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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
The Honorable D. Craig Brown, Circuit Court Judge (*Robertson* Court)
The Honorable W. Jeffrey Young (PCR Court)
Appellate Case No. 2017-000211

STEPHEN C. STANKO,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I.

Whether the PCR Court erred in adopting the State's post-hearing brief with negligible changes despite the PCR judge's assertion that he would and did draft his own order with his own findings of fact and conclusions of law.

II.

Whether the PCR Court improperly applied *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), in assessing prejudice on remand by considering the decisions made, and evidence presented, by unqualified initial PCR counsel and the initial PCR court's rulings based on unqualified counsel's presentation.

III.

Whether the PCR Court erred in finding trial counsel were not ineffective where they presented dehumanizing evidence (such as labeling Applicant a psychopath and comparing him to (infamous serial killers), pursued a legally impossible defense of not guilty by reason of insanity, and failed to investigate and present mitigating evidence related to Applicant's brain damage, mental illness, and life history.

IV.

Whether the PCR Court erred in finding trial counsel were not ineffective in failing to investigate and present mitigating evidence that Applicant had demonstrated good behavior in prison and the likelihood that he would not be a future danger while incarcerated.

STATEMENT OF THE CASE

Stephen C. Stanko seeks certiorari from the denial of his Georgetown County PCR application by Judge W. Jeffrey Young [the original PCR Court] (hereinafter "the 1st PCR Court") and then by Judge D. Craig Brown [the Robertson[1] Court] (hereinafter "the 2nd PCR Court").

The Georgetown Trial and Sentencing Proceeding

Stanko was convicted by a jury in Georgetown County on April 11, 2006 of the April 8, 2005 murder, kidnapping and armed robbery of Laura Ling and the kidnapping, rape, and attempted murder [ABWIK] of her 15 year old daughter. Bill Diggs and Gerald Kelly represented Stanko.[2] The jury found 5 statutory aggravating circumstances; the murder was committed in the commission of: kidnapping; CSC; armed robbery; larceny; and torture; and, recommended a death sentence. Judge Deadre Jefferson imposed sentence. Stanko received concurrent prison sentences on the other indictments. Stanko's convictions and sentences were affirmed on direct appeal. State v. Stanko. 376 S.C. 571, 658 S.E.2d 94 (2008). The United States Supreme Court denied certiorari.

The PCR Action

On October 17, 2008, Stanko filed a PCR application (2008-CP-22-1446). Stuart Axelrod, Bobby Fredrick, and Tristan Shaffer represented him. After many amended applications, in April of 2015, a PCR hearing was held before the 1st PCR Court. (Suppl. App. 70-482). Among other grounds, in his 1st PCR, Stanko raised the same IAC grounds he raised at his 2nd Robertson PCR hearing *and* now raises to this Court, except an IAC mental health ground was added to at the 2nd PCR. (Suppl. App. 1-12; 13-68; 484-575). On June 27, 2016, the 1st PCR Court denied relief as

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[1] Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016).

[2] Diggs was disbarred by this Court and the N.C. Supreme Court in 2016. In the Matter of William Isaac Diggs, 418 S.C. 229, 792 S.E.2d 219 (2016). Diggs' actions leading to his disbarment occurred several years after this trial and had nothing to do with his representation in this case. Id.

to all claims in a filed Order. (Suppl. App. 484-575). Post-hearing motions were also denied. (Suppl. App. 576-88; 685-717).

Stanko appealed to this Court. While on appeal, this Court issued its Opinion in Robertson, 418 S.C. 505, 795 S.E.2d 29 and allowed Stanko to file an amended, successive, PCR application pursuant to Robertson. After remand, the 2nd/Robertson PCR Court found initial PCR counsel did not meet the representation requirements of S.C. Code Ann. § 17-27-160 and ordered a prejudice hearing pursuant to Robertson. Stanko was appointed new PCR counsel and raised numerous claims in his new application, many of which had been raised in his original application and at his 1st PCR hearing. After conducting a full Robertson PCR hearing on January 28 - 29, 2019, the 2nd PCR Court found Stanko was not prejudiced by the fact original PCR counsel were not statutorily qualified and denied the application by Order Denying Relief filed March 14, 2021. (App. 4058-4147). Stanko filed a Rule 59 Motion. The State filed a Response to that Motion. On June 9, 2021, by Order filed June 11, 2021, the 2nd PCR Court denied the Rule 59 motion. (App. 4282).

The Appeal from the Denial of PCR

Stanko now appeals from the 2nd PCR Court's Order Denying Relief, consolidating his appeal with his original appeal from the denial of PCR by the 1st PCR Court. (Remand Order, App. 2738-39). Stanko's Petition for Writ of Certiorari raises 4 grounds [I. – IV]. The first 2 grounds [I. & II.] allege errors by the 2nd PCR Court having nothing to do with Stanko's actual claims of ineffective assistance of trial counsel (IAC). The remaining 2 grounds [III. & IV.] contain 4 claims of IAC raised by 1st PCR counsel to the 1st PCR Court and again by 2nd PCR counsel to the 2nd PCR Court, and 1 claim of IAC, which is an extension of a claim raised at the 1st PCR, but which contains new facts not presented at the 1st PCR. The grounds raised in the Petition are as follows:

I. Whether the PCR Court erred in adopting the State's post-hearing brief with negligible changes despite the PCR judge's assertion that he would and did draft his own order with his own findings of fact and conclusions of law.

II. Whether the PCR Court improperly applied Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016), in assessing prejudice on remand by considering the decisions made, and evidence presented, by unqualified initial PCR counsel and the initial PCR court's rulings based on unqualified counsel's presentation.

III. Whether the PCR Court erred in finding trial counsel were not ineffective where they presented dehumanizing evidence (such as labeling Applicant a psychopath and comparing him to infamous serial killers), pursued a legally impossible defense of not guilty by reason of insanity, and failed to investigate and present mitigating evidence related to Applicant's brain damage,[3] mental illness, and life history.

IV. Whether the PCR Court erred in finding trial counsel were not ineffective in failing to investigate and present mitigating evidence that Applicant had demonstrated good behavior in prison and the likelihood that he would not be a future danger while incarcerated.

FACTS

On April 8, 2005, Stanko bound, beat, stabbed, cut his girlfriend Laura Ling's throat, and strangled her to death. He then bound, beat, and raped Ling's 15 year old daughter. Stanko tried to smother the daughter but eventually cut her throat 2 times. He then packed, stole items belonging to the victims, and locked the door as he left Ling's home, believing he had killed both victims. Stanko stole Ling's car, withdrew money from her bank, used her credit card, and drove to a friend's home in Conway. That morning, Stanko called Ling's work and stated she would not be coming in because she was ill. Unknown to Stanko, the daughter had survived the assault and called 911. Police broke into Ling's home and found the daughter covered in blood. When Stanko called Ling's work, the operator was already aware of Ling's murder and notified authorities of

[3] As stated, Stanko's 2 grounds of IAC raised on appeal [Issues III. & IV] were raised to the 1st PCR Court, except a portion of Ground III., raising a claim of a new diagnosis of brain damage, not raised until the 2nd PCR, but which is an extension of the original mental health IAC claim raised at the 1st PCR. In summary, it appears 2nd PCR counsel "piggybacked" on or used 1st PCR counsels' final PCR application in the 2nd PCR [Robertson] action.

Stanko's deceptive phone call. (App. 212-28; 365-66; 271; 758; 370-73; 376; 504-05, 538; 764; 850; 196; 206; 209; 329-33; 342; 345; 538-39; 334-40; 851; 197; 229-30).

That same day, Stanko murdered the friend he was staying with, Henry Turner; stole Turner's truck, and fled to Columbia, S.C,[4] leaving Ling's car at Turner's home. Stanko was seen that evening partying in *the Vista* and spending large amounts of cash and representing himself to be persons he was not. Stanko then drove to Augusta and began a new romance. Stanko gave Dana Putnam the bracelet he removed from Laura's wrist after her murder. Putnam recognized Stanko's photo in an article about the S.C. murders and notified police. Stanko was arrested with Turner's truck. The key fob to Ling's car and a notebook with her name on it were found in the truck. Stanko was extradited to South Carolina. (App. 850; 428-29; 341-45; 1523-27; 1516; 1532; 1535-38; 1558-59; 1849; 1561-63; 1582-91; 1588 & 1584; 1576-79).

Stanko had been convicted of tying up and assaulting another victim, Elizabeth McClendon, in 1996. At that time, Stanko was on the verge of being arrested for several "scams" or "cons" he committed and was in danger of being exposed to police by that victim. That victim was also bound and gagged. At the time of the McClendon crimes, Stanko had already been diagnosed with anti-social personality disorder (ASPD) also known as "psychopathy" once and diagnosed with the same again while in prison. At the time of Ling's murder, while still serving community supervision, Stanko was similarly running cons, representing himself to be a "lawyer,"

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[4] Based on trial counsel's objections, evidence of the Turner murder was kept out of this trial. The State was only allowed to introduce Stanko left Ling's car at Turner's home and took Turner's truck to Columbia and had Turner's gun and truck when arrested. Ling's personal property was found in the truck. Stanko was convicted in Horry County of Turner's murder and armed robbery in 2009 and sentenced to death. His convictions and death sentence were affirmed. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). His PCR action in that case was denied and this Court denied certiorari in the appeal. The District Court just denied the federal habeas action. Stanko v. Stirling, et al., CA No. 1:19-cv-03257-RMG [ECF #99] (Unpublished). A Rule 59 Motion is pending.

"paralegal," or "investigator" and was able to secure retainers from "clients." Once again, Stanko's "cons" were on the verge of being exposed. (App. 1398-99; 1843; 1281; 754-55; 757-60; 763; 774; 1280-81; 1399-1401; 1411-47; 762; 818-19; 1394; 726-27; 1788; 1811-12).[5]

The Evidence in Mitigation at Trial and Sentencing

Because the evidence of guilt of the Ling and Turner crimes was overwhelming and due to Stanko's prior criminal history, trial counsel sought to defend and mitigate the offenses and Stanko's life of crime through a medical/mental health defense. Counsel retained medical and psychiatric experts and fully investigated Stanko's medical and psychiatric history. During trial and sentencing, Stanko called the numerous medical, psychiatric, and psychological experts, who testified Stanko suffered brain damage during birth and/or adolescence rendering him insane at the time of the Ling crimes when he was under extreme stress. These experts were: Drs. Bernard Albiniak; Joseph Wu, Thomas Sachy; David Thrasher, and Marc Einhorn. Counsel also introduced through Dr. Wu the structural brain study of Stanko's brain conducted by Dr. Ruben Gur. This testimony and evidence included MRI and PET scans of Stanko's brain, which the experts testified showed a malformed and damaged frontal lobe which decreased moral decision making and impulse control, and Stanko's birth records, showing probable or arguable intracranial brain damage at birth, and also testimony of a head injury at age 17. As to Stanko's ASPD diagnosis, Stanko's medical experts testified his medical diagnosis was *involuntarily acquired psychopathy,* i.e. Stanko did not choose to have ASPD [also known as "psychopathy"] but it was thrust upon

[5] In addition to Ling's daughter's testimony, D.N.A. linked Stanko to both the scene and the 15 year old rape victim. Surveillance photos from Ling's bank captured Stanko removing cash from her account after the murder and sexual assault. Stanko's briefcase was found in Ling's car at Turner's home, and items belonging to Stanko and Ling were found in Turner's truck upon Stanko's arrest. Putnam and Ling's daughter identified the bracelet taken from Ling's body and later given to Putnam. (App. 1394, 1397-98; 331-32; 342-45). *See also* Stanko. 376 S.C. 571, 658 S.E.2d 94.

him by brain damage at birth and/or the later head injury. This, they opined, explained and mitigated not only Stanko's current crimes but his prior crimes. (App. 400-45; 448-567; 569-83; 586-655; 675-813; 1955-99, 2028-99, 2152-78). Counsel presented additional sentencing-phase mitigation through Dr. Evelyn Califf, a qualified expert family counselor, who presented a social history and offered opinions about dysfunction in his childhood home, including a strict, domineering father. (App. 2258-84). Counsel also presented numerous lay witnesses who offered testimony on Stanko's life history, including stressors he was under at the time of the Ling murder, and his attempt to obtain help for his mental disorders before the crimes occurred. (App. 1765-1911; 1915-22; 2000-18; 2110-2151; 2179-2219; 2226-56). Counsel also presented evidence of Stanko's ability to adapt to prison. (App. 1714-28; 2164-68; 2172-74; 848-49).

In the guilt and penalty phases, the State presented rebuttal testimony from Drs. Pam Crawford, Tora Brawley, William Brannon, and Kenneth Spicer. Dr. Crawford found no mental disease or defect and diagnosed Stanko with *a personality disorder, not otherwise specified, with narcissistic and antisocial features*, which she categorized as a behavioral problem. Dr. Brawley testified she reviewed the battery of neuropsychological tests conducted by Dr. Einhorn and opined Stanko showed no signs of cognitive deficit. Dr. Brannon testified he reviewed Stanko's MRI and birth records and opined Stanko had both a normal brain and no indication of a brain defect from birth. Dr. Spicer opined Stanko's PET scan looks normal when compared to a normal hospital database. (App. 825-949). The State also introduced Stanko's prior criminal record; the fact that he was diagnosed with ASPD after the McClendon incident; and, that he was on community supervision at the time of the Georgetown and Horry County cons and the Ling offenses.

STANDARD OF REVIEW

This Court's "standard of review in PCR cases depends on the specific issue" presented. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d, 836, 839 (2018). The Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180; 810 S.E.2d at 839. "[Q]uestions of law" are reviewed "de novo, with no deference to trial courts." Id. at 180-81, 810 S.E.2d at 839.

To show ineffective assistance, the applicant must show (1) deficient representation by counsel, and (2) and prejudice from the deficiency. Strickland v. Washington, 466 U.S. 668 (1984). In evaluating penalty phase prejudice, an applicant must show that considering *all* the evidence – the trial evidence along with the new mitigation, and any new aggravation which would have likely accompanied the new mitigation – is there a reasonable probability of a different sentence. Wong v. Belmontes, 558 U.S. 15 (2009).

STANKO'S GROUNDS RAISED ON APPEAL FROM THE DENIAL OF PCR

I. *Whether this Court should remand for the 2nd PCR Court to issue another Order*

Stanko first argues this Court should remand this case and require the 2nd PCR Court to amend or withdraw its Order Denying Relief and enter another Order because that Court allegedly abdicated its judicial authority to the State when it relied on the State's post-hearing memorandum as a template in drafting the Order Denying Relief. However, the record shows the 2nd PCR Court did not abdicate its judicial authority. In fact, the record shows the Court notified both parties early on, in 2020, that the Court was going to deny relief and it would draft its own Order. When the Court first requested a proposed Order, and 2nd PCR counsel objected, the Court informed both sides it would draft its own Order. **The State never submitted a proposed Order.** The Court, months later, indicated to the parties that it had been diligently working on the Order and it was in

the range of 40 some odd pages but the Court had not included record cites. The Court indicated it was going to use the State's post-hearing memorandum as a template for its Order Denying Relief, and there was no objection. When the Court issued its own Order Denying Relief filed March 14, 2015, it contained the Court's own findings of fact and conclusions of law, and the Court initialed and numbered each page. (App. 4058-4147). The Court had used the State's post-hearing memorandum as a template, but had also made changes to that template. Stanko admits those changes were made.

Stanko argues Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), and also the Sixth, Eighth, and Fourteenth Amendments to support the assertion of error. The question is whether the 2nd PCR Court adhered to his sworn duty as a member of the judiciary in denying relief for the reasons expressed in the Order Denying Relief. Any fair reading of the record shows the Court did adhere to that duty.

In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), this Court did not ban proposed orders, but set out: "Counsel preparing proposed orders should be meticulous ... opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." Id., at 256, 423 S.E.2d at 128.[6] Pruitt was not a capital case. However, an order from a capital case was similarly challenged in Hall v. Catoe. Again, this Court did not prevent the practice of submitting a proposed order:

> Although we ***strongly encourage*** PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, ***it is common practice*** for judges to ask a party to draft a proposed order for the sake of efficiency.

[6] Rather than showing any signs of retreat, the Court has repeatedly directed the parties follow the process. *See, e.g.,* Reese v. State, 425 S.C. 108, 820 S.E.2d 376 (2018).

360 S.C. at 365, 601 S.E.2d at 341 (emphasis added). Not only did this Court not ban the proposed ordered process, it did not even find the Hall order resulting from the process to be deficient. Rather, the Court ultimately concluded the process produced an acceptable order finding "the evidence sufficiently indicates the PCR judge spent an adequate amount of time reviewing the order before adopting it." Id. Here, **no proposed order was submitted** by either party. The Court, on its own volition, and after announcing its decision, used the State's post-hearing memorandum as a template. Stanko can show neither a violation of the remand order nor caselaw. More recent than either Pruitt or Hall, though, is the discussion of proposed orders in Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589-90 (2019). In Fishburne, acknowledging once again a standard practice of calling for proposed orders, this Court instructed that particular care must be taken in the process with participation by each side. 427 S.C. at 516, 832 S.E.2d at 589–90. Simply, the process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and custom, Hall, *supra.*[7] This Court has instructed on specific safeguards and cautions to ensure that the process is fair and open. There should be no concern as long as an applicant adheres to the instructions of this Court to review and timely raise concerns.

Moreover, in capital cases, the PCR statute allows for the presentation of post-trial briefing, which is, necessarily, presented in a litigant's preferred phrasing. *See* S.C. Code Ann. § 17-27-

[7] This is in no way unique. A long line of precedent, state and federal, allows the acceptance of proposed order language where the court independently reviews and adopts the language as its own *See, e.g.,* Jefferson v. Upton, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)); State v. Holmes, 832 S.E.2d 777, 781 (Ga. 2019) ("It is well established that a trial court may request and then adopt a proposed order from one party. Doing so does not itself demonstrate an absence of cautious discretion.") (internal citations omitted); McGahee v. State, 885 So.2d 191, 229–30 (Ala.Crim.App. 2003) ("even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.").

160 (D). Nothing prevents that phrasing from being adopted. That is all that occurred here. Whether taken from a document titled "post-trial brief" or a document submitted as a proposed order, if the PCR judge, after careful consideration, adopts the language offered, that language becomes the Court's order. A judge is free to accept or reject a proposed phrasing, finding, or conclusion, as that judge deems appropriate. What is critical is whether the judge considered the submission(s) in light of the evidence and law; gave his own, independent consideration to those submissions; and, made the proposed language his own. That is the case here where the Court heard from each side; considered each side's arguments; considered language from each side; and heard no objection to using the post-hearing memorandum as a template.[8] The Court also carefully considered the Rule 59 motion and denied that motion by written Order. Again, Stanko has not shown a violation of this Court's remand order and/or Stanko's right to due process.

II. *Whether the 2nd PCR Court appropriately applied Robertson v. State?*

Stanko argues the judge in the 2nd PCR improperly applied Robertson in determining prejudice by re-considering whether 1st PCR counsel were deficient. Stanko is wrong. The Court properly determined whether Stanko was prejudiced by 1st PCR counsel's deficient performance as defined by this Court in Robertson and as directed by this Court's remand Order.

Stanko ignores that this appeal, as set forth in this Court's remand Order, is the *consolidation* of Stanko's original appeal from the denial of PCR by the 1st PCR Court and his appeal from the Robertson proceedings. *See* Order Dec. 14, 2017, App. 2738-39, p. 1 ("Any notice of appeal filed following the ruling on remand will be consolidated with the notice of appeal currently pending"). This Court ordered a hearing "to determine if petitioner was prejudiced by [his initial PCR counsel] attorneys' lack of qualifications" pursuant to S.C. Code Ann. § 17-27-

[8] Counsel objected to a proposed order process, but proposed orders were never submitted.

160(B) (2014) and Robertson. The hearing was predicated upon the 2nd PCR Court's finding that initial PCR counsel were not qualified under the statute. In determining **whether Stanko was prejudiced**, the 2nd PCR Court considered not only the testimony presented at the Robertson hearing but the record of the initial PCR proceeding because 1st PCR counsel raised and presented many of the same claims and evidence as 2nd PCR counsel presented at the Robertson hearing. (Appendix 4058-4147, Order Denying Relief). This was appropriate given the holding in Robertson and this Court's remand Order. Id.

Robertson unambiguously defined the narrow issue before the 2nd PCR Court. Robertson expressly set the remedy when capital PCR does not meet the statutory qualifications: "[i]f prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under Strickland,[9] Petitioner was prejudiced." Id. at 522, 795 S.E.2d at 38. The standard appropriate for the prejudice hearing was whether Stanko could demonstrate a reasonable probability of a different result at the initial PCR hearing. *See* Robertson, 418 S.C. at 521-22, 795 S.E.2d at 37-38. Yet, Stanko would have the 2nd PCR [Robertson] Court and this Court not be allowed to consider the prior proceeding before the initial PCR Court. This would be an absurd restriction in light of this Court's remand Order and Robertson, especially as the 2nd PCR Court found Stanko raised many of the same IAC claims at the Robertson prejudice hearing as were raised by 1st PCR counsel and denied by that Court. (See App. 4058-4147). [10] Of note, this Court rejected in Robertson the kind of truncated review Stanko forwards.

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[9] Strickland v. Washington, 466 U.S. 668 (1984).

[10] Stanko failed to include any of the proceedings before the 1st PCR Court in his Appendix. Respondent subsequently moved to include the entire record on appeal as required by Rule 243 (f), SCACR, which this Court granted.

In Robertson, this Court's intent to incorporate the Strickland prejudice standard is apparent. The Court declared that "a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification." Id. at 521 and nn.14-15, 795 S.E.2d at 37 and nn.14-15. Logically, an applicant cannot do this when he presents many of the same grounds asserted at that hearing and presents much of the same evidence in support of the same grounds – the situation shown here. (App. 4058-4147, Order Denying Relief). To be able to evaluate the ruling on prejudice, the 2nd PCR Court appropriately looked at the entire record and this Court must look at the entirety of the record. It is also important to examine what standard Robertson did not adopt. In dissenting in part, former Chief Justice Pleicones favored finding that, when statutory qualification is lacking, "the appropriate remedy is a new PCR proceeding in which he is represented by such counsel." Robertson, 418 S.C. at 524, 795 S.E.2d at 38–39. (Pleicones, C.J. dissenting in part). The majority did not choose to implement such relief. It follows, then, that Stanko was not entitled to a new PCR hearing under Robertson.

In sum, the standard adopted in Robertson is whether Stanko can demonstrate a reasonable probability of a different result at the initial PCR hearing had he been represented by statutorily qualified counsel. Robertson, 418 S.C. at 521-22, 795 S.E.2d at 37-38. Consequently, the 1st PCR record is a necessary part of the review. The 2nd PCR Court was appropriately guided by the correct standard, and correctly considered whether Stanko was prejudiced by the representation of his 1st PCR counsel. Stanko's real complaint is that he lost before the 2nd PCR Court, not the process.

Regardless, as discussed herein, and as the 2nd PCR Court found, Stanko cannot show prejudice from initial PCR counsel's deficient performance because there is no merit to Stanko's IAC claims against trial counsel. Stanko has failed to show any ground of *ineffective assistance of trial counsel* 1st PCR counsel overlooked, which would have afforded relief.

III. *Whether trial counsel was ineffective in 4 respects?*

This IAC ground actually has 4 claims. 3 of the 4 claims were raised to and addressed by both PCR Courts in their Orders and denied. (Suppl. App. 484-575; App. 4058-4147). Both PCR Courts addressed the claims of *alleged* IAC in (1) presenting dehumanizing evidence, (2) pursuing an insanity defense, and (3) not presenting a sufficient life history. The allegation of IAC in (4) allegedly not presenting brain damage and mental illness is an extension of a ground raised at the 1st PCR, but with new facts addressed by the 2nd PCR Court and denied. (App. 4058-4147).

A. IAC claims 1. [Insanity] and 2. [Psychopathy/ASPD/Negative references]

In these 2 subparts of Ground III., Stanko alleges IAC in offering the insanity defense and in allowing opposing counsel and Stanko's defense experts to refer to Stanko as a psychopath or otherwise portray him in a negative light during trial. These 2 IAC claims were addressed separately by the 1st PCR Court, (Supp. App. 513-20), [11] and collectively by the 2nd PCR Court. Respondent will address them collectively as the 2nd PCR Court because they are related.

As both PCR Courts found, trial counsel made an objectively reasonable strategic trial decision to pursue the defense of ***involuntarily acquired psychopathy*** given counsel's experts' diagnoses and findings and the facts of this case. (Suppl. App. 513-20; App. 4086-4103). After double review, the record still shows Stanko cannot meet his Strickland burden of proof.

Trial counsel did not come to this case as novice criminal attorneys. Bill Diggs had been

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[11] Further, Stanko raised a similar claim in his Horry County PCR. This Court can take judicial notice of its own records demonstrating this point. *See also* Stanko v. State, 2014-CP-26-00035 (Order of Dismissal filed May 18, 2016, pp. 7-8)(Horry County PCR/Turner murder) (finding "references to psychopathy, including testimony from Stanko's expert witness that Stanko is a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions" and thus a valid trial strategy articulated by counsel at PCR). This Court denied certiorari in Stanko's PCR appeal from the Horry County case. Stanko raised a similar claim as raised here in federal habeas corpus and it was denied by the U.S. District Court. *See* Stanko v. Stirling, *supra.*

the head of Appellate Defense. (App. 3071). He had argued a capital case before the U.S. Supreme Court and briefed numerous others. (App. 3024). He worked with David Bruck, a nationally-renowned capital defense attorney. (App. 3072). Diggs had tried capital cases as a sole practitioner. (App. 3025). He had garnered 1 acquittal and a hung jury in another case resulting in a life sentence. (App. 3070). Gerald Kelly had been involved in 9 capital cases. (App. 2984). Diggs and Kelly obtained 2 of only a few capital acquittals in "the modern era of the death penalty" in this state. (App. 3070-71). Prior to trial, Diggs had tried 2 capital cases with "brain issues" as the defense, had won both, 1an acquittal and 1 a life sentence, and desired to explore this in this case given the evidence of guilt. (App. 3028-30). Diggs' testimony demonstrates this was not a rash or uninformed decision. (App. 3029). Stanko reported to Diggs "he had blacked out" during an argument with Ling and responded with "the murder or the conduct that followed." (App. 3031-32). Counsel believed there had to be some reason for Stanko's actions (App. 3028, 3032, 3076). Counsel wanted to determine what was going on in Stanko's brain at the time of the offenses and assessed with the horrendous facts, he was not going to win this case with a social history and needed a different defense or approach. (App. 3065).

Diggs initiated his investigation, ultimately retaining Drs. Albiniak, Thrasher, Gur, Einhorn, Wu, Sachy, and Califf. (App. 3033-35). Diggs first consulted with 2 local psychiatrists he had a prior relationship with and trusted for advice in legal cases: Drs. Albiniak and Thrasher. (App. 3073-74). Diggs also perceived a strategic benefit in utilizing local doctors versus only bringing in out-of-state experts. The jury may know them or be more accepting of their testimony. (App. 3074). Dr. Thrasher rendered an opinion Stanko was insane at the time of the crimes. (App. 3040). Thrasher referred Diggs to Dr. Sachy, another psychiatrist, who could show brain function, a goal of Diggs'. (App. 3076). He could explain the condition of Stanko's brain and "demonstrate

it with visual evidence." (App. 3038).

Diggs consulted and hired Sachy because of Thrasher's recommendation and because he could provide a visual representation of insanity. (App. 3037, 3040, 3042, 3052-53). Sachy connected Diggs to Drs. Wu and Einhorn, who were brought in to conduct the PET scan which informed their medical opinions. Wu would create and utilize graphics to assist the experts' explanation of the diagnoses. (App. 3039, 3080-83). Given the possibility, Diggs felt a visual representation "would be an effective way to present the evidence" from these doctors. Years ago when the law on insanity was discussed or examined "there was no technology available to look at how the brain functioned at the time," but there is now, and Diggs saw no reason why he could not "use brain scans in criminal cases." (App. 3076).

Diggs consulted with more medical experts, Drs. Gur, Brawley, and Crawford. Gur was not available to testify because he was deployed at the time of trial, but he conducted a volumetric brain analysis from Stanko's MRI and made his report available for other experts to address at trial. (App. 3067-68, 3083-86). Diggs recalled that Drs. Crawford and Brawley were not familiar with the technology he thought was beneficial to his jury presentation, or were not "comfortable in going into that area," and so he did not utilize them for testimony. (App. 3077).

Diggs was not closeminded about this defense or retaining these experts, it "could've been changed at any time if it appeared to [him] that it didn't work out or wasn't working out." (App. 3038). His use of Dr. Sachy's expert opinion "was dependent upon whatever developed after" he hired him. He "was always in a position to change" because there were other experts he had discussed the case with. (App. 3041). But his investigation remained consistent at each and every turn, as exemplified by the testimony and diagnoses of his experts. (App. 3042; 2941-50). Crucial to his continued investigation and trial prep, Diggs found "each step of the way, as the evidence

developed, it fell more in line with what the theory was"—Stanko's brain was not "functioning properly nor in healthy fashion at the time he committed these acts," and "substantiating physical evidence" existed in the form of brain scans to support it. (App. 3078).

The experts agreed Stanko had ASPD. (App. 3078). Diggs understood this diagnosis "could be considered as a mitigating factor" depending "on the way it's presented and how it's pursued." (App. 3075). His insanity defense "wasn't solely based on Dr. Sachy's opinion." (App. 3047). It was appropriate in Stanko's case "because he didn't remember what happened. He blacked out. You have multiple medical doctors' expert opinions that he was insane, and we could demonstrate it with visual evidence." (App. 3057). Comparing Stanko's earlier crimes he was imprisoned for, Diggs pointed out Stanko was "not in his right mind even then" based on the evidence of that offense: he drug his live-in girlfriend by the hair down the hallway as he sang. The facts "fit squarely" with the circumstances of the Ling crimes. Diggs testified, "guilt implies that there was conscious awareness of what he was doing. I don't think he was." (App. 3079). Gerald Kelly likewise recognized Stanko "was clearly mentally ill." (App. 2991). He noted the experts examined Stanko and "determined that he had a brain injury," which fit with Diggs' theory. (App. 2989). He recalled Stanko's diagnosis included a personality disorder, but the testimony at trial provided reasons for the diagnosis, and it overlapped with the medical diagnoses presented in Stanko's defense at the guilt phase. (App. 3018).

All of the doctors' opinions dovetailed. (App. 3054, 3082-83). Stanko had an abnormal brain which led to impaired judgment in the area of impulse control. And they did more in the way to offer a medical reason for his ASPD diagnosis. "They explained why. They explained what that abnormal – abnormality was and how it contributed to this particular incident." (App. 3086-87). Diggs' experts linked Stanko's frontal lobe abnormality to his birth records and to being hit in the

head with a bottle of beer as a teenager. (App. 3087-88). As a result, Diggs was successful in getting the jury instructed that they may find Stanko NGRI or GBMI. (App. 3086).

Given the favorable diagnoses and the visual representations in support of them, Diggs assessed, to him, it did not matter "if it's as high as 99% of the time that the defense [of insanity] is rejected" because the defense was plainly justified by "the facts here, accompanied by the scans and the video evidence that was put together" to explain why the behavior occurred. (App. 3080). To Diggs, neither the wording of the insanity statute nor the success rate of the insanity defense was "outcome determinative" as to "whether or not insanity needs to be used or pursued in a particular case." (App. 3057). And his theory was consistent from the guilt phase into sentencing because, as Diggs put it, this case did not present "a situation where it was either/or." (App. 3055). Counsel would present the insanity defense "at the guilt phase. If the jury didn't feel like he was insane at that time, certainly that was not reason to eject Drs. Wu or Gur, Sachy or Thrasher. It wasn't a reason to eject them in terms of mitigating evidence." (App. 3055). Just because the jury did not find Stanko insane at the guilt phase, it did not make it "inconsistent to accept that evidence as mitigating evidence at the sentencing phase." (App. 3056).

Diggs wished to show the jury the images of the doctors showed Stanko's fully-engaged brain had a level of activity "well below what it should have been in terms of a normal scale." (App. 3082; 3050). The affected area "is the same area that would have regulated the limbic system" but because the "brain didn't operate or didn't function properly there, that – that impulse drove his conduct." (App. 3082). "It wasn't an analysis in his frontal lobes that would have occurred in a normal, healthy brain, and that's why he committed the offense that that's why he blacked out and doesn't remember it." (App. 3082). Diggs articulated that to compare the brain to a reptile was to explain an inability to regulate impulse. It was a reference to or explanation of the

limbic system where Stanko's brain defect was located. (App. 3060). Diggs failed to agree this terminology was offensive and inappropriate in the context of Stanko's case because the limbic system was "where that killer instinct or impulse came from in Stephen." (App. 3060). Stanko could not regulate his impulses. (App. 3062-63).

Diggs testified some of Sachy's testimony was not expected; Diggs had read Sachy's report before trial and interviewed him. During those interviews, Sachy had never made the comparisons he made during trial comparing Stanko to other famous psychopaths. This testimony was not planned but unexpected. (App. 3044-45; 3047-48; 3062-64; Suppl. App. 402-06; 415-16). Further, Diggs understood his job as counsel was to select who the experts "were going to be," *not* "to tell them what to do." (App. 3044). He felt "it would have been malpractice" and a "mistake not to present" the evidence of a brain defect despite the statistics he understood to be against it, because the evidence he had was "strong". (App. 3054; 3088-89).

Stanko ignores counsel could not choose or dictate the facts or Stanko's criminal past. Counsel knew through investigation there was ample evidence to be offered that Stanko was the perpetrator of the horrendous crimes against Laura Ling and her daughter.[12] Those facts could not be kept from the jury. And, Stanko's prior criminal record would be introduced in the penalty phase. He had just been released from prison for the McClendon kidnapping and convictions for breach of trust and larceny, along with evidence Stanko was defrauding others almost immediately upon release from prison while under community supervision.

Stanko, though, claims counsel was ineffective. He first alleges the insanity defense failed to meet the standard of insanity provided for under S.C. Code Ann. § 17-24-10, and the only

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[12] Counsel also knew the State was going to be able to prove Turner's murder, just hours later. The cases were interrelated. After murdering Turner, Stanko left Ling's car at Turner's home, and stole Turner's truck and fled.

evidence to support the defense was "[e]vidence of a mental disease or defect that [was] manifested only by repeated criminal or other anti-social conduct." Stanko posits the defense was "not sufficient to establish the defense of insanity" under our law. *See* S.C. Code Ann. § 17-24-10(c). Stanko claims, counsel was ineffective in presenting the defense and he was prejudiced in both the guilt and sentencing phases. Stanko is wrong.

First, as noted in the 2nd PCR Court's Order, (App. 4086-4102), this same claim was raised to the 1st PCR Court and relief denied, (Supp. App. 504-13). The ground was basically just reworded for the Robertson proceeding. Since the purpose of this 2nd PCR was to determine prejudice from 1st PCR counsel's performance, Stanko's copycat presentation evidence cannot form a basis for relief in this action. As a result, **1st PCR counsel** could not have prejudiced Stanko because **they raised this very issue** at the 1st PCR hearing and **it was denied.** Robertson, *supra.* (See Order, Suppl. App. 504-13). Further, based upon the record and testimony presented in both PCR hearings, no relief is due.

First, both PCR court's found **there was more evidence in this case than just repeated prior criminal behavior** by Stanko. There were **brain scans, medical testimony**, and Stanko's **birth records.** There was also testimony of **a head injury** suffered by Stanko **at age 17.**

Second, both trial counsel testified at the PCR hearings that the evidence Stanko committed the charged acts was overwhelming, and the State was going to be able to prove the same. Counsels' testimony on this issue is credible and supported by the record.[13]

Third, counsel retained appropriate experts who informed counsel that Stanko had a frontal lobe brain defect and he was legally insane at the time of the crimes. The specific psychiatric

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[13] Stanko also conceded in his "Memorandum in Support of the Rule 59 Motions" that there is no question he committed the crimes against Laura Ling and her daughter.

diagnosis was **involuntarily acquired psychopathy**. This evidence included 2 psychiatrists, PET and MRI scans, the testimony of a neuro-radiologist, Stanko's birth records of intracranial damage at birth, along with a head injury at age 17. Stanko was made aware of the results of the scans and diagnosis **and agreed with the findings and wanted to pursue the defense**. He told counsel he had no memory of the crimes. Counsel presented all of this evidence of insanity, that Stanko had a frontal lobe brain defect, that was not his fault, and at the time of the crimes could not differentiate between moral or legal right and moral and legal wrong, and were successful in obtaining jury instructions on the defense of NGRI and GBMI. However, the jury found that the State had disproved insanity and GBMI beyond a reasonable doubt. Based upon the record and the information available to counsel, including expert opinions, counsel made an objectively reasonable trial strategy decision under the circumstances to present an insanity defense. *See* Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (no IAC in arguing for insanity where the defense was supported by 2 witnesses); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible sentencing outcomes).

Notably, the Solicitor made the same argument pretrial that Stanko now makes, and Judge Jefferson rejected that argument and found there was sufficient evidence of insanity to allow the presentation of the same to the jury. (App. 13-109). Also, as noted above, **Stanko agreed with this defense**. As a result, Stanko cannot show deficient performance for offering this evidence in the guilt phase. Strickland. The record shows an objectively reasonable strategic decision given the facts in this case. Strickland (court must judge counsel's conduct from the circumstances at the time of representation); Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (same).

Stanko now ignores the fact trial counsel sought to explain and mitigate Stanko's life of

crime and his actions in this case, due to developmental brain damage using birth records, a head injury in adolescence, and current brain scans and medical and psychiatric testimony. If counsel did not mitigate these crimes with some type of medical mental health defense, then the only evidence would be Stanko was a career criminal, who had not been rehabilitated by prison, and had committed even more heinous offenses upon release. However, as brought out on cross-examination of Dr. Sachy in this case, Stanko had been repeatedly diagnosed during his lifetime, long before these present crimes, with ASPD or psychopathy. This could not be avoided.

In presenting each of the witnesses, counsel attempted to explain, not excuse, Stanko's behavior. The crux of the defense was that Stanko acted as a result of a brain defect – a defect that existed at the time of the Ling crimes, the Turner crimes, and in past criminal behavior. The defense evidence furthered the affirmative defense of insanity and the related mitigation strategy. The record shows counsel reasonably pursued this strategy through expert witnesses. At all times, counsel exercised professional judgment in an objectively reasonable manner. Both PCR Courts reasonably and correctly found no basis to find IAC on this allegation.

As to the presentation of psychopathy, Stanko argues from *his select* cases and articles, and 2 mitigation investigators' testimony at PCR, that ASPD or psychopathy should not be offered as mitigation. However, case law does not support his argument or the mitigation investigators' testimony. Evidence of his personality disorder may not have made Stanko any more likable, but it might have helped the jury understand him and his horrendous acts. *See* Sears v. Upton, 561 U.S. 945, **951** (2010). Stanko's "claim that counsel failed to perceive what was mitigating and what was aggravating ignores counsel's testimony, which revealed that counsel was well aware of the complexity and attempted to blunt the effect of the diagnosis." Commonwealth v. Robinson, 82 A.3d 998, 1018 n.11 (Pa. 2013). The fact the experts consistently diagnosed Stanko with ASPD

did not bear on counsel's effectiveness in his investigation and preparation of Stanko's defense. Id. at 377-81, 82 A.3d at 1017-19 (no IAC for introducing diagnosis of ASPD in the penalty phase as it humanized the defendant and explained why he was the way he was given his background); Ward v. State, 969 N.E.2d 46, 57-59 (Ind. 2012) (counsel's decision to pursue diagnosis of psychopathy as mitigating evidence was not deficient performance; while evidence of psychopathy might not have made defendant any more likable, it at least attempted to assist the jury in understanding the defendant, explained his horrendous acts, and lack of emotion on the day of the offenses)(citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) (psychopathy is mitigation evidence under South Carolina law and psychopathy diagnosis entitled defendant to instructions on certain mental health statutory mitigating circumstances). "The fact that [his experts] also provided some damaging testimony does not mean that the decision to use him as a witness fell below an objective standard of reasonableness. Rather, it presented a strategic decision." Beardslee v. Woodford, 358 F.3d 560, 583, *supplemented sub nom.* Beardslee v. Brown, 393 F.3d 1032 (9th Cir. 2004) (no IAC for calling expert who presented extensive evidence defendant was a sociopath where that testimony also provided useful mitigation including an explanation for defendant's failure to show remorse, testimony of his good behavior in prison, and physical and psychological explanations for his antisocial behavior).

"[C]ourts have specifically recognized evidence of [ASPD] can be considered mitigating evidence" because it serves as a response to the prosecution's claims of malice and intent. Ford v. Schofield, 488 F. Supp. 2d 1258, 1349 (N.D. Ga. 2007), *aff'd sub nom.* Ford v. Hall, 546 F.3d 1326 (11th Cir. 2008) (collecting cases). Courts have also acknowledged that, though evidence of ASPD could be damaging, competent counsel can regularly evaluate the potential impact of psychiatric testimony. *See* Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(these are

decisions left to counsel); Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir.2003)(same); Fulks v. United States, 875 F.Supp.2d 535 (D.S.C. 2019)(No IAC for making a strategic decision not to offer ASPD traits on the particular facts of this case). In South Carolina, as the 2nd PCR Court noted, ASPD or "psychopathy" is recognized as a diagnosis warranting jury instruction on certain mitigating factors. Caldwell, 300 S.C. at 506, 388 S.E.2d at 823. [14] Counsel knew and understood this. (App. 3075). As recognized in Truesdale and Byram, trial counsel is in a "Catch 22" in this situation. If he offers the evidence he is accused of IAC and if he doesn't offer the evidence he is accused of IAC. Id. As the Fourth Circuit has found, consistent with Strickland, the decision to offer this evidence is best left to trial counsel's strategic decision after a full investigation and in light of the facts of each particular case. Id.

Stanko incorporated the Horry County PCR testimony of Russell Stetler, a mitigation investigator, and presented an affidavit of the same information prepared for use in this case. Contrary to case law, Stetler opined ASPD should never be offered as mitigation, but, as the 2nd PCR Court reasoned, Stanko is wrong to rely on this assertion. Stetler's testimony and affidavit are irrelevant, unpersuasive, and inappropriate in this setting. Stetler's opinions on this mitigation presentation—and that of Dale Davis to the extent elicited and argued in support of a grant of relief —"amounted to a case-specific application of the Strickland test that was not designed to assist the PCR Court to understand certain facts, but rather, was a legal argument as to why the PCR Court should rule" for Stanko. McKnight v. State, 378 S.C. 33, 56-57, 661 S.E.2d 354, 366 (2008). It is not proper to offer an opinion "as to acceptable legal standards of defense practice." Id. at 56, 661 S.E.2d at 365-66. Of even less possible impact, Stanko has offered opinion testimony by *non-attorneys* as to how a particular lawyer should try his or her case. Green v. State, 351 S.C. 184,

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[14] The mitigators are: (2), (6), and (7). Counsel requested (2) and (6). Those were instructed.

569 S.E.2d 318 (2002) (attorney opinion on standards of defense practice properly excluded where impact constituted mere "legal argument why the PCR court should" find ineffective assistance). Whether *trial counsel's* performance was in fact deficient was for the 1st and 2nd PCR Court [and this Court] to decide based on the record, not for *biased investigators to decide.*

In any event, Strickland instructs deference to the decisions by trial counsel. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins, 539 U.S. at 521. The court is to "focus on whether the investigation supporting counsel's decision" on the introduction or non-introduction of mitigating evidence "was itself reasonable." Id. at 523.

Stanko's own experts testified at trial Stanko's brain was malformed and showed decreased activity in the frontal lobe based on PET and MRI scans. The experts attributed this brain defect to lack of oxygen at birth, which they argued was reflected in his birth records and the medical records of his mother from Stanko's birth, and/or from a head injury at age 17. Stanko's experts diagnosed him as suffering from ***involuntarily acquired*** psychopathy and their "psychopath" statements during trial merely stated the same. The characterizations of or references to Stanko, whether by his experts or by the State, were legitimately related to his diagnosed mental illness or personality disorder and insanity defense or mitigating circumstances and were supported by the

evidence of his character introduced at trial, including a lifetime of criminal and anti-social behavior. In fact, Stanko argues in his Petition that counsel must introduce evidence of brain damage according to Supreme Court precedent. (PWC, pp. 19-20, citing Sears, 561 U.S. at 950, Porter, 558 U.S. at 42-43, *and* Mills v. Maryland, 486 U.S. 367, 370 n. 1 (1988)). It is not IAC to offer such a defense under the facts of this case. Robinson, Ward, *and* Sears, *supra.* (evidence of personality disorder may not have made defendant any more likable, but it may have helped the jury understand him and his horrendous acts). Further, as the 2nd PCR Court found, the references to a "lizard" like brain were to the limbic system of Stanko's brain which was triggered by stress, fear, or threats, because the **frontal lobe of Stanko's brain was damaged** according to his experts. Again, this was part of the chosen defense and mitigation.

Stanko admits in his Rule 59 Memorandum that he committed the acts against Ling and her daughter. Based on counsel's review of the evidence, including Ling's daughter's identification, Stanko's DNA in the rape kit, Stanko captured taking money from the ATM, his abandoning Ling's car at Turner's home, and Stanko's capture with Turner's truck and Ling's items, counsel knew Stanko would be proven to have committed the acts against Ling and her daughter. Counsel also knew the State would prove in the penalty phase Stanko committed another kidnapping 10 years before, where he tied up the victim and attempted to kill her, fled Charleston, and committed multiple counts of breach of trust and larceny around the same time. And, Stanko served 8 ½ years in prison for those crimes and had not been rehabilitated, since upon release, he began similar cons and fraudulent schemes on community supervision and committed the present horrible offenses. As a result, counsel made an objectively reasonable trial strategy decision to offer the only defense available, a medical mental health defense, which would explain why Stanko committed the present horrible crimes – a strategy supported by his experts and included PET

scans, MRI scans, a structural brain study, and birth records supporting the diagnosis. This defense *also explained* much of Stanko's past and current crimes in a manner as would diffuse some of the aggravating effect from such evidence in the penalty phase; i.e., Stanko did not choose to be medically and mentally ill, but rather it was thrust upon him. The fact the defense was unsuccessful does not mean counsel provided ineffective assistance. Strickland. At least counsel attempted to mitigate the heinous crimes and Stanko's past crimes.[15] Had counsel acted as Stanko now says he should have, counsel no doubt would be faulted for "failing to present" these expert opinions and diagnoses. Sears; Porter; Mills v. Maryland; Robinson, 82 A.3d at 1019; Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (finding impulsivity was the most compelling evidence the defendant could have offered in mitigation and trial counsel **was ineffective** for failing to present expert testimony the defendant was "explosive" and "a time bomb"). *See also* Truesdale; Byram, and Fulks, *supra* (accusing counsel of being ineffective for not offering ASPD diagnosis).

Stanko further argues counsel should have prevented his expert, Dr. Sachy, from supporting his diagnosis by comparing Stanko to other famous psychopaths or in a negative manner; however, counsel credibly testified at PCR that he reviewed the expert's report prior to trial, which contained no such references, **and** interviewed Dr. Sachy prior to trial. This did not come out during counsel's pre-trial interviews with Sachy. This claim was also addressed by the 1st PCR Court. (Suppl. App. 517-18).[16] As a result, 1st PCR counsel could not have prejudiced

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[15] The fact Stanko was diagnosed as or is "a psychopath" could not be kept from the jury. He had been diagnosed with ASPD after the prior assault and kidnapping 10 years earlier *and* again in prison. The diagnosis was brought out extensively on cross-examination by the State in this case.

[16] *See also* Stanko v. State, 2014-CP-26-35 (Order May 18, 2016, pp. 7-8)(Horry County PCR) (references to psychopathy, including Stanko's expert witness testimony Stanko is a psychopath, was an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing he could not control his actions and thus a valid trial strategy articulated by counsel at PCR); Stanko v. Stirling, et al., *supra* (wherein the Court denied a similar claim to that raised here).

Stanko in his 1st PCR hearing. Robertson, *supra*. Prior to taking the stand at trial, Dr. Sachy never made any such comparisons or negative references to Stanko. It is clear Dr. Sachy made these references during the trial to *support* his diagnosis of "psychopathy" in light of Stanko's clear history of engaging in lifelong antisocial behavior, and specifically "**involuntarily acquired psychopathy**." It is also clear counsel did not intentionally elicit these responses or comparisons. As a result, **counsel was not ineffective** in this regard.

Stanko **is actually complaining about Dr. Sachy**, his chosen expert. "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) (citing Harris v. Vasquez, 949 F.2d 1497, 1518 (9th Cir. 1990) *and* Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)). To do so would result in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate, and would undermine the finality of a criminal conviction. Id.; Pruett v. Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir. 1993); *see also* Poyner v. Murray, 964 F.2d 1404, 1418-19 (4th Cir. 1992)(the constitutionally deficient performance must be that of counsel not the expert). The Fourth Circuit has observed:

> To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.

Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (*per curiam*). Simply, "[t]o be reasonably effective, counsel was not required to second-guess the contents of" his expert's "report." Wilson v. Greene, *supra* at 403; Williams v. Allen, 598 F.3d 778, 790 (11th Cir. 2010) (No IAC in arguing for insanity where the defense was supported by 2 experts); Forsyth v. Ault, 537 F.3d 887, 892 (9th Cir. 2008)(counsel not required to expert shop).

Stanko also argues Diggs' later disbarment. As set forth previously, Diggs' disbarment had

nothing to do with counsel's representation in this case, and it occurred years after this trial. In the Matter of William Issac Diggs, *supra.* Diggs' later misuse of client funds starting in 2009 would in no way relate to his representation of Stanko in 2005-2006. *See* Padgett v. United States, 302 F.Supp.2d 593, 603 (D.S.C. 2004) (finding no IAC stemming from counsel's subsequent disbarment for misuse of client funds) (citing United States v. Novak, 903 F.2d 883, 889 (2d Cir. 1990).[17] Plus, it was unrelated to this case.[18] This is not sufficient reason to grant certiorari.

Stanko also complains about credibility findings of the 2nd PCR Court, which were adverse to him. Such findings are entirely within the court's province as it viewed the testimony and evidence. Stanko wishes the 2nd PCR Court had found certain of his witnesses credible, but the Court in its' wisdom and discretion did not. Stanko does not offer a valid argument for relief.

Stanko also complains the 2nd PCR Court did not give proper authority to the ABA Guidelines for capital defense attorneys. As the Supreme Court has recognized the ABA Guidelines are not commands but guides – they are not the standard for ineffective assistance of counsel. Strickland; Bobby v. Van Hook, 558 U.S. 4 (2009). They simply cannot anticipate the unique and varied circumstances counsel could face in a specific capital case. Id. This particular complaint has no merit. Id.

In sum, all of Stanko's arguments claiming error in the PCR courts' rulings on his failure to show trial counsel deficient performance lack merit. Both PCR courts' rulings are fully and

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[17] *See also* Roach v. Martin, 757 F.2d 1463, 1472-73 (4th Cir. 1985) (no reason in disbarment record to overturn denial of PCR); United States ex rel. Ortiz v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976) (subsequent disbarment irrelevant where not connected to petitioner's case); White v. State, 481 S.E.2d 804 (Ga. 1997) (Strickland still applies after unrelated disbarment).

[18] Stanko also asserts that one of his experts was recently, in 2021, convicted of distribution of pain killers and sentenced to federal prison. But, it would have been impossible for trial counsel to foresee crimes by an expert 10 years after trial. The conduct was also unrelated to this case.

fairly supported by the facts of record and relevant case law. Stanko is not entitled to any relief.

Lack of Prejudice

As both PCR Courts correctly found, Stanko cannot show Strickland prejudice on this record. As to the insanity defense, Stanko has not shown prejudice in the guilt phase. Even had counsel not presented the defense, there is no reasonable probability the jury would have returned with a different verdict given the overwhelming evidence of guilt. Strickland. Further, Stanko has not met his burden prejudice in the penalty phase. In addition to the guilt phase evidence being incorporated into the sentencing phase, counsel also presented further expert testimony regarding Stanko's mental disease or defect. Stanko re-called several of his expert witnesses to testify to his brain defect and personality disorder, **which was not his choice** but was thrust upon him. As counsel testified at PCR, simply because the jury did not find Stanko legally insane at the time of the crimes, did not mean they would not accept the testimony of Stanko's experts in mitigation. As both PCR Courts found, Stanko's diagnosis of **involuntarily acquired "psychopathy"** and the testimony of mental disease or defect in both the guilt and penalty phases entitled Stanko to and received instructions on the statutory mitigating circumstances requested by counsel. *See* Caldwell, *supra.* However, after considering all of this evidence, the jury still sentenced Stanko to death. Stanko cannot show deficient performance or prejudice in the penalty phase. Wiggins; Pinholster, 131 S.Ct. at 1403 (citing Harrington v. Richter, 562 U.S. 86, 110 (2011)).

Finally, Stanko cannot overcome the overwhelming evidence in aggravation with anything presented in the PCR hearings. The State proved **5 aggravating circumstances**: the murder was committed during; (1) torture; (2) kidnapping; (3) CSC; (4) armed robbery; and (5) a larceny with a deadly weapon. Additionally, the non-statutory aggravating circumstances were horrible. Stanko bound Ling, beat her from head to foot, stabbed her, and cut her throat. He also bound the

daughter. He also manually strangled Ling to death while raping her daughter. He forced the minor daughter to witness her mother's murder. Stanko attempted to murder the 15 year old child by cutting her throat twice, almost severing her ear from her head, and left her believing she was dead. He then calmly stole Ling's bracelet, her car, and money from her bank account and then fled, where he continued partying, met a new girlfriend, and conned her and gave her the bracelet he took off Ling's dead body. He was only arrested after U.S. Marshalls captured him. Further, the jury heard Stanko was convicted of numerous fraud and theft crimes over the years. He was convicted of the 1996 kidnapping of McClendon 10 years earlier. He bound her and attempted to kill her with a cloth soaked in Clorox. Stanko was convicted of multiple counts of breach of trust, larceny, and obtaining goods by fraud, served 8 ½ years in prison for these crimes and was not rehabilitated. After release from prison, Stanko began conning multiple victims by pretending to be an attorney, paralegal, or investigator while on community supervision. Stanko then committed the murder of Ling and the attempted murder and rape of her 15 year old daughter when his cons were about to be exposed. Even taking out the references to his psychopathy or ASPD diagnosis, and even if counsel had a crystal ball and could have somehow prevented Dr. Sachy from making these previously unseen and unheard comparisons to support his diagnosis, the evidence in aggravation was overwhelming such that there is no reasonable probability of a different result. Stanko has failed to prove prejudice. Strickland, Belmontes, *supra.*

B. IAC claim 3 [alleged failure to investigate/present mitigating evidence related to Stanko's life history]

Stanko alleges the PCR court erred in finding *trial counsel* was not deficient in failing to investigate and present mitigation evidence. Stanko alleges counsel failed to investigate and present mitigating facts at the penalty phase including information concerning his past, the death

of his brother, his social history, the stressors he was under at the time of the offense, etc. Stanko is simply wrong. Trial counsel presented all of these in mitigation.

In the penalty phase, trial counsel **called 26 witnesses in mitigation.**[19] (App. Index pp. ii-iii; & pp. 1714-2321). The record demonstrates counsel conducted a reasonable and thorough mitigation investigation and presented a reasonable and thorough mitigation case. Sears, 561 U.S. 945; Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins, *supra.* Counsel credibly testified during the PCR hearing that Stanko was not forthcoming with his defense team, indicating Stanko likely provided false or misleading information regarding potential mitigation or aggravating information. In any event, both PCR Courts found *trial counsel* was neither deficient nor was there prejudice from their mitigation presentation on basically the same information. (App. 1714-2321). Even had counsel presented more witnesses, **there is no reasonable probability of a different result.** The evidence of Stanko's guilt of these crimes was overwhelming, the evidence of alleged insanity was found not to be credible, and the evidence in aggravation justifying and necessitating a death sentence was overwhelming. This ground was properly denied 2 times below. Stanko presented no different testimony on these claims at the 2nd PCR stage as he did at trial. Again, the record shows counsel pursued a defense supported by experts and sought to explain why Stanko committed the horrible criminal acts there was no denying he committed. Counsel attempted to explained much of Stanko's past and current behaviors to hopefully blunt some of the aggravating effects of the evidence. The fact the defense was unsuccessful does not mean IAC. Stanko has failed to meet his Strickland burden. Belmontes, *supra.*

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[19] Those witnesses were: Michael Stanley, Shirlease Maynard, Victoria Jones, Donna Williams, Connie Price, Thresla Dewittt, John Fulmer, Winnie Wenz; Minnie Wenz, Wanda Brooks, Thedus Mayo, Timothy Meachum, Dr. Wu, Sanford Graves, Louis Murden, Dr. James Thrasher, Dale Davis, Karen Hnbrink, Pam Harrelson, Dr. Sachy, Gloria Wilson, Heather Tolar, Irby Walker, John Bertang, Gary Owens, and Dr. Evelyn Califf.

Stanko argues, though, that the 2nd PCR Court erred in finding trial counsel was not deficient and Stanko was not prejudiced. Stanko alleges trial counsel provided "the jury with only general testimony that Stanko had a dysfunctional family with a strict father." Because he presented the bulk of his life history through a social worker in PCR, Stanko reasons he has met his burden of demonstrating deficient performance and prejudice. Stanko is wrong. Stanko has not met his burden by simply re-characterizing the evidence previously presented. Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998).

"Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). "Important sentencing phase considerations include a defendant's 'medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.'" Weik v. State, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (quoting Wiggins, 539 U.S. at 524). In Weik, this Court assigned prejudicial error to counsel's failure "to present even a skeletal version of Petitioner's social history even though there was abundant social history evidence available to them." Id. at 235, 761 S.E.2d at 768. "But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." Bobby v. Van Hook, 558 U.S. 4, 11 (2009).

Trial counsel struck a proper balance. Trial counsel Kelly explained he hired a mitigation investigator and a fact investigator who reported to him. (App. 2988). Kelly explained separate mitigating factors about Stanko's life history and how they were relevant to Stanko's penalty-phase defense. Stanko suffered no reported abuse or other remarkable hardship during his youth,

but he had a strict father. (App. 3009). Describing the father as alienating, Kelly testified: "His father was dominating, and his father drove a wedge between the women of the family and Stanko. He didn't want him around. He wanted him out. He didn't support him. He didn't help him when he got out of prison. He didn't try to help him through." (App. 3007). Kelly testified Stanko had served a prison sentence for a situation similar to the Georgetown crimes in the sense that he was unable to cope on an economic level. He couldn't hold a job. He had to rely on others for a place to live, and he relied on the first female victim. He became, in her case, demanding, and that was a quality he exhibited as the stress mounted on him. And instead of pulling back, it ignited. (App. 3010).

As a result, Kelly developed a purposeful theory of mitigation to show the jury "exactly what happened, the history of it," i.e. what happened after Stanko's release from his first prison sentence that led to his recidivism and the ignition in the Ling home. Kelly wished to attribute this ignition in part to law enforcement's non-responsiveness to citizen complaints. (App. 3011-13). Counsel "felt like it was small, but it was something that might turn a juror because he wasn't receiving any help, and the police, the Sheriff's Department, whoever it happened to be, they weren't reacting to it. If they'd have stepped in, they'd have stopped him." (App. 3013). Diggs echoed Kelly's assessment and preparation, testifying Stanko's intelligence and popularity during high school was "kind of like a double-edged sword"—"if you rely solely on his life history, it creates a problem" because it does not explain what caused the Ling crimes. (App. 3090).

Further, Stanko and his family did not always help. "Stanko concealed his activities from" counsel and was not forthcoming with them. (App. 3012). Testimony showed Stanko's family also would not attend the trial. The trial team still contacted and met with Stanko's family to prepare. (App. 3007-08). But as Kelly testified, Stanko's family: "would not make themselves available."

(App. 3007). Inv. Dale Davis recollected she asked the family to attend the trial, "but only as a formality because [she] knew they wouldn't" attend. (App. 3134). As to Jeff Stanko, Davis testified she met him in Atlanta and assessed "he just didn't want anything to do with it," or "anything more to do with Stephen." (App. 3136). She testified she was responsible for contacting the family and believed he was asked to attend and declined. (App. 3136-37). Kelly assessed Davis' work with high esteem, noting he'd previously worked with her and trusted her to be thorough. (App. 2993, 3014). Davis testified she would have created the following mitigation presentation for the jury as it pertains to her records collection in Stanko's case:

> Well, it would be quite in-depth based on the records, but I think I would – you would begin with his childhood and the situation. His father was in the military. We'd talk about that. His father was kind of a stern person and that when he would have qualified for college, his father wouldn't allow tax returns to be used so that he could get financial aid. We'd talk about how successful he was in high school. Then about you're not sure if the brain injury could have been at birth or the brain injury could have been from licks. You're really not sure where the brain injury came from, but it was certainly there and it affected his behavior, one being that the first incident with the girlfriend and the way she described it even at trial was very similar to the situation that happened in Georgetown County.
>
> To me, it seemed I just couldn't get my head around it. He left and went to Augusta, knowing that his face was all over the news, in a stolen truck, and made no attempt whatever to hide. Instead of taking off for Canada or Mexico or somewhere, he just went to Augusta and was just like he just moved there and was taking up residence.
>
> I mean none of those things signify to me a brain that's functioning properly. And so you can – you can frame things in a way. You're never going to get away from those. I don't think we would've ever used the psychopath, but he certainly had the antisocial personality disorder. I mean you acknowledge those things, but you can – you know, you can frame things different ways and make – make somebody know about him. About his whole life, instead of just all these separate things.

(App. 3129-30).

Counsel presented the mitigation investigator's research into Stanko's life history at trial. Counsel hired Dr. Evelyn Califf, to present the social history since the social worker was unavailable. (App. 2258-63). Dr. Califf had testified several times previously in the 15th Circuit.

(App. 2275). As for trial preparation, Califf made known during cross-examination she "could not get Mr. Jeffrey [Stanko], [Stanko's brother,] on the phone" in the weeks prior to trial. (App. 2276). Nor could she succeed in getting in touch with his parents or sisters. But she did meet with Stanko and Dale Davis, read all of the reports and records provided, as well as emails from Stanko's one sister. (App. 2276-79). Califf opined before the jury that Stanko's family absolutely showed signs of dysfunction, which she defined as anything, including a rigid (dogmatic) family system, which causes a family "not to be a family or to be able to operate or to live and to do a good job with their children." (App. 2261-63).

To put her opinion into context, Califf presented Stanko's family genogram. (App. 2263). She identified Stanko's father's "rigidity" as the main issue causing family dysfunction; his "more military" way of being with the family "was the hardest for the children." (App. 2264). "He seemed to in many cases reject some of his children and their ways. If – if the child did not do something that he wanted the child to do, he would withdraw. And it was almost like – we call it abuse when someone gets very silent and does not speak to you." (App. 2264-65). Califf "found that was one of the overriding issues with" Stanko, as he could never get enough approval or kindness or attention from his father. (App. 2264-65). Califf testified Stanko had not spoken to his father for 10 years because "he displeased his father even though he was good in school and did really well up until he did not get into the military academy." (App. 2266). She testified Stanko had vision problems, "so when he did not get into the military academy, he became rather depressed," and his father stopped supporting him. (App. 2266-67). Califf assessed, Stanko "went downward." (App. 2267). She expounded:

> If you begin to not be approved of and you still are trying so hard to get approval from someone and you begin to look at those things, you start building yourself up. And I thought it was really interesting on those who have assessed Mr. Stanko that most all of the time they came in with narcissistic personality disorder, and I can

> understand that because it's truly . . . it means that you really think you're great and you're always grandioso, and – but actually what that means is not that. What it means is many different things, but most of the time you have low self-esteem, when you do not feel that you have – inside that you have any real good things about you.
> . . . And another contributing thing there was when his – when *his brother was killed* because he was very close to him. And I believe that both of those things, but particularly himself, when I interviewed him, it was the only time I saw some real feelings from him is when we talked about that. And that goes into, when you see a person exaggerate, when you see them be a pathological liar because they're holding themselves up, and they are also telling everybody else what they do and they can do this and they can do that, . . . it is understandable. And what we try to do is to get people to see what the truth is, and you then know who you are and your real self, you get in there and you don't have to depend on another person for your identity, but somebody has to lead you that way when you come up in a very rigid home, and that's all the person you wanted to please.

(App. 2270-74)(emphasis added). Califf recognized throughout Stanko's young life at home, he was getting good grades, so he was getting support outside of the home in some respects. (App. 2273-74). But she opined Stanko never really got much support from his family because while he was getting some from his mother at home, "she could not intercede between the father who was her charge and the enabler for him." (App. 2273). Califf testified there "are down to earth things" she sees "every week" that may have a damaging effect on a person's development, such as Stanko's jaundice at birth, or the mental defects presented earlier at trial. (App. 2271-75). She ultimately opined during cross-examination:

> [H]e failed to develop because he was in a dysfunction situation, and his particular personality and the location in the family for whatever reason – because I was not there – but the functioning of that family caused him to – to – to do things that he had – lacking of the attention that he needed, and therefore he did not develop on forward.
>
> But when he received it out of other people, he did thrive because you can look at those records and you a can find that out. [ ] And you also know that when he thrived, the only time – every record shows that he had any problems was when he failed there or when he was hit in the head with a bottle.

(App. 2281-82 (omitting interjection by counsel)).

With the beer bottle incident, Califf testified she asked the mitigation specialist for follow-up records because before he got out of high school, "it appeared that when he was hit in the head with a bottle that that had some problems," but there were no records to assist in assessing the damage. (App. 2282-83). In fact, at this stage, counsel re-called Dale Davis to testify she made at least 7 attempts to garner the beer bottle records but they could not be obtained from the Charleston Naval Hospital where he sought emergency treatment. (App. 2285). She had eyewitness sources regarding the incident, which occurred during the end of his junior year or during his senior year of high school. (App. 2286). Davis had earlier been called to give testimony demonstrating that she collected the totality of Stanko's in-patient birth records from the Guantanamo Bay military base in Cuba. Despite 7 different attempts, Stanko's other outpatient records could not be located due to his family's movements with the military. (App. 2106-07).

As to the rest of the family, Califf noted they were a middle class family in relatively good health, but they could benefit from some counseling. (App. 2268). She opined Stanko's siblings each dealt with their father's personality differently. One or two rebelled at times, and another was fearful to stand up on her own and risk losing her father's approval. (App. 2265).

Counsel added additional firsthand accounts of Stanko's behavior as a child and adolescent, with his family in suburban Goose Creek. (App. 1855-1896). The assistant principal at Stanko's high school testified about his good academic performance and multitude of extracurricular involvements. (App. 1856-66). Stanko's high school physics and AP chemistry teacher testified that he was a leader, involved in activities, excelled academically, had potential, excellent manners, and demonstrated respect to all. (App. 1871-72, id. at 1879-80).

Stanko's neighbor Wanda Brooks testified Stanko lived with his parents, his brother Jeff, and his sister Cindy in a suburban single-family home in a subdivision alongside other military

personnel. (App. 1886-87). Stanko was about 12 at this time, and was as Brooks' neighbor through high school. (App. 1888). Stanko and his brother Jeff would visit Brooks' home to play games and sports with her children and family and swim in her pool. (App. 1887-89). Stanko was well-behaved, and she felt comfortable having him around her home. (App. 1888-89). Brooks was aware Stanko did not get into the Air Force Academy because he personally talked to her about it. (App. 1893). Stanko expressed he was very upset because it was a major life goal of his and he did not accomplish it. (App. 1893). She testified she was aware the other brother, Billy, had some troubles and did not live with the rest of the family. (App. 1887). Brooks stated when *Billy "died in a fire,"* Stanko and Jeff "showed very little emotion about anything. It was just like everything was suppressed, you know. I mean, it was like they had gone into a depression . . . ." (App. 1892)(emphasis added). Stanko never talked about his parents around her, but she noticed the Stanko home did not get many visitors compared to her own. (App. 1890). Brooks testified Stanko's father was a disciplinarian, smart, intimidating, and acted unusual "several times." (App. 1894-95). Brooks recounted he would go "berserk and yelled at the kids" when a firecracker would go off near his house on the 4th of July or New Year's Eve. (App. 1895). She did not recall seeing Stanko's father getting involved with any of Stanko's sports. (App. 1895).

Counsel also called individuals who experienced or had received reports of Stanko's cons and schemes. Others testified about Stanko's gaining insurance coverage and calling a psychotherapist prior to the Ling incident. (App. 2797-2881, 1897-1922, 2000-18, 2024-27, 2110-49, 2179-2256). This testimony demonstrated Stanko's functioning and behavior during the critical time period prior to the Ling crimes, as counsel testified at PCR he aimed to do. (App. 3011-14).

Connie Price, one fraud victim, testified she began calling authorities because she was concerned with Stanko's "pretty bizarre" behavior which affected her on a near daily basis,

including once when Stanko claimed he had visited a doctor but obviously had just self-applied Band-Aids. (App. 1786-87). Gary Owens echoed this testimony, speaking about Stanko's erratic behavior a few days prior to the Ling crimes, about Stanko's lies of a grandiose lifestyle, and about Stanko's collection of retainers to pursue legal actions that never panned out. The witness recalled meeting with police the morning before the Ling crimes to ask for Stanko's activity to be investigated. (App. 2242-53). A former assistant solicitor testified Stanko's name was well known to his office prior to the Ling events. (App. 1919).

Probation agents testified to Stanko's stint in community supervision leading up to the Ling crimes. Stanko failed to report in December and January of 2005 and was in arrears on his supervision fees. (App. 2124-25, 2189-91). Prior to those dates, in October 2004, Stanko reported he wanted to move to North Carolina with his brother. (App. 2213). At least 1 agent warned him of the consequences of the failure to report and of the consequences of the complaints, if true, about his unauthorized practice of law. (App. 2191-2201). One agent testified Stanko did not present himself as being in need of mental health counseling, but a January 2005 entry from a meeting with Stanko showed he intended to begin counseling at a specific location, and Probation had in February 2005 given Stanko the names of 3 separate mental health counselors as references to assist with his re-integration. (App. 2206-08). On April 5, 2009, Stanko reported he had begun counseling—the Ling crimes occurred on April 8. (App. 2209). And in March 2005, 1 month before the crimes, Stanko reported to his agent he had voluntarily enrolled in counseling. (App. 2218). Attorney Irby Walker testified to assisting Stanko in his battle to have himself removed from the sex offender registry for his prior kidnapping. The State also stipulated Stanko should not have been required to be on the registry for the prior kidnapping. (App. 2299-36).

Thresla Dewitt testified Ling added Stanko to her health insurance so he was eligible **to receive mental health benefits.** (App. 1850-51). And a psychotherapist in private practice testified Stanko *made a call to her office in April* just prior to the Ling crimes. (App. 2025-27). Elsewhere during the sentencing phase, trial counsel put forth extensive testimony about Stanko's and his mother's health at birth and during his immediate infancy. (App. 2029-75).

Yet Stanko now contends the mitigation presentation was prejudicial and deficient, that it was cursory regarding the father, and it omitted familial accounts from Stanko's brother Jeff and testimony from someone who was there when Stanko got hit in the head with a beer bottle. As the 2nd PCR Court found, the history and background presented to 2nd PCR Court provides little, if any, new information. (App. 3144-3332).

As outlined, from the record the jury knew: Stanko excelled in sports and academics during his youth despite having a strict and unsupportive father; his troubled brother Billy died in a fire and Stanko appeared to suppress emotion assigned to the loss; Stanko's birth was accompanied by a number of annotations regarding jaundice and other initial concerns; Stanko was affected by his failure to gain admission to the Air Force Academy, his vision was a contributing factor to his rejection, and this rejection also temporally coincided with getting hit in the head with a full bottle of beer during high school; Stanko, a braggart, started engaging in fraudulent activity when he entered the work force after high school graduation and continued after his release from prison; close in time to the Ling crimes; Stanko was behind on supervision fees and had reported to a probation agent an interest in moving to his brother's in North Carolina; Stanko failed to fully engage in therapy prior to the Ling crimes, was beginning to act erratically, and was in danger of being found out. Otherwise, many, if not all, of the facts presented by Dr. Andrews at the 2nd

PCR that appear to be outside the scope of Dr. Califf's testimony, derive from facts presented by the State in aggravation. (App. 1245-1450).

Importantly, at trial, the jury learned from Dr. Califf that Stanko grew up with dysfunction in the home which stunted his development, but he thrived when given structure. Her opinion plainly parallels Dr. Andrews's ultimate conclusion that "he just was poorly equipped to deal with all of these stressors, the barriers he had." (App. 3317). Dr. Califf just did not harmonize her presentation by calling it a "social history assessment" or by using terminology such as "social ecology" in front of the jury as was done by Dr. Andrews at the 2nd PCR. (E.g., App. 3280).

Stanko also complains about the 2nd PCR Court's credibility finding as to Jeff Stanko's PCR testimony. Although Jeff claimed he would have attended trial had the attorneys asked him, (App. 3158-59), this testimony is not credible, as the Court found. Not only is Jeff's statement not echoed by the trial team, but Jeff himself later testified he attended a preliminary hearing in the Georgetown case but did not attend trial "[b]ecause [he] really didn't want [his] face and [his] family all over the media. . . . It's a very hostile time because no one cares about you or your family." (App. 3176-77). He admitted he was contacted by Dale Davis multiple times; he did not recall speaking to anyone else, and Stanko himself did not request him to be there. (App. 3176-79). The PCR Court's credibility determination is supported by the record. Also, Jeff's testimony could be viewed to undermine part of the mitigation theory. Jeff testified at PCR he felt they experienced "[r]elatively what [he] would call a normal childhood." (App. 3146). Jeff did not consider his father to be strict, and did not agree with "that terminology being used." (App. 3159-61). In fact, Dr. Andrews testified she could not get in touch with Stanko's sister and she was disappointed to find there were no prior interviews with his parents before their deaths. (App.

3285). Even though Stanko's family would not cooperate or come to trial, counsel still fully investigated and presented Stanko's social history despite the lack of cooperation or assistance.

Given expansive trial testimony regarding Stanko's upbringing and the stressors causing him to "ignite" in the commission of the crimes at the Ling home, counsel cannot be found to have rendered deficient performance or to have prejudiced Stanko. Stanko's family life and upbringing presented no significant problems which required any more detailed testimony than that presented at trial. *Compare* Wiggins, 539 U.S. at 123 (finding IAC to "put on a halfhearted mitigation case" making no mention of defendant's tumultuous family background); Council v. State, 380 S.C. at 172-74, 670 S.E.2d at 363-64 (IAC for not obtaining defendant's family record, to limit social history investigation, to forego hiring a social worker, and to present only "extremely limited testimony" by defendant's mother in furtherance of life history mitigation).

But even speaking solely to trial counsel's performance, the presentation at trial does not warrant a finding of deficient performance because counsel employed an objectively reasonable strategy. Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (objectively reasonable articulated strategy "generally will not be deemed ineffective assistance of counsel"). Counsel presented a case in mitigation which focused on Stanko's birth records and adult brain scans, on Stanko's youth and adolescence, and on Stanko's actions and stressors during the crucial last weeks before the Ling crimes. (App 3011-13, 3090). They hired Dr. Califf a local, credentialed expert in dysfunctional families. Counsel and his mitigation investigator both recognized family dysfunction as a mitigating feature of Stanko's youth. They strengthened Califf's testimony with other firsthand accounts of eyewitnesses who knew Stanko. And as to the "stressors" presentation, it countered the aggravation put forward by the State and dovetailed with the medical mitigation –

these witnesses' testimony about Stanko's increasingly erratic behavior and reported pursuit of mental health treatment perhaps would help the jury assign reason to the crimes' commission.

The trial mitigation investigator's PCR testimony is also telling on the point of deficient performance. Dale Davis has significant experience in capital trial mitigation investigations. Davis testified her role in these capital cases includes interviewing the client and then seeking out an exhaustive list of contacts, interviews, and records, which she then provides to trial counsel for their use and evaluation. (App. 3101-04, 3112-18). Davis testified a social worker would ordinarily be hired to review, verify, and testify about the records she collected and summarized. According to Davis: "They just – they weave – they weave things into a story, which always makes information more interesting and relevant. While it's accurate, it's still cohesive in telling a story." (App. 3114). Dr. Califf's testimony cannot be said to deviate from this role or to differ from that employed by Dr. Andrews at the 2nd PCR hearing. Further, Davis testified that the social worker she recommended from Greenville was not available for trial. (App. 3120-22). There was no deficient performance under the totality of these circumstances existing in this specific case. In sum, it cannot be said counsel put on only a skeletal presentation of Stanko's life history. "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." Van Hook, 558 U.S. at 11 (citing Wiggins; Rompilla).

Stanko claims the 2nd PCR Court erred in finding his evidence was cumulative to that submitted at trial. (*See, e.g.*, Order at 23, citing Jones, 332 S.C. 329, 504 S.E.2d 822). He claims this case differs because he did not offer "merely 'a more elaborate version' of the mitigation evidence" presented at trial, Id. 332 S.C. at 339, 504 S.E.2d at 826, and implies the 2nd PCR Court simply lumped this case in with Jones, because there were similarities. Stanko is wrong. The 2nd

PCR Court followed Strickland and Wiggins in conducting its analysis. (App. 4078-4139; 4146-47). As the 2nd PCR Court found, what Stanko presented below at the Robertson hearing was cumulative, a fancier mitigation case, or the evidence was simply not credible, and as a result, *trial counsel was not deficient nor did Stanko suffer prejudice*. Jones, *supra*. Other cases besides Jones have recognized this principle, as set forth in the 2nd PCR Court's Order. Cullen v. Pinholster, 563 U.S. 170, 200-01 (2011); Morva v. Zook, 821 F.3d 517, 530 (4th Cir. 2016); Byram v. Ozmint, 339 F.3d 203, 211 (4th Cir. 2003); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006). Applying this guidance, the 2nd PCR Court found Stanko's presentation was just a "fancier" supplement to that presented to the Georgetown jury. (App. 3288-3332). The new evidence is either cumulative to the old or was unavailable at the time of trial. Accordingly, the factual basis for relief Stanko presented to the 2nd PCR Court was not enough to warrant a finding that 1 juror would have struck a different balance on this record. As a result, Stanko can point to no evidence that initial PCR counsel's performance caused prejudice to Stanko. Robertson, *supra*.

Finally, Stanko also alleges, under this ground and the following one, that the 2nd PCR Court conducted its prejudice analysis erroneously because it considered **each IAC claim individually**. Stanko is incorrect. While the 2nd PCR Court addressed Strickland prejudice under each ground, it also considered all of the mitigation collectively against all the aggravating evidence, and found there was no reasonable probability the jury would have returned with a different sentence. **(See App. 4137-39).** The 2nd PCR Court stated that even had counsel presented "...the mental health assessment, life history, and other prison adaptability evidence in the manner presented before this Court rather than in the manner reflected in the Record on Appeal[,] there exists no reasonable probability" the jury would have returned with a different sentence, citing

Belmontes, *supra.* (App. 4139). Stanko's complaint about the 2nd PCR Court's prejudice analysis is without merit. (App. 4137-39).

C. IAC claim 4 [the alleged failure to present mental health mitigation][20]

Stanko alleges the 2nd PCR Court erred in finding no IAC for not further retaining Dr. Wu. Stanko argues Dr. Wu could have diagnosed a different, more mitigating, reason for Stanko's inability to handle stress, temporal lobe epilepsy, if Wu had been given certain information. **Yet, the record shows Wu had the very information he claims he did not have, and testified about it before the jury,** but like all the other experts, did not diagnose temporal lobe epilepsy in 2006. There is no deficient performance or prejudice. Strickland.[21]

At trial, Dr. Wu testified almost exactly as he testified at the 2nd PCR. (App. 586-638, 1924-27, 1955-62; 625-38, 1962-75; 3220; 3201-29, 3251-60). There was a decrease in brain activity on both sides of Stanko's frontal lobe and was 50% or greater in some areas [25% at PCR]. **He also examined Dr. Gur's quantitative volumetric brain analysis in preparation for trial, which he then testified in 2006 showed a statistically significant decrease in volume by a measure of 4 standard deviations from the norm. (App. 639-40, 656; 3228-29).** Wu described the abnormality affects Stanko's **ability to regulate or control his impulses.** (App. 634-35, 1991). Wu claimed Stanko would have difficulty controlling aggressive behavior. (App. 1974-75; 3224-25, 3234-35, 3241-42).). Wu determined Stanko's decrease of frontal lobe activity to be clinically

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[20] Stanko raised a similar IAC mental health mitigation claim at the 1st PCR hearing, but it is not the exact same claim raised to the 2nd PCR Court.

[21] Stanko also argues under this portion of this ground that trial counsel failed to introduce evidence of the stressors Stanko was under before the Ling murders and how he could not cope with those. As shown under the previous portion of this ground, trial counsel introduced much evidence about the stressors Stanko was under at the time of the Ling crimes and how he could not cope with them, so this claim, has no merit. Jones v. State; Simpson. Respondent will not rehash that discussion but incorporates its discussion of this issue under the previous ground.

significant, and it could "be consistent with someone who had a significant developmental problem" there. (App. 637). **He testified at trial and PCR, 1 potential contributing factor to the abnormality could be Stanko's having suffered a blow to the back of the head with a beer bottle when he was a senior in high school, which Wu categorized as a traumatic brain injury. (App. 1981; 3244-45). Other expert witnesses testified to the same incident and its possible effects on Stanko's brain in the guilt and penalty phases. Dale Davis also testified at trial she confirmed this head injury through 3 witnesses.** Further, Wu testified medical records from Stanko's birth indicated developmental brain abnormalities—there existed poor wiring in Stanko's brain function from the time of birth. (App. 1981-82). And, developmental abnormalities sometimes do not manifest until early adulthood because "the frontal lobe is not fully connected throughout their brain until late adolescence." (App. 1982-83). Wu **did not** diagnose **or** testify in 2006 Stanko suffered from temporal lobe epilepsy even though Wu and other trial experts were **fully aware of the information he now complains he did not have.**

Wu only minimally expanded his prior diagnosis at PCR by testifying that he reviewed additional records not provided to him as part of his trial preparation in this case. (App. 3229-43). According to Wu, the key record he was not provided was ***Gur's volumetric analysis*** **of Stanko's brain.** (App. 3227-28; **3232, ln. 13- 3233, ln. 10;** 3237). If he had been provided that, it would have tipped him off to look at other causes of Stanko's condition and would have led to a diagnosis of temporal lobe epilepsy. (App. 3227-30; **3232, ln. 13 - 3233, ln. 10**; 3237). Wu concluded Stanko's records support a "working diagnosis, based on what [he had] learned so far," Stanko had an imaging consistent with a traumatic brain injury and temporal lobe epilepsy." (PCR 320).[22]

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[22] Dr. Wu's 2019 PCR testimony opined the only manifestation of Stanko's undiagnosed temporal lobe epilepsy Wu could testify to other than excessive writing [hypergraphia], came in the form of the same criminal or antisocial conduct relied upon by Stanko at trial in 2006 and

Wu's PCR testimony shows he did not review his trial testimony. (App. 3258-66). He **testified about Gur's volumetric analysis at trial in 2006** and **its' findings. (App. 3254-60; App. 639-40; Def.'s Ex. 1)).** And, he knew and testified about the head injury. Additionally, Dr. Wu in no way retracted his testimony and diagnosis provided in 2006. (App. 3270).

Trial counsel also testified at the 2nd PCR Court he selected who the experts were going to be and their role (App. 3044). Wu testified he was retained to review Stanko's PET scan which led him to opine Stanko has a brain abnormality in the frontal lobe, specifically the ventral frontal lobe, which is near the bottom of the frontal lobe. Diggs contradicted Wu and testified Wu did not ask for additional information to complete the task he was hired to do. (App. 3087). Importantly, Diggs did not hire Wu to diagnose Stanko upon a review of records extraneous to the PET scan—he hired him "to put together the video" of the PET scan imagery and to testify about it and his findings in it, which he did. (App. 3081-83; 3039). "Dr. Wu was in that area of expertise explaining what the scans revealed. Dr. Wu was the one that put together the visual video" used at trial. (App. 3047). Along with Wu's review of the PET scan and creation of the PET scan graphics came an opinion Stanko had a frontal lobe abnormality. (App. 3081). This testimony served to enhance the opinions of the other medical experts. (App. 3083). Wu's visual examination and diagnoses fit squarely with that of the other doctors who viewed Stanko's PET and MRI scans and testified about them at trial. (*Ibid.* at 8-16). Diggs' opinion was Wu's trial and sentencing testimony "demonstrated visually what their opinions were based on." (App. 3083). Diggs also appraised the defense prepared and presented by counsel and their team of experts and investigators as one which

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complained of as deficient by both present and initial PCR counsel. (App. 3242-44, 3267-68, 3271). As to the hypergraphia, Stanko has previously authored a book and intended to support himself by writing.

provided a medical explanation for Stanko's abnormal brain and explained how that abnormality "contributed to this particular incident." (App. 3086).[23]

"When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry 'is not whether counsel should have presented a mitigation case' but 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable.'" Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009) (quoting Wiggins, 539 U.S. at 523). "The 'prevailing norms' that guide our judgment as to whether counsel's performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion"—or a promising one. Stone v. State, 419 S.C. 370, 406-07, 798 S.E.2d 561, 581 (2017).

The record shows counsel made an objectively reasonable professional decision to hire Wu to visually examine the scan and prepare testimony on that topic for the jury, knowing Wu's testimony would supplement other experts he would present who actually examined Stanko and diagnosed insanity and involuntarily acquired psychopathy. Wu admitted at PCR his "primary modality of interpretation is a visual analysis of the scan," (App. 3216-17), and counsel acted exactly as later "recommended" by Wu at PCR ("clinical correlation is recommended") through another credentialed expert. (App. 3272).[24] This strategic decision should not be subject to second guessing in favor of a new strategy. Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir. 2007)(though more detail in evidence may be shown, no Strickland error where counsel investigated the case,

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[23] Mitigation investigator Dale Davis likewise assessed before the 2nd PCR Court that defense counsel "found the answer" to explaining Stanko's behavior: brain damage. (App. 3130).

[24] Dr. Wu later criticized counsel for asking him general questions about PET scans rather than more specific questions about the functioning of Stanko's brain. (App. 3235). The record does not support this.

relied on experts, presented a sound defense, and evidence of aggravation was overwhelming).[25] The fact Stanko can years later secure an alternative diagnosis, **based on the same information the expert previously had,** does not mean counsel's failure to obtain that expert testimony constituted deficient performance. McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008)("McClain blames Dr. Maish's failure to diagnose the frontal lobe disorder on his counsel's failure to inform Dr. Maish of McClain's history of childhood abuse and substance abuse, but that argument fails [where] Dr. Maish was aware of ... McClain's substance ... and childhood abuse.").

This Court has found deficient performance and prejudice where capital counsel failed to provide relevant information to their testifying psychiatrist. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). In that case – a case notably missing from Stanko's argument – counsel was deficient because counsel only "exerted some effort," determined insufficient to "adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder." Id. at 608, 602 S.E.2d at 743. However, Von Dohlen is not analogous to this case for multiple reasons apparent from the record. It is not cited in Stanko's petition for good reason. First, because Wu was not hired to examine and diagnose Stanko but to generate the PET scans and examine them and provide testimony regarding his findings in those scans, which he did. Second, because of the depth of the battery of experts counsel strategically employed to present compelling mitigating evidence throughout both phases. Von Dohlen did not present a battery of experts until his PCR hearing. Id. at 604-06, 602 S.E.2d at 741-42. But at Stanko's trial, each

[25] *See also* Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) ("counsel did retain medical experts whom he thought well-qualified. The experts he had retained did not state that they required the services of . . . additional experts. There was no need for counsel to seek them out independently."); Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998) (counsel has no duty to pursue additional testimony from alternative neurological experts when the experts with whom he consulted indicated no additional testing was required).

expert's testimony built upon that of the previous one to paint a full picture of the causes and implications of Stanko's brain abnormality. Stanko's experts provided a medical reason—a visually discernable frontal lobe impairment—for Stanko's ASPD diagnosis and criminal behavior. And with the exception of Drs. Einhorn and Wu who were hired to conduct, create, and testify about the findings in the PET scan, Stanko's remaining experts were provided with the gamut of Stanko's relevant records, including social history, for assistance in diagnosis. Drs. Thrasher and Sachy also personally interviewed Stanko prior to reaching any conclusion and diagnosis. Wu did not. Thrasher and Sachy did not diagnose Stanko with temporal lobe epilepsy.

Finally, Wu's testimony at PCR is simply not credible. He testified *if* he had been given Gur's report prior to trial it would have led him to eventually diagnose Stanko with temporal lobe epilepsy. (App. 3227-28; **3232, ln. 13- 3233, ln. 10;** 3237). He was given all this information **(App. 3254-60); he was aware of Gur's report of Stanko's brain and testified about it at trial** and **he did not diagnose Stanko with temporal lobe epilepsy in 2006 or testify to the jury to the same. (App. 3254-60; App. 639-40; 656; Def.'s Ex. 1).** Wu eventually admitted at PCR, **he did have Gur's report** before trial and even testified about its' findings to the jury. **(App. 3254-60; App. 639-40; Def.'s Ex. 1).** Wu also knew about the other experts' findings and his own findings in the PET scans. As to the prior head injury at 17, the record shows counsel attempted **7 times through their mitigation investigator to obtain medical records of this incident** but were unable to do so, through no fault of counsels', because Stanko's father was in the military and his family had moved so many times. **(App. 2285-87).** Counsel's mitigation investigator **was able to confirm through 3 other sources the head injury at 17 did in fact occur. (App. 2285-87).** This was not deficient performance. **Dr. Wu also knew about the prior head injury at 17 as he testified about it before the jury in 2006. (App. 1981). Other experts also testified about**

the head injury at trial. (App. 472). Again, Wu **did not** diagnose Stanko with temporal lobe epilepsy in 2006 even though he was aware of all of the evidence.[26] Wu's assertions at PCR regarding his diagnosis if he had been given the right information are simply not credible.[27] Von Dohlen is simply not applicable to these facts.[28]

Testimony at both PCR hearings showed counsel completely, thoroughly, and properly investigated, researched, and became knowledgeable of all aspects of Stanko's alleged brain defect and mental health history and presented the same in the guilt phase and as mitigation in the penalty phase through numerous experts, tests, scans, records, Gur's Report, the head injury at 17, and birth records. Wiggins. Counsel also demonstrated a connection between the insanity defense and Stanko's birth records, a lack of oxygen at birth, which counsel obtained and presented, indicating probable or possible intracranial damage at birth. Counsel was able to obtain instructions on statutory mitigating circumstances as requested. Counsel was entitled to rely on retained psychiatric, medical, and psychological experts' diagnoses of what Stanko suffered from and what he did not suffer from. Counsel certainly was entitled to make an objectively reasonable strategic decision not to pursue a mental health defense [temporal lobe epilepsy] counsel's own experts did not diagnose at the time.

Stanko has also not demonstrated prejudice. There is no reasonable probability of a different sentence with Wu's new non-credible diagnosis. Wiggins; Belmontes. The evidence of

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[26] Nor did any of the other medical and psychiatric experts in the case whether for the State *or* for Stanko, and they were aware of Gur's report, the head injury, and what the brain scans contained.

[27] Dr. Wu also claimed that Dr. Sachy's trial testimony further informed his new diagnoses; but counsel could not have given Sachy's testimony to Wu before trial because it did not exist.

[28] This concept is also related to the case law that there is no constitutional right to the effective assistance of an expert. Wilson v. Greene, *supra.* It matters whether counsel conducted a reasonable and thorough investigation, not whether a certain expert he hired missed something fairly duplicative and otherwise discredited from the remainder of the testimony at trial.

Stanko's guilt of the crimes was overwhelming; the evidence in aggravation of the murder, kidnapping, attempted murder, torture, and rape was overwhelming; and, the evidence of Stanko's bad character and future dangerousness was proved through prior convictions and bad acts in the penalty phase. Moreover, Stanko cannot establish prejudice because, in addition to being largely cumulative of his 2006 testimony, the content of Wu's 2019 testimony was also cumulative to other trial experts, who had all the information Wu had and did not diagnose temporal lobe epilepsy. (App. 417-19; 2161-64; 470-72; 695-96). Further still, Wu's new diagnosis would be attacked as not credible if presented today, because he had the information in 2006, testified about it, but did not diagnose temporal lobe epilepsy at that time.

Perhaps the most telling indicator relevant to the prejudice analysis is the lack of credible weight Wu's new "working diagnosis" carries. The contention Stanko suffers from "undiagnosed temporal lobe epilepsy," (App. 3229), is contradictory to the testimony of trial experts who actually examined Stanko.[29] Notably, Dr. Thrasher testified at trial that seizures can cause the type of brain dysfunction he diagnosed Stanko with, but his personal examination of Stanko showed he "does not have seizures." (App. 466). Wu's new "working diagnosis" should further be viewed with caution due to Wu's acknowledgement that "you kind of have to ask for" information regarding the manifestation of symptoms. (App. 3271). No other expert diagnosed Stanko with temporal

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[29] Notably, the trial presentation was consistent on points Dr. Wu did not disagree with. Dr. Sachy testified that aggressive behavior resulting from a diminished ability to control one's impulses can be curtailed with medication. (App. 728, 2168). On the issue of prison adaptability, Dr. Sachy testified Stanko was likely to be well-behaved in a structured prison environment and why, because he has ASPD, **and Stanko would be a benefit to the institution.** (App. 2166-68, **2172-73**). As to memory loss, Dr. Thrasher testified at trial Stanko's stated memory loss during the Ling crimes could be caused by a frontal lobe defect. (App. 561-62). Sachy also addressed Stanko's stated inability to remember certain things about the crimes. Sachy offered an opinion Stanko likely chose not to remember some things, but the memory loss also could result from entanglement in an emotionally charged incident which reduces one's ability to store detail. (App. 735-38). At PCR, Dr. Wu expressly stated that he did not disagree with Dr. Sachy on this point. (App. 3265).

lobe epilepsy before or since the 2006 trial. Wu's entire testimony, including cross-examination shows, unlike Dr. Thrasher, he has requested no additional information to support his diagnosis. Wu's testimony further shows **Stanko does not present any symptoms of the disorder and is not undergoing treatment or being medicated for it.** (App. 3268, 3271).

As to Stanko's purported hypergraphia, Wu's basis for this finding lacks evidentiary support, as it is known Stanko endeavored to write and publish a book while in prison the first time, sought to support himself by writing once released from prison, Stanko has been isolated in a cell by himself much of the time since these crimes so he would have little else to do but write, and as Wu never personally tested/examined Stanko or asked for additional records to enhance or verify his assessment on only limited facts. (App. 3267-68; 3271-72). Mere speculation does not satisfy the burden of demonstrating prejudice from alleged omissions from trial. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).[30]

Further, Wu never personally examined Stanko and was provided with only circumspect materials from the 2006 trial. (App. 3257-67). For the PCR, he was apparently not asked to review the testimonies of the trial medical experts. He in fact **could not recognize the testimony he was hired to prepare for this 2019 hearing was largely cumulative to other doctors.** Moreover, at PCR, Wu agreed Stanko has a personality disorder, and he lowered the percentage of abnormal functioning he observed in Stanko's PET scan to 25%, from 50% at trial. (App. 3226, 3251; *contra* App. 631-32, 638, 1974). And in spite of presenting a "working diagnosis" regarding another abnormality in Stanko's "right temporal insular cortical metabolism," Wu agreed that area remains

[30] Moreover, Dr. Wu's suggestions Stanko's condition can be treated with hyperbaric oxygen therapy and cognitive rehab, (App. 3246-47), are unavailing to this prejudice analysis given the aggravating evidence, Wu's new testimony is not credible, and the likelihood of Stanko's receipt of that type of boutique treatment in prison, is not available in this country.

in the limbic system and thus remains responsible for impulse control. (App. 3228, 3253-54). Still more, his identification of this portion of the limbic system may contradict a crucial distinction he made at trial. There Wu testified Dr. Einhorn administered neuropsychological tests upon Stanko and obtained normal results. Wu then explained he would expect the results to be normal in Stanko's case because the parts of the frontal lobe Stanko would use to complete those neurological tests were higher up than the impaired portion. (App. 629). Stanko's revamped presentation of Wu is also suspect given Wu's similar role in other capital collateral actions.[31] Stanko takes issue with the PCR Court's credibility finding; however, the Court's credibility finding as to Wu is fully supported by the record. It is also within that Court's discretion as it viewed and heard Wu's testimony and compared it with the entire record. And, the key report on which Wu relies to support his new diagnosis is suspect at best. Dr. Gur is not an M.D. but a psychologist. Gur's methodology in diagnosing brain damage by volumetric analysis and comparison to other brains or what he terms an "average normal brain" has been rejected by medical doctors and courts throughout the country or found not credible.[32] And, Gur, like Wu, has admitted in the past, "a

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[31] *E.g.*, People v. Woodruff, 5 Cal. 5th 697, 717, 421 P.3d 588, 607 (2018)(physician and co-chair Cedars-Sinai imaging department "concluded that Wu's method was appropriate for research but not diagnostics"); Clemons v. State, 55 So.3d 314, 328 n.5 (Ala. Ct. App. 2003) (court correctly refused to admit testimony of PET scan conducted by Wu that defendant suffered a brain injury at or near birth because the test was conducted during adulthood and because **"Wu conceded that none of the scientific journals or studies supported the use of a PET scan as a diagnostic tool to ascertain old brain injuries").** Wu's non-credible findings do not offer a mitigating explanation of the effects of Stanko's neurological and mental status at the time of the crimes, and there is no reasonable probability placing a different emphasis on the cause of his behavior would have persuaded the jury to vote for a life. Smith v. Ryan, No. CV-12-00318-PHX-PGR, 2014 WL 1247828, at *46 (D. Ariz. Mar. 24, 2014), *aff'd*, 823 F.3d 1270 (9th Cir. 2016)(Unpublished) (addressing testimony by Wu); *see also* Berryman v. Ayers, No. 1:05 CV 05309 AWI, 2007 WL 1991049, at *81 (E.D. Cal. July 10, 2007)(reaching same conclusion: "Dr. Waxman indignantly states that Dr. Wu's method in this regard "is intended to mislead the reader by suggesting that normal *individual* subjects have no asymmetries of the temporal lobe") (unpublished).

[32] Smith v. State, 170 So.3d 745 (Fla. 2015); State v. Mundt, 2016 W.L. 3573169 (Ct. App. Ohio 2016)(*Slip Copy*); Foster v. State, 132 So.3d 40 (Fla. 2013); State v. Powell, 2011 W.L. 20411183

PET scan is only a 'snapshot' of a patient's brain at one particular time, and that one cannot make retrospective appraisals of that brain from such snapshots." United States v. Mezvinsky, 206 F. Supp. 2d 661, 675 (E.D. Pa. 2002). Thus, Wu cannot make any inference about Stanko's brain during childhood, as a teenager, or at the time of the crime based on a later PET scan. Id., at 675.

Wu's testimony is not enough to warrant a finding at least 1 juror would have struck a different balance. Pinholster; Morva; Byram. Wu has simply said more of the same as before (and he has supported it with the same visual presentation trial counsel hired him to provide). To credit any expansion of Wu's testimony would also improperly discount the testimony for a number of other well-qualified experts who testified at trial. *See* In re Yates, 177 Wash.2d 1, 296 P.3d 872, 891 (Wa. 2013)(no IAC in failing to present Gur and other experts as counsel retained appropriate experts in neuro-psychology and psychiatry and those experts did not recommend further evaluations or testing). Stanko failed in his burden of proof.

D. IAC claim 5 [alleged failure to present prison guard and adaptability evidence]

Stanko argues the 2nd PCR Court erred in not finding IAC of trial counsel for failing to present prison adaptability lay and expert testimony. *See* Bowman v. State, 422 S.C. 19, 37, 809 S.E.2d 232, 242 (2018) (a capital defendant may offer in his sentencing phase evidence of good behavior while in jail or prison adaptability). Stanko argues the expert testimony presented at the

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(Super. Ct. Del. 2011)(*unpublished*); Steven Bixby v. State, Order of Dismissal, 2011-CP-01-110, filed January 13, 2015, the Honorable Knox McMahon, ***cert. denied*** **March 7, 2017, S.C. Supreme Court, Appellate Case No. 2015-00821)**; Cone v. Carpenter, 2016 W.L. 1274599, *134-35 (W.D. Tenn. 2016)(*Slip Copy*); United States v. Duncan, 2013 WL12057465 (D. Idaho 2013)(*Slip Copy*); Nelson v. United States, 97 F.Supp. 3rd 1131, 1146 (W.D. Mo. 2015). *See also* Commonwealth v. Ballard, 622 Pa. 177, 80 A.3d 380 (2013)(noting Gur's bias for defendants).

Moreover, Dr. Gur testified to his findings using the same methodology in the guilt phase of State v. Stanko, (*Stanko II.*)(Turner murder), and Stanko was still convicted and sentenced to death. Gur testified similarly in United States v. Fulks, *supra* and Fulks was still sentenced to death.

2nd PCR hearing painted a new picture of Stanko's prison adaptability and future dangerousness, but the trial record's expert and lay testimony refutes this contention.[33] Stanko's hurdle in this issue is that counsel did, in fact, offer such evidence at trial simply by different testimony.

Stanko presented a retired warden, a retired security sergeant, and a retired correctional facility chaplain during his 2nd PCR hearing. Each witness worked at Turbeville prison during Stanko's 1996-2004 prison term for kidnapping, ABHAN, breach of trust (9 counts), and obtaining property by false pretenses (2 counts). Each testified Stanko posed no disciplinary problem, was helpful to other inmates and acted in compliance with the structure and authority in the institution. (App. 2955-81, 248-65). Each recalled Stanko helped other inmates and was a benefit to the prison. (App. 2957, 2961-63, 3183-84, 3193-94). (App. 3182-84; 3193-94; 2957-58, 2961-63). Lay witnesses also stated Stanko spoke with youthful offenders and at-risk youth brought to Turbeville. (App. 2958-60, 3188-89). Stanko presented a risk assessment and inmate classification expert Dr. James Austin, who testified Stanko "does prison time well." And, Stanko's records from his prison term showed he was held in the lowest prison classification possible, because of his kidnapping conviction, had no disciplinary record, and behaved like a minimum security prisoner. (App. 2976, 2977). He noted if Stanko were sentenced to life he would indefinitely be held in the highest security classification due to the convictions, but he could contribute to the prison. (App. 2977-81). Dr. Wu and Dr. Andrews also testified Stanko could adapt to prison based on his history or brain injury and would contribute to the prison. (App. 3249, 3291; 3325, 3304-05).

But all of this testimony is similarly reflected in Stanko's 2006 trial where witnesses also testified Stanko does well when incarcerated in jail **or** prison. Stanko was a well-adjusted inmate

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[33] 1st PCR counsel raised this claim but offered no evidence in support of it at the PCR hearing. The 1st PCR Court denied and dismissed the claim because no evidence was offered in support of, and even if Stanko had, he could not establish prejudice on this record. (Suppl. App. 546-49).

when he served his prison sentence for the McClendon kidnapping (8 ½ years), and had almost no prison disciplinary violations for assaultive behavior. (App. 848-49). In that stressful prison environment, Stanko could control himself and was not a violent inmate who engaged in fights, but walked away. (App. 848-49). Stanko was a well behaved prison inmate with a clean disciplinary record. (App. 2166-68, 2172-73). Counsel also presented the 2nd-in-command at the Georgetown County jail who testified he had daily contact with Stanko and never had any difficulty with him—he was not violent, he followed the rules, he was not bad at being managed, he was respectful rather than threatening, *and Stanko was his cell block's grievance spokesman.* (App. 1714-20). Another county corrections officer testified Stanko followed instructions in the cell block and in the larger unit and was respectful rather than a threat or harm to others. (App. 1720-24). Another officer testified Stanko was quiet and respectful during booking, and he was respectful and caused no problems during his pre-trial confinement and Stanko was the voice of the cellblock—he brought inmate grievances to the chain of command's attention, and they were not frivolous. (App. 1725-28). Further, Dr. Sachy testified Stanko could be housed safely with other inmates and would not be a danger to them because those with his disorder do well in a structured environment and are not violent; and would work favorably with prison guards. (App. 2166-68). Stanko had a clean record when he served 8 ½ years for the McClendon incident and he believed Stanko **"could be a contributing individual to the inmate population, to the corrections system, and to science at large . . ."** if he were sentenced to prison. He agreed Stanko "could be housed in that prison – structured prison environment so as not to be an unreasonable risk to any other corrections personnel or inmate." (App. 2172-73)(emphasis added).

Stanko's trial/sentencing presentation on prison adaptability was not deficient or prejudicial. As demonstrated, the jury heard the same basic information from the testimony

presented at trial and sentencing. Each witness discussed Stanko's (1) low risk of violence while incarcerated; (2) Stanko's adaptability to the structure of incarceration; and (3) that Stanko had an ability to contribute in a productive way. The presentation before the 2nd PCR Court was just lengthier and "fancier" than that presented to the Georgetown jury. Therefore, the new evidence is cumulative and does not warrant a finding that one juror would have struck a different balance.

Moreover, the newly offered evidence relating to Stanko's prison adaptability is "by no means clearly mitigating, as the jury might have concluded that [Stanko] was simply beyond rehabilitation." Pinholster, 563 U.S. at 201 (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002) (recognizing mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness); Belmontes, 558 U.S. at 24 (taking into account certain mitigating evidence would have exposed the petitioner to further aggravating evidence)). Not all of the new mitigating evidence was complimentary of Stanko. The retired security sergeant acknowledged Stanko spoke to at-risk youth, but also reoffended with the Ling crimes a short time after release. (App. 3189-90). Further, presenting Stanko' previous prison time of 8 ½ years would have re-emphasized the McLendon crimes for which Stanko was imprisoned. The prison adaption testimony presented at PCR would also have undercut the mental health defense presented at trial and sentencing, in that Stanko could control his actions under a high stress environment like prison. Further, like the McClendon crime, in the Ling crimes, Stanko *escaped* from the area of the State where he committed the crimes. The State could have further emphasized Stanko's escape risk, re-emphasizing his flight in both crimes. Further, the State could have re-emphasized Stanko learned from the McClendon incident, i.e. he left her alive and he landed in prison. Instead, this time he murdered Ling and thought he had murdered her daughter, leaving no witnesses. As demonstrated by Gerald Kelly's penalty-phase opening, counsel asked the jury to gauge Stanko's future

dangerousness and created a favorable barometer by limiting their consideration to the timeframe between Stanko's arrest in Augusta and trial. (App. 1705-06). Kelly testified that his mitigation investigator Dale Davis had all the past prison records and he did not consider presenting that as evidence of adaptability. (App. 2994). Diggs testified he did not consider calling a prison adaptability expert and chose to rely "on the witnesses that were presented at the trial who were familiar with what his behavior was in a structured environment." (App. 3058-59). Counsel matched this lay testimony with expert testimony from psychiatrist Dr. Sachy. (App. 2166-68).

When the new evidence is weighed along with the old evidence to determine whether the omission prejudiced the outcome of Stanko's sentencing phase, it is of "questionable mitigating value" thus does not support relief. Pinholster, 563 U.S. at 201. The new, but same mitigating evidence, that Stanko could adapt and contribute to the D.O.C. would be heard along with re-emphasis of the graphic assault and numerous schemes and cons Stanko committed before McClendon's kidnapping. It draws attention to the fact Stanko assaulted his live-in girlfriend because she found out about his conning and scheming, was sent to prison for those crimes, did well and contributed therein for his own benefit, and then reoffended in an eerily similar manner less than 1 year after release. Jurors could infer Stanko received no benefit from prison even where he contributed positively because he was clearly not rehabilitated, and thus decline to find this mitigating. And, jurors could have determined from the prison guards and prison records, Stanko could control himself in an extremely stressful environment with people his own size, but preyed on those weaker than him on the outside, especially women and even a 15 year-old girl.

The 2nd PCR Court correctly considered the evidence in total and logically found Stanko failed to carry his burden of proof. Wiggins, 539 U.S. at 535 (the double edge of certain mitigation evidence may justify a limited investigation by counsel in some cases) (citing Burger v. Kemp,

483 U.S. 776 (1987); Darden v. Wainwright, 477 U.S. 168 (1986)). The record shows Stanko engaged in a long pattern of behavior as a con man who took advantage people he could engage in business and on the women he could engage in romance. Stanko's assault on the Lings was vicious and violent in its own nature. Given the limitations of the most recent testimony on adaptability as presented at the 2nd PCR hearing, and the minor impact, if any, of that testimony given the totality of the evidence available at sentencing, the 2nd PCR court reasonably and logically found Stanko failed to show that "at least one juror would have struck a different balance" regarding Stanko's "moral culpability." Wiggins v. Smith, 539 U.S. at 537–38. Again, Stanko has failed to show any error in the 2nd PCR Court's ruling.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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