggs was the subject of numerous post-conviction claims of ineffective assistance of counsel (IAC) in that case, the Horry County trial court appointed Diggs to represent Stanko again. The State moved to remove Diggs due to an unwaivable conflict. Despite Stanko's known traumatic brain injuries and the failure to properly advise him of the consequences of the conflict, the trial court accepted Stanko's purported waiver. Diggs pursued the same legally untenable defense before the second jury, which he conducted at the expense of any credible mitigation during the sentencing phase.

In the Horry County post-conviction, the state courts repeatedly denied funding for expert services for presenting Stanko's substantial brain damage. In habeas corpus, the District Court, under supervision of the Chief Justice of the Court of Appeals, deemed such services "reasonably necessary" pursuant to 18 U.S.C. § 3599(f). High-resolution brain imaging was finally conducted via the District Court's transport authorization, but before the funded experts could even obtain the resulting data for analysis, that Court granted summary judgment dismissing the petition. The Fourth Circuit then deemed that a certificate of appealability under 28 U.S.C. § 2253(c) was needed for the non-final order depriving Stanko of these authorized expert services.

Stanko asks this court to consider the following issues:

1. Does 28 U.S.C. § 2253(c)(1)(A) require a certificate of appealability for review of an order prematurely granting summary judgment against the petition, effectively depriving the use of expert services under § 3599?

2. a. Can a capital defendant waive his attorney's actual conflict against him that adversely affects counsel's representation?

2. b. Can a defendant suffering traumatic brain injury with related psychological impairments who is not advised of to the consequences knowingly, voluntarily, and intelligently waive his capital counsel's conflict against him?

PARTIES TO THE PROCEEDINGS BELOW

Stephen C. Stanko, Applicant and Petitioner/Appellant below.

Bryan Stirling, Director, South Carolina Department of Corrections, and Lydell Chestnut, Deputy Warden Broad River Correctional Institution, Respondents and Respondents/Appellees below [hereinafter, collectively "the State" or "Respondents"].

CORPORATE DISCLOSURE STATEMENT

For purposes of Rule 29.6, no party to the proceedings in the Fourth Circuit is a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

State v. Stanko, No. 2005-GS-26-2927 (Horry County Ct. of General Sessions) (Nov. 18, 2009, convicted) (Nov. 19, 2009, sentenced to death).

State v. Stanko, No. 27224, 402 S.C. 252, 741 S.E.2d 708 (S.C. 2013) (Feb. 27, 2013, affirmed) (Apr. 3, 2013, rehearing denied).

Stanko v. South Carolina, 134 S. Ct. 247 (2013) (petition for writ of certiorari denied).

Stanko v. State, No. 2014 CP-26-00035 (S.C. Court of Common Pleas) (May 18, 2016, PCR petition dismissed).

Stanko v. State, No. 2017-002281 (S.C. Sept. 19, 2019) (denial of petition for writ of certiorari in PCR) (Nov. 4, 2019, remittitur issued).

Stanko v. Stirling, No. 1:19-03257-RMG, 2022 WL 22859294 (D.S.C.) (Mar. 24, 2022, petition for writ of habeas corpus dismissed on summary judgment) (July 1, 2022, order denying Rule 59(e) motion).

Stanko v. Stirling, Case Nos. 22-2(L) & 22-3, 109 F.4th 681 (4th Cir 2024) (July 29, 2024, affirmed).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen C. Stanko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Mr. Stanko was capitally prosecuted in two South Carolina proceedings, first in Georgetown County in 2006 and then in Horry County in 2009. The second of these is the subject of the federal habeas corpus litigation now before this Court.

In Stanko's first trial, Mr. William Diggs was appointed and advanced a theory of the case that, as Diggs recognized, was not viable under South Carolina's not guilty by reason of insanity (NGRI) statute. *See* App.051–069. Diggs thus attacked the NGRI statute's preclusion of a liability theory founded upon a theory of anti-social personality disorder (ASPD), firing a volley of pre-trial motions to that end that were summarily rejected in the Georgetown County Court of Common Pleas. Undeterred, Diggs proceeded with his theory of an NGRI defense for Stanko—which he committed to without obtaining Stanko's mental health evaluation—and predictably obtained his client's conviction and sentence of death.

While Stanko headed to his second trial, in Horry County, his Georgetown post-conviction counsel pleaded Diggs's ineffective assistance. As Diggs was appointed in the Horry County case (by the judge in the Georgetown County case, appearing by special appointment), the potential conflict was noted. After Stanko initiated PCR in Georgetown County, raising ineffective assistance of counsel (IAC) claims related to Diggs's representation, and despite Diggs's express intent to espouse the same

Quixotic NGRI defense, the Horry County judge denied the State's motion to replace Diggs owing to his "unwaivable conflict," accepting Stanko's un-advised purported waiver of his attorney's conflict against him. Diggs brought an identical slew of pre-trial motions attacking the constitutionality of South Carolina's NGRI statute and again met defeat. Diggs put on a materially indistinguishable defense for Stanko in Horry County—to deviate from his jarringly wrongheaded approach in the first trial would embody an admission of his prior deficient performance. Laboring under this perhaps unique conflict of interest, due to reputational interests and immediate financial imperatives from sustaining the second appointment for Stanko, Diggs was certain to double down on his same moribund theory of the defense used in the first trial. And Diggs did just that. Predictably, his dehumanizing, reductive, and erroneous presentation of his client as a psychopath, eliciting comparisons to Ted Bundy and Jeffrey Dahmer and false testimony that Stanko's family had disavowed him obtained the same outcomes as transpired in the first trial.

In Stanko's Horry County post-conviction proceedings, his appointed counsel's repeated strenuous efforts to secure resources to analyze Stanko's brain imaging were denied, as was his entire petition.

In the District of South Carolina, Stanko's counsel appointed under 18 U.S.C. § 3599 secured District Court authorization, expressly approved by the Fourth Circuit's Chief Judge, for various brain and mental health related specialists pursuant to the "reasonably necessary" standard of § 3599(f). Under the one-year statute of limitations, Stanko's pleadings were due in the early days of the COVID-

19 pandemic. The massive upheaval of society and institutions profoundly impeded the development of his case. Nonetheless, pleadings were filed and the use of the authorized specialist services, especially those of a brain imaging neuroscience expert, were anticipated. In the throes of the worst of the pandemic in North America, the neuroscientist literally dismantled his research laboratory to distribute human and other resources to aid his research hospital in attending to the severely ill and combating the virus.

When the expert was able to take steps toward resuming his expert services, and only then, he realized that the previous brain imaging of Stanko was not up to the specifications used for the quantitative data analysis that he conducts. Thus, it emerged in 2021 that new brain imaging of Stanko was needed. The District Court thus authorized Stanko's request for substantial funding to conduct such imaging and a transport order from prison to an imaging facility. Three weeks after Stanko's transport and imaging—and before the hospital could deliver the resulting imaging data to the neuroscientist for analysis—the District Court granted the State's summary judgment based only upon pleadings submitted almost entirely without the use of the "reasonably necessary" authorized specialist services, including and especially, of course, those of the neuroscientist.

Further, the District Court elided Diggs's conflict of interest against Stanko and its severe negative effects on the Horry County proceedings while endorsing the state courts' opinions that Stanko competently waived the unwaivable conflict, notwithstanding his established traumatic brain injuries and mental illness and the

failure of both Diggs and the trial court to supply independent guidance to Stanko as to the conflict.

After granting a Certificate of Appealability under 28 U.S.C. § 2253(c)(1)(A) on four issues, a panel of the Fourth Circuit held oral argument wherein, despite extensive briefing by both sides on the District Court's foregoing deprivation of expert services for brain imaging data analysis, the notion that Stanko needed a COA in relation to the denial of his Rule 59(e)—rather than the underlying denial of his habeas corpus case—for the Court of Appeals to entertain the denial of § 3599(f) rights emerged. In its opinion, the panel departed from very well-worn precedents within the circuit and, critically, splintered what had been consensus among the circuits on the application of § 2253(c)(1)(A).

Certiorari is warranted here to address the Fourth Circuit's splitting off from the other circuits. Further, summary reversal is also warranted to remedy the lower courts' grave mishandling of the decidedly "reasonably necessary" expert services of which the District Court deprived Stanko by virtue of its precipitous closure of the habeas corpus case before, by no fault of his own, he could meaningfully plead the bulk of his claims for relief. In addition, the blind eye the state and lower federal courts have turned to the ruinous course of representation of conflicted counsel, who was subsequently disbarred in North Carolina and South Carolina for grave misconduct during the time of his representation of Stanko, too requires such reversal.

OPINIONS BELOW

The July 29, 2024, opinion of the United States Court of Appeals is published. *Stanko v. Stirling*, 109 F.4th 681 (4th Cir. 2024). The March 24, 2022, opinion of the District Court of South Carolina is available in the Westlaw database. *Stanko v. Stirling,* No. 1:19-03257-RMG, 2022 WL 22859294 (D.S.C. 2022).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (providing for review upon grant of a writ of certiorari of cases in the federal courts of appeals).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28 U.S.C. § 2253 provides, in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

Title 28 U.S.C. § 2254 provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Title 18 U.S.C. § 3599(f) provides, in relevant part:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

South Carolina Statues Annotated, § 17-24-10 (2005) is included in full in the appendix accompanying this Petition. App.048.

STATEMENT OF THE CASE

A. Trial Court Proceedings

1. Georgetown County Trial: Counsel's Failed NGRI Strategy and Deficient Mitigation Investigation.

Prior to the Horry County proceedings at bar, on August 11, 2006, and August 18, 2006, respectively, Stanko was convicted and sentenced to death in a separate proceeding in the State of South Carolina in the Court of General Sessions for Georgetown County. App.353–354. In that trial for six charges including murder, in the death of his girlfriend and assault of her daughter (*State v. Stanko*, 658 S.E.2d 94, 95 (S.C. 2008)), the court appointed William Diggs and Gerald Kelly to represent Stanko. After unsuccessfully challenging the constitutionality of statutes prohibiting presenting a not guilty by reason of insanity (NGRI) defense premised on antisocial personality disorder (ASPD) (App.051–069), Diggs presented an ASPD theory of the case in pursuit of an NGRI liability verdict, to the detriment of a meaningful mitigation investigation and presentation in the penalty phase. *See* App.362–363 and

sources cited therein. Diggs committed to this strategy before conducting any type of mental health evaluation of his client: at the March 17, 2006, hearing of Stanko's motion to remove Diggs from the case due to Stanko's frustration that Diggs had not yet conducted any expert evaluation, Diggs said that he had engaged and expert, but then switched to find an expert that would go along with his strategy. *State v. Stanko*, No. 2005-GS-2200918, ROA.3585–89 (Vol. 8)[1]. Diggs engaged Dr. Sachy because he knew he was amenable to Diggs's pre-determined strategy from Sachy's work in a Georgia case. App.081. The Supreme Court of South Carolina affirmed the Georgetown County judgment in *State v. Stanko*, 658 S.E.2d 94 (S.C. 2008). On October 13, 2008, Stanko initiated post-conviction review proceedings ("PCR"), eventually raising eight distinct claims of ineffective assistance of trial counsel concerning the foregoing performance in the liability and penalty phases. App.204–209, App.210–218.[2]

At the April 27–28, 2015 evidentiary hearing, Diggs testified in opposition to Stanko's IAC claims. He said that Dr. Sachy told him Stanko "was legally insane, met the definition of insanity." App.075. He testified, grossly contrary to defense norms, that if the insanity defense failed "then it would certainly be a mitigating factor in the sentencing. . . . I didn't see a downside in presenting it at the guilt phase." He

[1] Available at https://ctrack.sccourts.org/public/caseView.do?csIID=40270. The State included a substantial but incomplete portion of the Georgetown Record in the District Court in this case. The District Court later granted Stanko's motion to supplement the record with the full set. App.085–089.

[2] At the December 8, 2008, Georgetown PCR hearing, Stanko and Judge Baxley discussed the "conundrum" of keeping Diggs in the Horry County case (infra) while pleading IAC here. App.121–123.

acknowledged the unmistakable, *viz.*, that state law did not permit the defense he continued to pursue even after denial of his pre-trial motions challenging the statute. App.076. He testified that it could be a reasonable legal strategy to compare your client to Ted Bundy, who was convicted of thirty-six murders and thought to have committed over a hundred. App.077 ("I think reasonable minds can disagree on that."). He said of testimony comparing Stanko to John Wayne Gacy, who was convicted of sexually assaulting, killing, and eating some thirty-three young boys, that he "didn't think it distracted from the merits of the defense we were presenting." App.079–080. He acknowledged that he told the jury "that not even his family would come to support him" at trial. App.082. He dug in, defending his decision not to argue or submit certain mitigators because he believed they were inconsistent with his insanity defense. App.083. He believed he should not do anything inconsistent with his chosen defense, and if the law foreclosed that defense, his obligation was to tell the jury not to follow the law because he believes it is unconstitutional. App.084.

Ultimately, on June 20, 2024, the state supreme court declined to review denial of post-conviction, and federal habeas corpus proceedings are underway. *Stanko v. Stirling*, No. 1:24-cv-04109-RMG-SVH.

2. Horry County Trial: Diggs's Actual Conflict Is Deemed Waived.

On August 5, 2005, a Horry County grand jury true billed a two-count indictment of Stanko consisting of one count of murder under S.C. Code Ann. § 16-3-10 for the April 8, 2005 death of Henry Turner, and armed robbery under § 16-11-330(A). App.150.

On November 15, 2006, Diggs was once again appointed for Stanko, this time by Judge Baxley presiding in the Court of General Sessions for Horry County by special appointment. App.106–112. Counsel from the Public Defender told the court their office is "overwhelmed with the caseload that we presently have." App.111. Although Diggs informed the court that Stanko had filed a motion to remove Diggs from his Georgetown County case and substitute in David Axelrod, "the underlying factual scenario that played out in that situation has created a conflict" that would bar Axelrod's appointment as Diggs's second chair in this case. App.112. Judge Braxley questioned Stanko with no counsel present. App.115–118. Without receiving any advice, Stanko told the court "I'm not an idiot to the law, and I don't and would not raise any kind of argument concerning Mr. Diggs and his representation." App.118. Subsequently, Ms. Brana Williams joined Diggs as the second chair at trial by her appointment on February 23, 2007. App.171.

At the March 4, 2009, hearing reviewing Diggs's appointment by Judge Baxley, Judge John remarked that the appointment was "at least questionable, if not inconsistent" in light of the IAC claims Stanko raised against Diggs in the Georgetown County PCR. App.127. Judge John recognized that the conflict would adversely affect Diggs's performance noting that Diggs could no longer discuss the Georgetown representation with Stanko. App.127. Stanko told Judge John that he was confident Diggs would learn from his mistakes and do things differently.[3]

[3] But Diggs had already promised Judge Baxley "a significant savings" because he would not need a mitigation investigator because the defense meant to rely on the what was done in Georgetown County. App.113–114.

App.128. Judge John determined that Stanko "definitely wants Mr. Diggs to remain as his trial counsel." App.129.

On April 28, 2009, the State filed a motion submitting that "a non-waivable conflict of interest exists between William L. Diggs Esquire, and the defendant, in that the defendant has, by the filing of his Post Conviction Relief petition, already waived attorney-client privilege in connection with the companion case," and observing that Diggs "intends to offer a similar defense and similar mitigation utilizing the same experts from the companion case" and that "waiver of the attorney-client privilege in the companion case would materially limit representation" in this case. App.172–173. The State also argued that "waiver of the attorney-client privilege in the companion case would materially limit representation" in this case.[4]

On June 5, 2009, Judge John conducted a hearing on the State's motion. App.132–148. Second chair Williams informed the court that nothing had changed since the prior April discussion of the matter, and the court ascertained that Stanko still wanted Diggs on the case. App.137–138.[5] No one apprised Stanko of the consequences of waiver, that the NGRI strategy Diggs adopted was outside the norms

[4] Diggs would be disbarred in North Carolina and South Carolina for conduct during the period he represented Stanko in Horry County. App.377–378. This conduct—stealing from client trust accounts and repeatedly failing to disclose disciplinary proceedings he was obliged to disclose—displays likely financial difficulties. It also demonstrates a pattern of withholding required information. Diggs's financial straits provide an underlying conflicted interest in continuing his appointment in Horry County. App.364 n.16, App.365–366, App.376–378.

[5] Judge John remarked that this is the third time addressing the issue, referencing the November 15, 2006, appointment hearing before Judge Braxley. App.137. But that hearing took place nearly two years before Stanko initiated the Georgetown County PCR proceedings alleging IAC of Diggs's representation on October 13, 2008.

of capital representation, or that professional norms had established a far better way of mobilizing evidence of brain trauma. Stanko again expressed confidence that any prejudicial deficient performance in the Georgetown case would not be repeated. App.142. The State pointed out that neither of the hearings on the conflict addressed the issue of waiver of the attorney-client privilege, but in affirming Diggs's appointment, the court inexplicably said that that "fact has no [e]ffect on, on this particular trial." App.143.

At trial, Diggs pursued the same untenable NGRI strategy including a substantively identical set of pre-trial motions challenging the South Carolina statutes. App.151–170. That strategy again failed, and Stanko was convicted and sentenced to death in Horry County also. App.098–101. As noted, Diggs's strategy, far outside the professional norms of capital representation,[6] entailed presenting his client to the jury as a psychopath, which included eliciting testimony comparing him to notorious serial killers Ted Bundy and Jeffrey Dahmer. App.203, App.201–202. He also elicited false testimony that Stanko's own family had disavowed him, further dehumanizing his client, and ensuring the worst outcome. App.366, App.103–104.

The predictable result was verdicts in conviction (November 16, 2009) and death sentence (November 19, 2009). App.099–102, App.097.

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[6] "This diagnosis [ASPD] is not only very harmful but, unfortunately for many of our clients, it is often arrived at erroneously." John Blume, *Mental Health Issues in Criminal Cases: The Elements of A Competent and Reliable Mental Health Examination*, The Advocate, Ky. DPA (Aug. 1995) at 10–11, available at https://secure.in.gov/ipdc/files/Elements-of-Competent-Reliable-MH-Evaluation.pdf (cited American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 956 n.93 (2003))

Direct appeal began in May 2012. App.174. After the parties' briefing, the South Carolina Supreme Court affirmed the trial court judgment on February 27, 2013. *State v. Stanko*, 741 S.E.2d 708 (S.C. 2013) (*Stanko II*). Stanko sought rehearing on the denial of his direct appeal, which was denied on April 3, 2013. *State v. Stanko*, No. 2010-154746 (S.C. Apr. 3, 2013). App.175–176.

On October 7, 2013, the United States Supreme Court denied Stanko's petition for writ of certiorari from his direct appeal decision. *Stanko v. South Carolina*, 571 U.S. 902 (2013).

B. Post-Conviction Relief Proceedings

1. PCR Counsel Were Unable to Litigate Colorable Claims Because the Trial Court Refused Adequate Funding.

At PCR, Stanko's counsel made a clear record that they provided ineffective assistance because they were denied adequate funding to present colorable claims.

Following the October 7, 2013 denial of certiorari (*supra*), Stanko properly filed his state PCR petition, which was assigned to the Court of Common Pleas, Fifteenth Judicial Circuit, Hon. Benjamin H. Culbertson. Judge Culbertson presided over the "initial-review collateral proceeding," as that term is used in *Martinez v. Ryan*, 566 U.S. 1, 4 (2012) (*infra*).

On April 1, 2014, post-conviction counsel filed an *ex parte* motion for expert funds in excess of the statutory limit, as "reasonably necessary for the representation of the defendant." App.219–221. Counsel sought funding for: (i) a fact investigator necessary to follow up on facts revealed by post-conviction counsel's initial records review and preliminary investigation steps which revealed facts that if true suggest

colorable claims of juror bias, juror misconduct, ineffective assistance of counsel at jury selection, and ineffective assistance in failure to investigate and rebut the state's case that Stanko is "a con-man with violent tendencies"; (ii) a mitigation investigator to investigate what was revealed in consultation with the Georgetown mitigation investigator, that trial counsel unreasonably limited mitigation investigation due to his fixation on an NGRI defense and baseless predetermination that a "psychopath" diagnosis would be the only outcome from a mitigation inquiry; and (iii) a forensic psychologist to investigate the relationship between Stanko's life history and potential brain damage and/or mental illness. App.225–232. On April 29, 2014, the court granted the motion as to the mitigation specialist only, denying the other two funding requests. App.250–260. The court said that the motion failed to say what facts it turned up that would necessitate a fact investigator, and that a forensic psychologist is not reasonably necessary without "more substantial indication that [Stanko] suffers a mental illness other than being a psychopath." App.255, App.258.

On May 8, 2014, post-conviction counsel filed a motion to reconsider, arguing, inter alia, that lead trial counsel's obsession with NGRI and the "psychopath" diagnosis foreclosed any meaningful investigation of other mental illness or brain damage. App.261–272.

On June 3, 2014, the court partially granted the motion to reconsider (for limited fact investigation), but altogether denied funding a forensic psychologist, reasoning that under the statute, S.C. Code Ann. § 17-27-160, funding cannot be

granted "until after the services are performed and a beneficial result obtained." App.273.

On July 28, 2014, post-conviction counsel filed a second motion for expert services, which included a request for a licensed social worker (LSW) to investigate Stanko's social and family history. App.274–287. The motion detailed that the LSW, Dr. Andrews, had already begun work without a funding order: having reviewed documents, met with Stanko, and interviewed one family member. Dr. Andrews provided a detailed listing of what must be done to complete the work, something she could not do without funding. App.280–283.

On September 25, 2014, the court denied the second funding motion, again stating that the statute permitted funding only after services were performed and shown to be necessary. App.288–290.

On October 14, 2014, counsel filed a motion to reconsider (App.291–315), noting that the court's interpretation of the statute put Stanko in an "impossible and unprecedented bind." App.298. The motion placed on the record that denial of funding will result in ineffective assistance of post-conviction counsel, creating a *Martinez* exception (*supra*) in federal court. App.298–300. With a merits hearing of the petition for post-conviction relief set to begin on March 2, 2015, on January 6, 2015, counsel filed a brief in support of the motion to reconsider the second funding motion (App.316–321, App.322–343), and a motion to continue the merits hearing until nine months after the disposition of the funding motion to provide time to conduct the

necessary investigations (App.177–193).[7] On February 27, 2015, the court denied four motions, including the motion to reconsider the second funding motion and the motion to continue the merits hearing. App.198–199. The court used a form denial and offered no reasoning. *Id.*

Meanwhile, on February 3, 2015, Stanko's counsel petitioned the South Carolina Supreme Court for oversight of the post-conviction action in order to raise the deprivation of adequate funding for investigation and experts and to seek a continuance permitting proper preparation for a merits hearing on Stanko's PCR application scheduled for March 2, 2015. App.195.

After the State's response and counter-request to release the *ex parte* funding requests and Stanko's reply, the Supreme Court of South Carolina denied the requests on February 25, 2015. App.196. On March 2, 2015, the PCR hearing commenced as scheduled. App.200.

The PCR court ultimately denied the application by an order signed May 13, 2016. App.344–352. On March 1, 2018, the Supreme Court of South Carolina appointed Stanko's PCR counsel, Ms. Lindsey Vann, and permitted co-counsel, Ms. Emily Paavola, to serve in a pro bono capacity to petition the court for certiorari review. App.355.

[7] As in the state supreme court proceedings, infra, the continuance motion triggered State's motion to unseal all these *ex parte* funding pleadings and orders. App.194.

2. PCR Appeal

On October 31, 2019, the South Carolina Supreme Court denied Stanko's petition for rehearing of its September 19, 2019, affirmance of the denial of his state PCR application. App.356–357.

Subsequently, Diggs was disbarred in both North Carolina and South Carolina for egregious professional misconduct, including misappropriation of client trust funds and repeated failures to make required disclosures of disciplinary actions. App.377–378.

C. Federal Habeas Proceedings

1. From the Beginning, the Parties Anticipated Investigation Beyond the State Court Record.

On November 19, 2019, the Court of Appeals appointed counsel for Stanko pursuant to 18 U.S.C. § 3599 and initiated the habeas corpus litigation with a scheduling order. App.090–096. The year prior, this Court clarified that the entitlement of capital petitioners to specialist services pursuant to § 3599(f) arises when, under the plain meaning of the statutory terms, such services are "reasonably necessary" for presenting constitutional claims. *Ayestas v. Davis*,584 U.S. 28, 45–46 (2018).[8] The District Court, acting "with the concurrence on May 5, 2020, of Chief Judge Roger L. Gregory, Court of Appeals for the Fourth Circuit," approved Stanko's

[8] *Ayestas* holds that while the term "reasonably necessary" does not mean the services are absolutely "essential" to the representation, the correct standard "requires courts to consider the potential merit of the claims that the applicant wants to pursue" in addition to "the likelihood that the services will generate useful and admissible evidence." *Id*. at 46–47.

request for specialist services, including those of neuroimaging expert Prof. Ruben C. Gur, which would explore evidence that was not developed in the state court record due to deficiencies in that process but would be cognizable in these proceedings pursuant to the equitable rule in *Martinez* (*supra*), finding the requisite necessity of such services.

Recognizing the need to investigate evidence outside the record and the barrier, due to the global pandemic, to timely achieving that evidentiary development within the statute of limitations, the parties entered into an agreement under which Stanko would file a timely First Amended Petition pleading only record-based claims, to be followed by a subsequent amendment raising "additional habeas corpus claims beyond those contemplated" in that petition. App.358–361.

2. New Brain Imaging, Quantitative Analysis, and Other Specialist Services Were Again Deemed Reasonably Necessary.

Many of Stanko's petition claims depended on specialist services, including particularly Dr. Gur, who was contracted to perform Quantitative Analysis (Q.A.) of high-resolution brain imagery which can show brain anomalies (especially volumetric losses) in specific brain structures, and to provide integrative reporting relying on other contracted specialist services including the mitigation specialist and, notably, psychiatrist James R. Merikangas, M.D., and neuropsychologist, Dr. Robert H. Ouaou, whose services were authorized under § 3599(f)'s "reasonably necessary" standard. Stanko's counsel inherited earlier brain imaging and understood, upon

consultation with Dr. Gur, that the preexisting imaging would be put through the expert's Q.A. processing.

The global COVID-19 pandemic forestalled efforts to deploy these services. Dr. Merikangas, for example, could not visit prisons owing to risk factors associated with his age. Dr. Ouaou was compelled against the standard of care to conduct a Kentucky prison evaluation and became seriously ill during one of the waves of the pandemic in 2021. The university hospital where Dr. Gur's office is located shut down all forensic work and redeployed its resources to clinical and ongoing research projects. Dr. Gur's office was disassembled and during this period, Stanko's counsel was unable to conduct any meaningful consultation with him. It was only when pandemic conditions eased, that Dr. Gur began reassembling his technical capabilities. Only at that point, however, did counsel learn that existing brain imaging was not adequate for Q.A.

Accordingly, on October 6, 2021, Stanko filed another motion for specialist services, *viz*., certain brain imaging at the Medical University of South Carolina (MUSC) in Charleston, arguing they are reasonably necessary because they are "essential to certain specialist services already funded under 18 U.S.C. § 3599(f)." App.367. Before and after Stanko's response to the State's return and motion for summary judgment, and pleadings connected to Stanko's partial summary judgment motion, (App.369, App.372–375), this Court granted the brain imaging funding motion, (App.368 (*Ex Parte Funding Order*)) and associated transport motion (App.379). Under the transport order, the brain imaging, after extensive effort to

broker coordination between the medical facility, the department of corrections, and the funding court, took place on March 3, 2022. *See* App.380.

3. The District Court Abruptly Granted Summary Judgment Before Permitting Amendment of the Petition to Incorporate Reasonably Necessary Specialist Services.

On March 24, 2022, three weeks after Stanko's transport and brain imaging and before the facility could deliver the imaging data to Stanko's specialists for analysis and reporting that would substantiate amended petition claims, the District Court granted the State's *Motion for Summary Judgment*. App.381, App.385.

During the pendency of Stanko's Rule 59(e) *Motion to Alter or Amend the Judgment*[9] filed April 20, 2022 (App.386–424), on May 23, 2022, the Supreme Court decided *Shinn*, holding that 28 U.S.C. § 2254(e)(2) prohibits consideration of evidence beyond the state court record even as to claims falling under the *Martinez* equitable exception. *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022). Further, it held that, where a petitioner "failed to develop" evidence in state proceedings, the district courts may not even consider evidence outside the state court record "to assess cause and prejudice under *Martinez*." *Id*. at 388. On July 1, 2022, the District Court denied Stanko's Rule 59(e) motion. App.426–432.

4. The Fourth Circuit Panel Applied Certificate of Appealability Analysis to Rule 59(e) Motion Rather than the District Court's Judgment.

[9] The Rule 59(e) motion cited certain *ex parte* filings for the fact that the § 3599(f) specialist services had been deemed "reasonably necessary." The District Court granted the State's motion to remove *ex parte* status. The Fourth Circuit consolidated the interlocutory appeal (raised under the collateral order doctrine) with the present appeal of dismissal of his § 2254 petition by summary judgment.

Upon granting a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) on four issues (where the District Court granted none), the parties briefed and argued the appeal and the Fourth Circuit panel affirmed the District Court's denial of all relief and "dismiss[ed] the portion of the appeal over which we have no jurisdiction." *Stanko*, 109 F.4th at 685.

In so doing, the panel grafted onto § 2253(c)(1)(A) certain fine lines the circuit court had drawn between "*dismissal*" and "*denial*" in motions to reopen judgments pursuant to Rule 60(b). *Id.* at 700. Observing that the District Court dismissed Stanko's Rule 59(e) motion, the panel divined that the deprivation of his resources under § 3599(f) became a question needing a certificate of appealability rather than a non-final order that, by definition, does not need one. *Id.* This confused reasoning places the non-final versus final order question with the motion to alter the District Court's judgment rather than the very judgment denying relief itself. That confusion, if left unaddressed, splinters prior uniformity among the circuits on the availability of appellate review without a COA for non-final orders.

The panel's fateful misapplication of § 2253(c) thus foreclosed review of the grave issues underlying the deprivation of Stanko's repeatedly court-recognized entitlement to expert funding under § 3599(f) concerning the illumination of his traumatic brain injury history. The improperly truncated process Stanko received compounded both the paralyzing consequences of cascading hospital crises and lockdowns and the failed PCR process in which he received nothing resembling meaningful development and review of brain damage evidence. Perhaps above all, it

amounted to only superficial scrutiny of a uniquely severe conflict of interest of counsel against his client due to the persistence of Diggs's representation—for the sake of his reputational and financial interests—and advancement of an unambiguously hopeless theory of an NGRI defense.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S ANOMALOUS HOLDING THAT A CERTIFICATE OF APPEALABILITY IS REQUIRED TO REVIEW THE DENIAL OF A NON-FINAL ORDER, ON EXPERT SERVICES, FRACTURES PRIOR UNIFORMITY AMONG THE CIRCUITS.

A. A Certificate of Appealability is Not Required for Review of District Court Decisions Not Disposing of or Lacking Sufficient Nexus to the Merits of the § 2254 Petition.

In 2009, this Court unanimously held that an order denying a request for counsel resources under 18 U.S.C. § 3599 does *not* require a certificate of appealability ("COA"). *Harbison v. Bell*, 556 U.S. 180, 183, 196 (2009). Justice Stevens, writing for the majority, held that the denial of a motion to authorize federal counsel to proceed in state clemency "was clearly an appealable order under 28 U.S.C. § 2291." *Id*. at 183. Justice Scalia, writing in dissent and joined by Justice Alito, "agree[d] with the Court that Harbison was not required to obtain a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) before appealing the District Court's denial of his motion to expand counsel's appointment." *Id*. at 200.

Nine years later, the Court reviewed the Fifth Circuit's affirmance of the Southern District of Texas's denial of an expert funding request, recognizing that the court of appeals "held that a COA was not required insofar as petitioner challenged the District Court's denial of funding under § 3599." *Ayestas v. Davis*, 584 U.S. 28, 38

n.1 (2018). At bottom, a COA is plainly not required for issues that are not "the final order in a habeas corpus proceeding." *Harbison*, 556 U.S. at 182 (citing *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78–83 (2005)).

In Stanko's case, the Fourth Circuit broke from its own precedents that correctly apply this Court's *Harbison* line and caused a split among other circuits. Instead of applying *Harbison* and *Ayestas* with respect to Stanko's pivotal, albeit non-merits, expert services issue, the Fourth Circuit's disposition contrives a novel incorporation of Rule 60(b) rationale into Rule 59(e), simultaneously shifting the fundamental point of inquiry from the denial of Stanko's habeas corpus application to the denial of his motion to *alter* that denial. This shift mainly functions to reorder the sequence of events between a substantial change in the law and the pendency of Stanko's petition.

That is, the Fourth Circuit re-sorted the chronology to enable a rationale that the handing down of *Shinn* foreclosed the procedural viability of Stanko's pursuit of presenting § 3599 expert evidence in federal court, given that *Shinn* largely precludes the introduction of such trial-ineffectiveness evidence when it is not already in the state court record.

The first problem with this manipulation of the timeline is that it yields a depiction of the events that is, in a word, disingenuous. There is no escaping that the District Court granted the State's summary judgment motion *before Shinn* was handed down. *Shinn* could not have had any bearing on the denial of Stanko's

application. *Shinn* could only have had a bearing on the denial of Stanko's Rule 59(e) motion.

Thus, the Fourth Circuit panel's recitation in the Rule 59(e) motion's disposal skewed the timeline:

> And, as in *Reid*, the district court considered the merits of that claim in denying Stanko's motion: There was no need to wait for the testing at issue, it concluded, because the results would be inadmissible under the Supreme Court's then-recent decision in *Shinn*, barring a federal habeas court from considering new evidence, beyond the state court record, based on ineffective assistance of post-conviction counsel.

109 F.4th at 700. This rewriting of the case history is perhaps the only available explanation for the panel's bizarre application of § 2253(c)(1)(A) to Stanko's motion to amend or alter the judgment rather than to the judgment itself. However, in this capital case, that is not merely legally absurd.

An important further consideration of *Shinn*'s implications is that the Fourth Circuit's treatment of this new authority overstated its impact of foreclosing review. While *Shinn* provides that responsibility for post-conviction counsel having "failed to develop" evidence in the state court, per 28 U.S.C. § 2254(e)(2), "is attributed to the prisoner," 596 U.S. at 382, here, as set forth herein, the reason for lack of brain imaging evidence at PCR is due to the post-conviction *court*, not post-conviction counsel, who struggled mightily, the record unmistakably reflects, to secure the requisite resources for developing appropriate evidence to support a meaningful presentation of Stanko's brain anomalies. Also, *Shinn* did not erode a petitioner's ability to stay federal proceedings in order to return to state court to exhaust under *Rhines v. Weber*, 544 U.S. 269 (2005), and in Stanko's case, his ability to do just that

was foreclosed by the District Court's abrupt termination of the case just three weeks after it had permitted his transport out of prison to a medical facility for braining imaging on March 3, 2022.

Thus, the Fourth Circuit's choice to premise its anomalous decision on whether the District Court's disposal of the *Rule 59(e) motion*—not the § 2254 action itself—was designated a "dismissal" or a "denial" functions, improperly, to justify avoidance of the lower court's facially rash management of the capital litigation:

> We have drawn a line between a *dismissal* of a motion for reconsideration as an unauthorized successive petition, which may be appealed without a COA, *id.* at 399-400, and a *denial* of a motion for reconsideration on its merits, which may not, *see Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004). Whereas a dismissal by definition does not pass on a habeas petitions merits, the same is not true of a denial: When a district court denies a reconsideration motion[10] "on the merits, it necessarily considers the merits of the underlying habeas petition" because such a motion "alleges illegality in the conduct of" the habeas proceedings. [*United States v. McRae*, 793 F.3d 392, 399 (4th Cir. 2015)].

109 F.4th at 700 (emphases in original).

The Court of Appeals' reliance on *Reid*, 369 F.3d at 370, and *McRae*, 793 F.3d at 299, is misplaced,[11] and the case at bar thereby departs from prior Fourth Circuit authorities. *See, e.g.*, *Bixby v. Stirling*, 90 F.4th 140, 157 n.3 (4th Cir. 2024); *United*

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[10] But *McRae* did *not* involve a "reconsideration" motion. *McRae*, 793 F.3d at 399. ("When a district court *denies* a Rule 60(b) motion on the merits, it necessarily considers the merits of the underlying habeas petition.").

[11] These cases involve Federal Rule of Appellate Procedure 60(b) motions—a motion to re-open an already-denied petition, which is not at all involved here—are predicated on discerning whether a non-merits issue from a district court's denial of habeas corpus relief is appealable without a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c).

States v. Williams, 56 F.4th 366, 370 n.3 (4th Cir. 2023); *United States v. Isom*, 771 F.App'x 188, 189 (4th Cir. 2019)

This departure fractures a general uniformity among the circuits on § 2253(c) and non-final orders. *See, e.g.*, *Mizori v. United States*, 23 F.4th 702, 704–05 (6th Cir. 2022) (COA not needed for order denying extension of time because it is non-final); *Ellison v. United States*, 120 F.4th 338, 343 (3d Cir. 2024) (COA only required for "orders that dispose of the merits of the proceeding" and is not required to review denial of a request for an evidentiary hearing); *Illarramendi v. United States*, 906 F.3d 268, 269 (2d Cir. 2018) (COA not required for order denying supervised release because it is non-final); *Watson v. Goodwin*, 709 F.App'x 311, 311–12 (5th Cir. 2018) (COA not required for order denying bail because it is non-final).

In creating this split, the Fourth Circuit bafflingly framed Stanko's motion to alter the judgment, a motion filed in the typical course of litigation and granted only in extraordinary circumstances, as the main event of the habeas corpus action. The Rule 59(e) motion merely gave the District Court the opportunity to *reconsider* whether it improperly truncated specialist services previously authorized under § 3599. The Fourth Circuit's approach conflates Rule 60(b) with Rule 59(e), but no authority, nor principle, justifies that contravention of the foregoing Supreme Court authorities.

Reid held that a COA was required because denial of a Rule 60(b) was a final judgment in a habeas proceeding. *Reid*, 369 F.3d at 367–69. *McRae* also addressed whether a COA is needed to appeal disposition of a Rule 60(b) motion, but in that

case the disposition was styled a "dismissal" rather than a denial, though the district court specified the "dismissal" was because the purported Rule 60(b) motion was actually an impermissible successive habeas petition. *McCrae*, 793 F.3d at 394. Based largely on guidance from post-*Reid* Supreme Court decisions, the Fourth Circuit found that a COA was not necessary in every disposition of a purported Rule 60(b) motion. *Id*. at 398 ("Based on the Court's reasoning in *Gonzalez* [*v. Crosby*, 545 U.S. 524 (2005)], and *Harbison v. Bell*, 556 U.S. 180[] (2009), we hold that the COA requirement in § 2253(c) allows us to review, without first issuing a COA, an order dismissing a Rule 60(b) motion as an improper successive habeas petition.").[12]

B. *Shinn* Does Nothing to Impair Entitlements under § 3599(f).

As noted above, the Fourth Circuit's improper focus on the disposition of the Rule 59(e) motion skewed the timeline masking the fact that *Shinn* had not even been decided when the District Court's error in issuing summary judgment without first permitting the performance of expert services that it authorized pursuant to § 3599(f) accrued. App.385.

More important, nothing in *Shinn* invalidates or otherwise calls into question § 3599(f). Neither the briefing nor opinion in *Shinn* mentions § 3599 at all. *See generally*, *Shinn*, 596 U.S. at 366-91; Brief for the Petitioners, *Shinn*, No. 20-1009, 2021 WL 3056470 (July 15, 2021); Brief for Respondents, *Shinn*, No. 20-1009, 2021

[12] The Fourth Circuit subsequently recognized that *Gonzales* and *Harbison* further abrogated *Reid*'s broad holding by noting that "*Gonzalez* reveals the importance of distinguishing between Rule 60(b) motions and successive petitions, and *Harbison* opens the door for us to ensure that the district court does so properly." *Bixby*, 90 F.4th at 157 (4th Cir. 2024).

WL 4197216 (Sept. 13, 2021); Reply Brief for the Petitioners, *Shinn*, No. 20-1009, 2021 WL 4845766 (Oct. 13, 2021). *Shinn* only addressed whether the equitable exception in *Martinez*(*supra*) implies an exception to § 2254(e)(2). *Shinn*, 596 U.S. at 371. It did not address the range of admissibility of new evidence that might be reasonably necessary to the § 3599 representation. *See, e.g., Harbison*, 556 U.S. at 183–87 (holding that § 3599 provides for representation of indigent prisoners in proceedings beyond federal habeas, including state executive clemency and other available post-conviction proceedings).

Similarly, the Fourth Circuit improperly relies on *Shoop v. Twyford*, 596 U.S. 811 (2022), without responding to arguments showing it is inapposite. *Twyford* addresses the ramifications of *Shinn* as to a request for a transport order under the All Writs Act (28 U.S.C. § 1651(a))—not the effective denial of specialist services authorized under § 3599(f). *Twyford*, 596 U.S. at 814. Section 1651 requires that the writ generate evidence admissible in the federal jurisdiction. *Id.* at 816. Just as *Harbison* found it could not infer a limitation to "federal" proceedings in § 3599(e), *Harbison* 556 U.S. at 186–87, this Court should not infer a similar unwritten limitation in § 3599(f). Here, by contrast, the District Court issued a transport order in furtherance of authorized services—not the All Writs Act. As repeatedly pleaded, on February 15, 2022, the District Court issued its transport order for Stanko's brain imaging on March 3, 2024. App.380. Just three weeks later, before the hospital could

even transmit the scans to Stanko's authorized specialists, the District Court granted summary judgment.[13]

II. TRIAL COUNSEL'S CONFLICT ADVERSELY AFFECTED STANKO'S REPRESENTATION.

A. Diggs's Self-Interest Based Conflict Adversely Affected Stanko's Representation and Was Thus Unwaivable.

This Court has long recognized that the Sixth Amendment requires reversal of a conviction obtained when trial counsel labored under an actual conflict which adversely affected performance, even when the defendant "raised no objection at trial." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). This Court has repeatedly emphasized that actual conflict and adverse effect of the conflict are the only two elements a petitioner must prove, rejecting that there is any burden to prove a likely effect on the outcome. *Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); *Cuyler*, 466 U.S. at 349–50; *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Although a defendant may waive the representation of counsel who is "unhindered by a conflict of interests," like in *Holloway v. Arkansas*, "[i]n this case, however, [the State] does not contend that [the] petitioner[] waived that right." 435 U.S. 475, 483 n.5 (1978). Rather, the prosecution, at trial, insisted that the conflict was unwaivable and Stanko was unable to consent to Diggs's representation—setting

[13] Further, the District Court abruptly ended the case before *Shinn* was decided, and before Stanko could move to stay the federal proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005).

aside the profound cognitive and mental health questions and the absence of independent representational advice in relation to the Horry County bench's re-appointment of Diggs.

A conflict is "actual" when counsel "actively represent[s] conflicting interests." *Cuyler*, 446 U.S. at 350 (citing *Glasser*, 315 U.S. at 72–75).[14]

Diggs's conflict was actual in that he actively represented conflicting interests when he was simultaneously resisting claims of IAC in the Georgetown County case while representing Stanko in the Horry County case. *See also Christeson v. Roper*, 574 U.S. 373, 379 (2015) (recognizing that § 3599 counsel were in conflict because they "manifestly served their own professional and reputational interests" when they blew the AEDPA statute and then defended their calculation of the statute against their own client's interest).

The Second Circuit has noted that conflicts which "so permeate the defense that no meaningful waiver may be obtained," including those arising from the attorney's self-interest are *per se* unwaivable. *United States v. Schwarz*, 283 F.3d 76, 96 (2d Cir. 2002) (quoting *United States v. Fulton*, 5 F.3d 605, 613 (2d Cir. 1993)[15] (alteration in *Schwarz*)). The test was whether "the [attorney] would sacrifice [the defendant's] interests for those of the [police union]." *Schwarz*, 283 F.3d at 96. The Second Circuit concluded it did: "Thus, we conclude that the conflict between [the

[14] Here, the state courts presumed the actual conflict was waivable, without even making the determination, as required by South Carolina's Supreme Court Rules, whether the conflict is "consentable." *See* App.370 (quoting South Carolina Supreme Court Rule 407, Rule 1.7, Comment 2).

[15] *Fulton* also involved an attorney self-interest conflict. Fulton, 5 F.3d at 612–13.

attorney]'s representation of [the defendant], on the one hand, and his ethical obligation to the [police union] as his client and his self interest in the [police union's] retainer, on the other, was so severe that no rational defendant in [the defendant]'s position would have knowingly and intelligently desired [the attorney]'s representation." *Id*. at 96 (citing *Fulton*, 5 F.3d at 613 ("[N]o rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation."); *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") (alterations in *Schwarz*). "In sum, we hold that Schwarz's counsel suffered an actual conflict, that the conflict adversely affected his counsel's representation, and that the conflict was unwaivable. Accordingly, we are required to vacate Schwarz's conviction in the first trial and remand for a new trial." *Id*. at 96–97.

Similarly, a Virginia capital case involved an attorney self-interest conflict stemming from counsel's contract with a third-party payer. *Stitt v. United States*, 369 F. Supp. 2d 679, 691–92 (E.D. Va. 2005), aff'd, 441 F.3d 297 (4th Cir. 2006), *opinion recalled*, 459 F.3d 483 (4th Cir. 2006) *and aff'd*, 552 F.3d 345 (4th Cir. 2008). Counsel was "not credible in answering questions about the source of the funds, his expenditures, and his record-keeping." *Id*. at 692. The conflict arose because counsel never discussed with the defendant about his intention to engage experts because he presumed the family would not be able to pay for them and he did not try to obtain

court-appointed experts (though he knew that route was available) because he wanted to shield from government inquiry the source of his funding. *Id*. at 695. This was admittedly for the attorney's personal financial interest. *Id*. at 694. In federal habeas, the district court found that counsel's decision to shield his funding by refraining to seek court-funded experts created an actual conflict, and that the conflict adversely affected the representation, noting, "[S]uch an actual conflict of interest may never be harmless error." *Id*. at 691 (quoting Swarts, 975 F.2dat 1048) (alteration in *Stitt*). The district court emphasized that once an actual conflict is found, all that remains is to determine whether it the actual conflict adversely affected "the performance of counsel's defense team." *Id*. at 694.

Here the conflict adversely affected the representation because "[t]he failure of counsel to undertake some professional duty on behalf of his client because of the conflict of interest amounts to an adverse effect." *Id*. (*citing United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991)). Ultimately, the decision to present just one mental health expert and no mitigation experts or investigators was "solely a choice made because of the financial situation," and "[t]his is not a reasonable basis for the decision, because the circumstances suggest that [the attorney] could have obtained court-appointed experts." *Id*. Nor did other members of the team do anything to cure the prejudice caused by the conflict. *Id*. In order to protect his reputational interests, Diggs doubled-down on the defense he knew to be untenable under South Carolina law, and which dramatically departs from the standard of care in developing and

presenting evidence of Stanko's brain injuries in a humanizing and sympathetic manner.

B. If the Conflict Was Waivable, Stanko Could Not Have Knowingly, Voluntarily, and Intelligently Waive It.

The Fourth Circuit affirmed the District Court's finding that the state court deemed reasonable Stanko's purported waiver of the conflict, even though it was well known Stanko suffers significant brain impairments and he was never properly advised by anyone—not conflict-free counsel, nor Diggs, nor the trial court, nor PCR counsel in the Georgetown County case—as to the consequences of the conflict, specifically that Diggs would repeat his NGRI strategy, a method of litigating Stanko's brain impairments far outside the norms of presenting such a capital defendant.

It is simply impossible to prove Stanko received the effective assistance of counsel in handling trial counsel's conflict by pointing to ostensible process he received without the advice or even presence of any conflict-free counsel. While it was certainly proper to exclude Diggs from an inquiry into his conflict (other than as a witness), it was not proper to conduct such proceedings without providing Stanko the assistance of counsel.

In fact, the "in-depth hearing on the matter on March 4, 2009" also illustrates the problem of the overlapping duties of the court and Diggs. Diggs was a material witness to the inquiry into his conflict. App.382–383. He could not be present in that role and simultaneously act as Stanko's counsel.

Diggs had his own duty "to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler*, 446 U.S. at 346. Diggs also had duties to determine whether the conflict was "consentable," and to refer neutral counsel to advise Stanko on the ramifications of the conflict. App.370–371 (and ethical rules cited therein).

But presuming the conflict was waivable, the District Court endorsed the trial court's waiver process without acknowledging that Stanko's alleged waiver was provided without the effective assistance of counsel. *See* App.384. Stanko was never advised of the consequences of waiving the conflict, and in particular of the fact that Diggs's performance in the Georgetown County case fell far outside the norms of professional practice, and that other attorneys proceeding within the norms would present evidence of his brain trauma and resulting impairments in a humanizing and sympathetic manner. The court simply ascertained that Stanko wanted Diggs to continue (while overlooking that even Stanko's purported consent assumed Diggs would learn from his mistakes in the Georgetown County case although at his appointment, Diggs assured the court he would rely entirely on the mitigation evidence developed in Georgetown County, and indeed that he meant to pursue the same failed strategy).

Additionally, the court failed to consider whether Stanko's history of brain traumas and resulting impairments interfered with his capacity to knowingly, voluntarily, and intelligently waive the conflict.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and either call for briefing and oral argument or summarily reverse the opinion below and remand for further proceedings.

Respectfully submitted,

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