STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Lower Court Case Number: 2014-CP-26-035

STEPHEN C. STANKO #6022,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Petitioner, Stephen C. Stanko, appeals the Honorable Judge Benjamin H. Culbertson's order dismissing his capital post-conviction relief action filed on May 18, 2016 and the order denying Petitioner's motion to alter or amend judgment filed on October 2, 2017. The order denying Petitioner's motion to alter or amend judgment was received by counsel for Petitioner on October 2, 2017. A copy of the orders on appeal are attached to this notice.

Respectfully submitted,

Lindsey S. Vann, SC Bar No. 101408
Emily C. Paavola, SC Bar No. 77855
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044

October 30, 2017

RECEIVED
NOV 01 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2017-000211

STEPHEN C. STANKO #6022,

PETITIONER,

V.

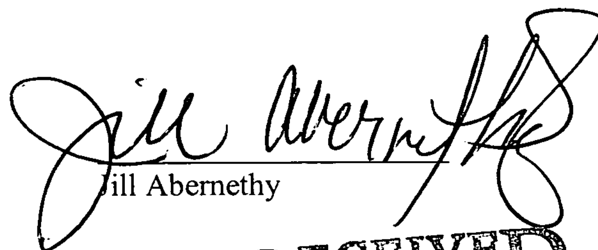
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Notice of Appeal was served by first class United States mail, postage prepaid, this 30th day of October, 2017, upon the following:

Donald J. Zelenka
J. Anthony Mabry
Caroline M. Scrantom
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211



Jill Abernethy

RECEIVED

NOV 0 1 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2014-CP-26-035

2016 MAY 18 PM 2:28

Stephen C. Stanko, #6022,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

FINAL ORDER
DENYING POST-CONVICTION RELIEF

TRIAL DATE . . . . March 2 – 3, 2015
PRESIDING JUDGE . . . . Benjamin H. Culbertson, Circuit Court Judge
APPLICANT'S ATTORNEYS . . . . Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
RESPONDENT'S ATTORNEYS . . . . Donald J. Zelenka, Assistant Attorney General
Caroline M. Scrantom, Assistant Attorney General
COURT REPORTER . . . . Grace L. Hurley

This case comes before the court on an application for post-conviction relief. The applicant, Stephen C. Stanko ("Stanko"), seeks post-conviction relief from his conviction and sentence for murder and armed robbery occurring in Horry County, S.C.. On 11/19/2009, Stanko received a death sentence for murder and a 20-year sentence for armed robbery. His conviction and sentence were affirmed on appeal. See *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013), cert. denied *Stanko v. South Carolina*, 134 S.Ct. 247, 187 L.Ed.2d 183, 82 USLW 3186 (U.S.S.C. 10/7/2013).

In his Final Amended Application For Post-Conviction Relief, Stanko alleges the following grounds for post-conviction relief:

1. denial of the right to conflict-free assistance of counsel;
2. ineffective assistance of counsel during the pre-trial phase of his criminal trial;
3. ineffective assistance of counsel during guilt-or-innocence phase of his criminal trial;

4. denial of due process during the guilt-or-innocence phase of his criminal trial;
5. ineffective assistance of counsel during the sentencing phase of his criminal trial;
6. ineffective assistance of counsel during his appeal;
7. denial of an impartial jury;
8. unconstitutionality of his death sentence.

At the outset of this trial, Stanko voluntarily dismissed his claims for ineffective assistance of counsel arising out of his criminal attorneys' alleged failure to properly *voir dire* potential jurors regarding Stanko's prior conviction in Georgetown County, S.C.,[1] and their alleged failure to adequately impeach the State's expert witness, Dr. Pamela Crawford. Stanko also voluntarily dismissed his claim for post-conviction relief arising out of the alleged denial of his right to an impartial jury.

Prior to the presentation of his case, Stanko argued that he is unable to fully present a case for post-conviction relief on the following allegations due to inadequate funding from the Court:[2]

1. that he was denied effective assistance of counsel because his criminal trial attorneys "agreed to postpone raising the change of venue motion until after voir dire was completed and the jury was impaneled..."

2. that he was denied effective assistance of counsel because his criminal trial attorneys "failed to retain an appropriate expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevelance [sic] of media coverage of the crimes and defendant in order to present the information to the trial court in support of the change of venue motion;"

3. that he was denied due process during the guilt-or-innocence phase of his criminal trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer..." and

---

[1] Prior to Stanko's criminal trial, he was convicted in Georgetown County, SC, of murder, criminal sexual conduct in the 1st degree, assault and battery with intent to kill, armed robbery and two counts of kidnapping ("Georgetown case").

[2] Pursuant to this Court's orders dated 4/29/2014, 6/3/2014, 9/25/2014 and Form 4 order dated 2/27/2015 (denying Stanko's Motion to Reconsider), the Court partially granted and partially denied Stanko's *ex parte* petition to authorize funding for expert and investigative services. The basis for this court's ruling is set forth in those orders. Further, pursuant to the South Carolina Supreme Court's Order in *Stanko v. State*, Appellate Case No. 2015-000212, the Supreme Court denied Stanko's "Petition for Court Oversight of Capital PCR Action" wherein Stanko petitioned the Supreme Court for continuance of this PCR trial pending reconsideration of this Court's denial of funding for investigative and expert services.

4. that he was denied effective assistance of counsel during the sentencing phase of his criminal trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the preponderance of the evidence presented during the trial of this case, I do hereby find the following salient facts and conclusions of law:

I. Right to Conflict-Free Assistance of Counsel

Stanko alleges that one of his criminal trial attorneys, William Diggs, had a conflict of interest in representing him in his criminal trial in Horry County. Mr. Diggs had previously represented Stanko in his Georgetown case.[3] At the time of Stanko's criminal trial in Horry County, he had an action for post-conviction relief pending in Georgetown County for alleged ineffective assistance of counsel by Mr. Diggs arising out of Mr. Diggs' representation of Stanko in the Georgetown case.[4] Stanko also alleges that he was denied effective assistance of counsel by his appellate attorneys for their failure to raise this issue on appeal.

Even if Mr. Diggs had a conflict of interest in representing Stanko in his criminal trial, that conflict was knowingly, voluntarily and effectively waived by Stanko. In pre-trial hearings, Stanko was questioned and advised extensively regarding Mr. Diggs' representation while Stanko's allegations of ineffective assistance of counsel were pending against Mr. Diggs for services rendered in the Georgetown case. Notwithstanding that advice, Stanko wanted Mr. Diggs to continue as his criminal attorney and waived any conflict of interest that may exist. Further, Stanko's appellate counsel raised this issue and it was addressed on appeal. See *State v. Stanko, id.* Therefore, Stanko's application for post-conviction relief on the grounds that he was denied conflict-free assistance of counsel in his criminal trial and that he was denied effective

[3] See Footnote 1, *ibid.*
[4] Stanko's action for post-conviction relief arising out of his conviction and sentencing in the Georgetown case is still pending and no ruling has been made on his allegation of ineffective assistance of counsel in that case.

assistance of counsel in his appeal due to appellate counsels' alleged failure to raise this issue should be denied.

II. Ineffective Assistance of Counsel in Pre-Trial Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the pre-trial phase of his criminal trial due to his criminal trial attorneys': 1) agreement to postpone raising a motion for change of venue until after a jury was impaneled; 2) failure to retain an expert or conduct a study to support a change of venue; and 3) failure to seek a pre-trial ruling that the South Carolina death penalty statute is unconstitutional.

Contrary to Stanko's allegations, his criminal trial attorney raised a motion for change of venue prior to jury selection. After the State objected to hearing the motion prior to jury selection, Stanko's attorney consented to argue his motion after striking the jury but before the jury was sworn. He argued his motion for change of venue at the agreed time but, the motion was denied. The court's denial of Stanko's motion to change venue was also addressed on appeal. See *State v. Stanko, id.*

Although Stanko's criminal attorney did not retain an "expert or otherwise conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevelance [sic] of media coverage of the crimes and defendant,"[5] he argued to the court about the amount of pre-trial publicity surrounding the criminal trial. He also retained a psychologist, Dr. Albiniak, who testified at the motion hearing that potential jurors' often fail to be totally forthcoming in their responses to *voir dire*.

As to Stanko's allegation that his criminal trial counsel was ineffective for not arguing that the South Carolina death penalty statute is unconstitutional "because [it] does not genuinely narrow the class of offenders eligible for a death sentence," his criminal attorney did argue in

[5] Final Amended Application For Post-Conviction Relief, ¶ 11(b)(2).

pre-trial motion that the death penalty is unconstitutional and that issue, likewise, was addressed on appeal. See *State v. Stanko, id.*

In an action for post-conviction relief, the applicant bears the burden of proving he is entitled to relief. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). To establish ineffective assistance of counsel, one seeking post-conviction relief must prove that his counsel's performance was deficient and that a reasonable probability exists that, but for counsel's errors, the result of trial would have been different. *Brown v. State, id.* citing *Strickland v. Washington*, 466 U.S. 668 (1984).

In the case at hand, Stanko's criminal attorneys sought a change in venue and challenged the constitutionality of the South Carolina death penalty statute prior to trial. Both motions were denied and both decisions were affirmed on appeal. Therefore, nothing indicates that Stanko's criminal attorneys were deficient in their pre-trial representation or that they could have presented representation that would have achieved a result more beneficial to Stanko. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the pre-trial phase of his criminal trial should be denied.

III. Ineffective Assistance of Counsel in Guilt-or-Innocence Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney "failed to protect [Stanko's] right to conflict-free counsel by failing to adequately advise [Stanko] and the trial court of all relevant issues regarding the conflict of interest created by [Stanko's] then pending PCR application alleging counsel was ineffective in a prior, related proceeding."

As stated above, Mr. Diggs' representation of Stanko while allegations of ineffective assistanace of counsel were pending against him were extensively discussed with Stanko in pre-

trial hearings. Stanko wanted Mr. Diggs to continue as his attorney and knowingly, voluntarily and effectively waived any conflict of interest. The matter was raised, addressed and affirmed on appeal. The fact that the issue was not raised again in the guilt-or-innocence phase of the criminal trial is inconsequential. Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel in the guilt-or-innocence phase of his trial because his criminal attorney failed to protect his right to conflict-free counsel should be denied.

IV. Denial of Due Process of Law and Fair Trial in Guilt-or-Innocence Phase of Criminal Trial

Stanko alleges that he was denied due process of law and a fundamentally fair trial because "[t]he State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared [Stanko's] brain PET scan to an inappropriate database and testified that the PET scan was 'perfectly normal,' despite knowing the database was inappropriate for comparison to [Stanko's] PET scan."

Dr. Kenneth Spicer testified on the State's behalf during in the criminal trial regarding Stanko's PET scan. However, Stanko challenged that testimony during his cross-examination of Dr. Spicer and through the testimony of Stanko's expert witness, Dr. Jospeh L. Chong-Sang Wu. Although Dr. Wu and Dr. Spicer rendered different opinions regarding Stanko's PET scan, nothing indicates that the State knowingly "presented false, misleading, inaccurate, and unreliable expert testimony...." Therefore, Stanko's application for post-conviction relief on the grounds that Dr. Spicer's testimony denied him due process of law and a fundamentally fair trial should be denied.[6]

[6] This court is aware that it denied Stanko's request for funding in this PCR action to obtain an expert who could dispute Dr. Spicer's testimony in the criminal trial. However, such evidence would have only corroborated the testimony of Dr. Wu and would not have indicated any due process violations by the State.

V. Ineffective Assistance of Counsel in Sentencing Phase of Criminal Trial

Stanko alleges that he was denied effective assistance of counsel in the sentencing phase of his criminal trial because his criminal trial attorneys: 1) informed the jury that Stanko's family did not like him and were not in attendance at trial; 2) elicited expert testimony that Stanko was a psychopath; 3) failed to investigate and present mitigating evidence of Stanko's life history and background; and 4) failed to investigate and present mitigating evidence of Stanko's mental health.

Stanko's criminal attorney admits that he informed the jury during the sentencing phase of the criminal trial that Stanko's family was not in attendance. This was a conscious decision on counsel's part. He opined that if he could persuade the jury that Stanko's family was so angry and disappointed with Stanko that they felt justified in refusing to attend the trial, that extreme perception of Stanko by his own family would support Stanko's defense that he could not function like a normal person and, thus, mitigate his culpability. Counsel's argument to the jury that Stanko's family was not in attendance at trial was an intentional trial strategy to curry sympathy for his client. Also, 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.

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, Stanko's application for post-conviction relief on the grounds that he was denied effective assistance of counsel during the sentencing phase of his trial because his criminal trial attorneys informed the

jury that Stanko's family was not at trial and because Stanko's expert witness testified as to his psychopathy should be denied.

Contrary to Stanko's allegations, his criminal attorneys investigated and presented mitigating evidence of Stanko's life history, background and mental health. Most of the investigation occurred in preparation of Stanko's Georgetown case. Rather than conducting extensive investigation into Stanko's life history, background or mental health again, his criminal attorneys decided not to retain a mitigating investigator but, rather, use the information obtained in preparation of Stanko's Georgetown case in the criminal trial of his Horry County case. Such a decision does not constitute ineffective assistance of counsel.[7] Therefore, Stanko's application for post-conviction relief on the grounds that his criminal trial attorneys failed to investigate and present mitigating evidence of Stanko's life history, background and mental health should be denied.

VI. Ineffective Assistance of Counsel in Appeal

Stanko alleges that he was denied effective assistance of counsel in his appeal because appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Stanko's prior murder conviction over trial counsel's consistent objections. Stanko's appellate attorney chose not to raise this issue on appeal because he felt the argument was futile.

During the sentencing phase of Stanko's criminal trial and over his criminal attorney's objection, the trial court permitted references to Stanko's murder conviction in the Georgetown case. A defendant's prior conviction for murder is admissible as an aggravating circumstance in

[7] In this case, the court granted up to $15,000.00 in funding for Stanko to retain a mitigation specialist, Drucy A. Glass. However, Ms. Glass did not testify in this PCR action and no evidence from her services was presented. Further, this court is mindful of its denial of Stanko's funding request for a fact investigator and forensic psychologist. However, the request to fund a fact investigator and forensic psychologist in this PCR action was not for the purpose of determining whether Stako's criminal trial attorneys were ineffective but, rather, to determine whether the investigators that were used missed anything.

the sentencing phase of a subsequent death penalty case for murder. Code of Laws of South Carolina 1976 §16-3-20(C)(a)(2). Therefore, Stanko's appellate counsel was not ineffective for failing to raise this issue on appeal.

VII. Unconstitutionality of South Carolina Death Penalty Statute

Stanko alleges that he is entitled to post-conviction relief because the South Carolina death penalty statute, Code §16-3-20, does not genuinely narrow the class of offenders eligible for death sentence.

The constitutionality of the Death Penalty Act is well settled. *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985), certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178 (U.S.S.C. 1985). Further, this issue was addressed in Stanko's appeal. See *State v. Stanko, id.* Therefore, Stanko is not entitled to post-conviction relief due to the alleged unconstitutionality of the South Carolina death penalty statute.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the Applicant, Stephen C. Stanko, is **DENIED** post-conviction relief in this case.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

May 13, 2016
Georgetown, SC

opy of Order/
led 5-18-16 mailed to all
arties not in default on 5-18-16
nitials

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT

Stephen C. Stanko, #6022,

Applicant,

v.

State of South Carolina,

Respondents.

C/A No. 2014-CP-26-00035

Order Denying Applicant's Motion to Alter or Amend Judgment

FILED HORRY COUNTY
2017 OCT - PM 1:33
CLERK OF COURT HORRY COUNTY, SC

Hearing Date...August 1, 2016
Presiding Judge....................................... Benjamin H. Culbertson, Circuit Court Judge
Applicant's Counsel...Emily C. Paavola, Esquire
Lindsay S. Vann, Esquire
Respondent's Counsel..............Donald J. Zelenka, Senior Assistant Deputy Attorney General
Caroline M. Scrantom, Assistant Attorney General
Court Reporter..Teresa J.F. Bautz

This case comes before the court following the undersigned's May 13, 2016, Order denying post-conviction relief to Applicant Stephen C. Stanko ("Applicant"), who received a death sentence on November 19, 2009, for the Horry County murder of Henry Turner, as well as a twenty-year sentence for an accompanying armed robbery.[1]

Pursuant to Rule 59(e), SCRCP, Applicant timely filed the Motion to Alter or Amend Judgment now before this Court. Applicant seeks reconsideration of all findings made in this Court's May 13, 2016, Order. At the undersigned's request, a hearing was conducted on the motion in Horry County on August 1, 2016. Following oral argument, the undersigned issued a Form 4 Order denying the Motion to Alter or Amend. This formal order follows, in which the

[1] Applicant has another PCR action arising out of his conviction and sentence in a related Georgetown County case. The PCR court in that action denied relief in an order filed July 15, 2016. Applicant's Rule 59(c) Motion in that case was denied via order issued January 19, 2017. *Stanko v. State*, C/A No. 2008-CP-22-01446 (Georgetown County Court of Common Pleas).

undersigned denies the motion for the reasons enumerated below.

I. Funding

Applicant seeks this Court's reconsideration of denied requests for funding of expert and investigative services in preparation for the evidentiary hearing in this matter. (59(e) Motion, pp. 1-4).

As noted in the Order of Dismissal, the undersigned partially granted and partially denied Applicant's *ex parte* petitions to authorize funding for expert and investigative services. (Applicant's Mot. for Continuance; Order of Dismissal, nn. 2, 6-7; 59(e) Motion, pp. 1-4, 15-18). At the outset of the evidentiary hearing, this Court reiterated that it denied the funding requests on the basis that the undersigned did not find them to be reasonable and necessary, not upon the basis that they were made *ex parte*.[2] (PCR Tr. p. 4, lines 5-22).

Specifically, Applicant sought and the Court denied or granted the following throughout the course of this litigation:

Individual for Whom Funding was Requested	*Expert or Investigative Service Provided*	*Amount Requested*	*Disposition by this Court*
Mark B. Harris, Private Investigator	Fact Investigation of Potential Juror Bias, Cause and Effect of Applicant's Brother's Death, and Extent of Applicant's Employment Prior to Crimes	$10,000	Granted in the amount of $4000 upon Motion to Reconsider and Applicant's contribution of articulable facts in support of its request. No evidence resulting from this investigator's work was introduced at Applicant's evidentiary hearing.
Drucy Glass, Mitigation Investigator	Survey of Applicant's Life History	$15,000	Granted. No evidence resulting from this investigator's work was introduced at Applicant's evidentiary hearing.

[2] Respondent had no knowledge of the specifics of each request until Applicant's Second Motion to Supplement the Record, filed February 10, 2017, which incorporated these *ex parte* motions and orders into the record for the first time. Accordingly, throughout the course of these proceedings, Respondent was unable to take a position regarding any funding request, as each request was made and decided without service upon the State.

Dr. Susan Knight, Forensic Psychologist	Develop a Correlation between Applicant's Mental Health and Mitigation	$15,000	Denied. The factual support for this motion lacked any substantial indication that Applicant suffered from a mental illness other than psychopathy. Without any indication of mental illness other than that explored at Applicant's trial, there thus exists no basis for finding these expert services reasonable or necessary. The undersigned did not foreclose the possibility of renewed funding requests with the presentation of additional factual support for the request.
Dr. Arlene Andrews, Licensed Social Worker	Uncover and Conduct Additional Social History Investigation	$13,000	Denied. The factual support for the requested services was that the licensed social worker utilized at Applicant's trial did not investigate all potential mitigation angles, not that trial counsel deficiently performed in its collection and presentation of mitigating evidence. Counsel also did not supply particularized facts regarding potential mitigation that was not presented at trial. The undersigned found that counsel's reasoning did not satisfy the reasonable and necessary requirement.
Professor Neil Vidmar, Media Saturation Expert	Conduct a Retroactive Media Saturation Study and Testify on Results	$9,000	Denied. The factual support for the requested services was that this expert was not used during Applicant's trial. The undersigned found that counsel's reasoning did not satisfy the reasonable and necessary requirement.

(Applicant's Second Motion to Supplement the Record, Attached *Ex Parte* Pleadings 5-15; Order of Dismissal, nn. 2, 6-7).

In response to the undersigned's denial, Applicant petitioned the South Carolina Supreme Court for oversight in the present action. That court denied the petition and also denied Respondent's related request to unseal the *ex parte* funding requests.[3] *Stanko v. State,* Appellate Case No. 2015-000212 (S.C. Sup. Ct. Order filed Feb. 25, 2015, denying Petition for Oversight and denying Respondent's Motion to Unseal *Ex Parte* documents). The undersigned later

[3] Within its denial, the South Carolina Supreme Court noted that the circuit could ably address Respondent's related motion to unseal the *ex parte* funding requests giving rise to the petition for oversight.

unsealed these *ex parte* documents in a Form 4 Order filed February 27, 2015.

Requests for funding for expert and investigative services in a capital trial fall within the discretion of the trial judge and may be granted upon a showing of reasonable necessity. S.C. Code Ann. § 16-3-26(C)(1). As pointed out by our Supreme Court in ruling upon Applicant's petition for oversight in the instant case, "[w]hen a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings. These statutory provisions are, however, inapplicable to post-conviction relief proceedings." *Thames v. State*, 325 S.C. 9, 11 n.1, 478 S.E.2d 682, 682 n.1 (1996) (citing S.C. Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp.1995); *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994)); *Stanko v. State*, Appellate Case No. 2015-000212 (S.C. Sup. Ct. Order filed Feb. 25, 2015, denying Pet. for Oversight and denying Respondent's Mot. to Unseal *Ex Parte* documents). Civil proceedings to not give rise to the constitutional rights afforded a criminal defendant. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."); *United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a [civil] commitment hearing"); *Cf., e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) *and McGahee v. State*, 885 So.2d 191, 229 (Ala. Crim. App. 2003) (proclaiming the findings in *Ake v. Oklahoma*, 470 U.S. 68 (1985), concerning a defendant's right to have access to a psychiatrist assistant at trial, do not apply to PCR).

As reiterated in the Order of Dismissal, the undersigned denied Applicant's request to fund certain experts because their purported purpose was to determine whether the investigators utilized in Applicant's trial missed anything, not to determine whether Applicant's trial attorneys

were ineffective. (Order of Dismissal, p. 8, n.7). Orders dated April 29, 2014, June 3, 2014, September 25, 2014, and a February 27, 2015, Form 4 Order set out the bases for this court's prior funding decisions. (Order of Dismissal, p. 2 n.2; Applicant's Second Motion to Supplement the Record, Pleadings 5-15).

Since issuance of the undersigned's orders in the present matter, the South Carolina Supreme Court has decided similar issue in another capital PCR case over which the undersigned presided. *Winkler v. State*, Op. No. 27685 (S.C. Sup. Ct. filed Nov. 23, 2016) (Shearouse Adv. Sht. No. at 13) (Kittredge, J., concurring) (Hearn, J., concurring in a separate opinion) (Pleicones, C.J., concurring in part and dissenting in part in a separate opinion in which Beatty, J., concurs). The court reversed the denial of that applicant's second motion for a continuance to obtain and analyze MRI and PET scans, and remanded that case back to the PCR court. *Id.* at 29. The court also vacated the undersigned's denial of PCR as to trial counsel's alleged failure to investigate and present evidence of brain damage. *Id.*

In *Winkler*, the undersigned authorized funding for MRI and PET scans to be conducted in furtherance of counsel's investigation into potential PCR claims, and extended the deadlines for amended the PCR application until such time as the requested testing could be completed. *Id.* at 26. The reversal in that case stems from a subsequent denial of a second continuance request which was made as a result of unforeseen circumstances concerning that applicant's health and related inability to timely undergo the funded PET and MRI scans. *Id.* at 27-29. The Supreme Court found "'good cause [was] shown to justify a continuance.'" *Id.* at 29 (quoting S.C. Code Ann. § 17-27-160(C)). The undersigned finds the recently decided *Winkler* inapposite to the denied funding in the present case because it addresses the just cause standard for denying a continuance and not the reasonable and necessary standard applicable to this Applicant's funding

requests.

Further, for reasons discussed herein, the undersigned denies the motion to alter or amend judgment on the funding issues in this case as Applicant failed to meet its burden of showing that the requested expert and investigative services were reasonably necessary for the furtherance of its ineffective assistance of counsel claims.

II. Right to Conflict-Free Assistance of Counsel and Related Allegation of Ineffective Assistance of Counsel in Guilt-or-Innocence and Appellate Phases of Applicant's Criminal Trial

Applicant seeks amendment of this Court's Order of Dismissal regarding three conflict of interest claims raised in the final PCR application. (Order of Dismissal, pp. 3-6, §§ I. and III; *see* Final PCR App. allegations 10&11(a), 10&11(c), and 10&11(f)(2)). As discussed in the Order of Dismissal, the conflict of interest arises from trial counsel Diggs' continued representation of Applicant in the Horry County matter, which went to trial after Applicant filed a PCR application alleging Diggs' deficient performance in Applicant's earlier Georgetown County capital trial. (Order of Dismissal, p. 3). Applicant's 59(e) Motion asserts that the undersigned, akin to Appellant's trial and appellate counsel, did not adequately define the conflict, and that the Order of Dismissal fails to set out the legal standard utilized in dispensing of these allegations. (59(e) Motion, pp. 4-14).

The undersigned denies the motion to alter or amend its order on the conflict of interest allegations. As reflected in the Order of Dismissal, the South Carolina Supreme Court ruled on the merits of this issue as a result of Applicant's raising it on direct appeal. *State v. Stanko (Stanko II)*, 402 S.C. 252, 265–70, 741 S.E.2d 708, 715–17 (2013). With the Supreme Court looking past any issue preservation deficiencies to find that Applicant affirmatively waived the conflict of interest, this Court would be hard pressed to find counsel error and prejudice on the

related Horry County PCR allegations as required by *Strickland v. Washington*, 466 U.S. 668, 687–89, 104 S.Ct. 2052, 2064-65 (1984).

> Prior to this trial, a jury found Appellant guilty of a separate murder and recommended a sentence of death. *State v. Stanko,* 376 S.C. 571, 573, 658 S.E.2d 94, 95 (2008). William Diggs represented Appellant at that trial, and Appellant requested that Diggs represent him in the instant case, as well. However, Appellant also filed a post-conviction relief (PCR) application collaterally attacking Diggs's prior representation on the ground that he provided ineffective assistance of counsel. Appellant argues that this gave rise to a conflict of interest, and that the trial court erred in accepting Appellant's "inadequate" waiver of this conflict. We disagree.
>
> On November 15, 2006, the trial court held a hearing to determine Appellant's representation in this case. Diggs stated at that hearing that he did not know of any reason that would preclude his availability for appointment. Appellant spoke at that hearing, expressing his satisfaction with Diggs's efforts in the prior trial and requesting Diggs represent him a second time:
>
>> So, what I'm saying to you is if you choose to appoint [Diggs] as counsel I have no problem with that and would greatly appreciate it actually . . . . I'm familiar with the law. I'm not an idiot to the law and I don't and would not raise any kind of argument concerning . . . his representation.
>
> On December 8, 2008, the PCR court held a hearing regarding Appellant's PCR application. At that hearing, Appellant explained his desire to proceed with a PCR application against Diggs, but at the same time retain his representation in the instant case:
>
>> The conundrum that I have is that: In the same sense, this [PCR] may have allegations of ineffective assistance of counsel against him. My argument is . . . just because I feel he may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently. So my conundrum is I don't want to lose him; because I believe in him. He knows my case. He's the one who had the test ordered and found out everything that was wrong with my medial frontal lobe. I don't want to lose him.[4]
>
> The trial court next conducted a hearing on March 4, 2009, to discuss the potential

[4] Diggs testified similarly at PCR regarding his understanding of Applicant's wish to continue the attorney-client relationship in preparation of the Horry County trial, even in light of the pending Georgetown County PCR application. (PCR Tr. pp. 74, 91-94).

conflict arising from the PCR application and trial counsel's continued representation. The trial judge noted that the continued representation could be a "downright" disqualification of Diggs as trial counsel. However, Appellant explained that he filed the PCR application to "stop the death watch" after this Court turned down his direct appeal. Appellant insisted that the court allow him to retain Diggs as trial counsel:

> I can't say, Your Honor, this is what I'm going to file, but if we play worst case scenario and I did file ineffective assistance of counsel against [Diggs] on any issues, understanding the *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 687–89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] two-prong test, but that's still prerequisite that I wouldn't trust or believe in him to handle this case, (A) if he did commit errors that, let's say, he even determined as being errors, by looking at that case, I believe that [Diggs] would say, "Maybe I should have done this differently," and in this particular case, which is going use a very similar defense, wouldn't he have learned from that? (B) Even if I did file them, is it not a situation where it would have no effect on this case as long as I do trust and believe in him and his efforts toward this case?

The trial court responded by explicitly asking Appellant whether he wanted to retain Diggs:

> The Court: If I understand you correctly that you want [Diggs] to remain as lead counsel and remain as one of your attorneys in this particular case?
>
> Appellant: Yes.

Appellant continued an unprompted monologue requesting that Diggs represent him regardless of the pending PCR application:

> [B]efore I jump away, I'm going to use an analogy. (A) There's a Solicitor that was in this case and that has been sanctioned by the State for previous misconducts [sic], but he is still a Solicitor. (B) I'm going to use a baseball analogy. If you have Derek Jeter, and in the ninth inning of the final game of the World Series he commits an error that costs the Yankees the game, that doesn't mean that you don't want him back starting next season, and I do. One thing about [Diggs] is he does believe in my case and he understands it's a very in-depth case concerning the defect in my brain, and I would ask—what I don't want to do is say, "Well, Your Honor, is the only way that I can keep [Diggs] is to say that I'm going to waive any [claim]?"

To this the trial court responded: "No sir. I'm not asking you to do that." The trial court then asked Diggs whether he found any conflict in his continued representation of Appellant. Diggs responded that he did not, but that the trial court may want to revisit the issue if it appeared later that the PCR theories and the theories used in the instant trial worked to undermine Appellant's case:

> Based upon the—your statements to the Court, and the Court's questioning of [Appellant], [Appellant]'s statements to me, that I will keep [Diggs] as counsel here in this particular matter with the ability for the Court to re-visit in the future should there be any issues in the amended application that either gives the Court any concern, or [Appellant], or [Diggs] concerns as to [Diggs] continued representation in this matter.

On June 5, 2009, the trial court heard the State's Motion to Review Status of Counsel. The State took issue with what it believed to be an "apparent direct conflict of interest," based on the filing of Appellant's PCR application against Diggs. Diggs stated that he did not feel the PCR application had impacted his relationship with Appellant, his ability to communicate with him, or his ability to effectively represent him in any way. Appellant stated that he had the opportunity to confer with his PCR attorneys, but that nothing had changed regarding his desire to retain Diggs.

The trial court then engaged in a detailed colloquy with Appellant regarding the potential conflict:

> The Court: Do you continue to want to have [Diggs] represent you in this action?
>
> Appellant: Yes sir, I do.
>
> The Court: All right sir, and do you feel that there is a free and open communication between you and [Diggs] despite the fact that the [PCR] application has been filed?
>
> Appellant: Yes, sir, there is.
>
> The Court: And you are able to fully discuss all issues that you deem necessary with him?
>
> Appellant: Yes, sir.
>
> The Court: All right sir, and have you found in any way that he is unresponsive to you or in any way ... harboring any ill feelings to you because of the filing of the [PCR] application?

> Appellant: Not only is he not now, but I do not believe that when we file the supplemental . . . there will be any problems at that time.
>
> . . .
>
> Appellant: The issues that we're going to raise that have him in it have nothing to do with any issues that would create a conflict or any argument or I feel cause any communicative problems between [Diggs] and myself. They're more at trial situations that should have been objected to, things of that nature, and there is, there are two issues. But sir, I do not believe that [Diggs] and I are going to have any problems presenting the second trial.

Thus, the trial court concluded that Appellant "more than expressed" full and complete confidence in Diggs's abilities, and permitted Diggs to continue his representation of Appellant.

A. Preservation

Appellant's argument that the trial court erred regarding an apparent conflict by his trial counsel is unpreserved. This Court has explained the rationale underlying issue preservation as follows:

> The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those arguments.
>
> . . .
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724–25 (2000) (citing *Roche v. S.C. Alcoholic Beverage Control Comm'n,* 263 S.C. 451, 211 S.E.2d 243 (1975)). This explanation is especially pertinent to this case.

Appellant did not object to the appointment of Diggs as counsel, but instead emphatically requested that Diggs continue to represent him. Additionally, both the trial court and the PCR court questioned Appellant as to the wisdom of continuing with Diggs as trial counsel, and verified that Appellant had no objections to this arrangement. Appellant never raised a single objection. Thus, he

> avoided the critical first step of preservation: convincing the trial court that it ruled incorrectly. Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.
>
> *B. Waiver*
>
> Even if Appellant had somehow preserved his arguments for our review, the trial court did not err. To the extent that this situation gave rise to a conflict of interest, implicating any constitutional right, Appellant was fully informed of that conflict. Appellant's extensive endorsement of Diggs's continued representation constituted a valid waiver. *See Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Appellant cannot now complain of an error which his own conduct induced. *See State v. Babb,* 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("The record in this case clearly establishes that any shortage of time to prepare a defense was not the fault of the trial judge or the State, but rather the fault of [the defendant] in failing to act.").
>
> Appellant's argument regarding trial counsel's alleged conflict is unpreserved. The lack of preservation notwithstanding, the Record demonstrates a knowing and intelligent waiver of any possible conflict.

Stanko II, 402 S.C. at 265–70, 741 S.E.2d at 715–17 (footnote added).

Since the issue concerning Applicant's waiver of the conflict of interest was considered in full on direct appeal, collateral issues pertaining to the finding of a knowing, intelligent, and voluntary waiver are not proper. *Drayton v. Evatt,* 312 S.C. 4, 430 S.E.2d 517 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.") (citing *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975)).

Even so, the record fails to show error and prejudice on the part of trial counsel. The record instead shows that regardless of the identification and explanation of the existing conflict of interest, Applicant "emphatically requested that Diggs continue to represent him." *Stanko II* at 269, 741 S.E.2d at 717. It follows that no prejudice flows from the conflict where the appellate

court, after a thorough review of the conflict's nature and extent to which it was addressed by trial counsel and the court, conducted a merits review of the issue and deemed Applicant to have waived the existing conflict in a knowing, intelligent and voluntary manner. *Id.*

Moreover, the Supreme Court's opinion on this issue demonstrates that the definition of the conflict Applicant seeks to elicit through its 59(e) motion was considered by Applicant at the time he made his waiver. The record exhibits that Applicant considered what it meant to allege that Diggs erred while representing him at an earlier point, and reasoned before the court that he wished to retain that counsel even in light of those deficiencies because he trusted counsel to consider any previous errors in calibrating his defense at the second trial. *Id.* at 266-67, 741 S.E.2d at 715-16. Reiterating Applicant's words, he did not want to deprive himself of counsel in whom he believed, and he did not think that counsel should be precluded from continuing in his defense merely because an error may have been made in an earlier trial. *Id.* The presentation of these metered conclusions before the trial court supports that Applicant's waiver of the conflict considered all angles pertaining Diggs' previous and future representation of Applicant, including Applicant's ability to file for PCR.

III. Ineffective Assistance of Counsel in Pre-Trial Phase of Criminal Trial

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997).

1. **Timing of Change of Venue Motion**

Applicant urges this Court to alter or amend its finding no error or prejudice timing of Applicant's change of venue motion. (Final PCR App. allegation 10&11(b)(1); 59(e) Motion, p. 17). This Court's finding is supported by the record, which demonstrates that trial counsel moved to change venue after voir dire and prior to the jury strike. (R. p. 1284, line 5 – p. 1288, line 8). The trial record is also clear that due to timing considerations, the parties agreed to strike a jury prior to taking testimony on the change of venue motion, but that the jury would not be sworn in until the conclusion of the motion in the event that it were granted. (R. p. 1289, line 1 – p. 1291, line 21).

This Court's finding comports with well-settled South Carolina law on this issue. "If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until the jury panel is voir dired." *State v. Manning*, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997) (citing *State v. Easler,* 322 S.C. 333, 471 S.E.2d 745 (Ct.App.1996), *aff'd as modified,* 327 S.C. 121, 489 S.E.2d 617 (1997)). Therefore, the record demonstrates that defense counsel made the motion at the appropriate time.[5]

2. **Failure to Retain and Expert or Conduct a Media Saturation Study to Support Change of Venue Motion**

Applicant also sought relief upon an allegation that trial counsel tendered substandard representation during the change of venue motion by failing to retain a media expert or to conduct a formal study of the size and characteristics of the community where the crime occurred and the type and prevalence of media coverage related to the crimes. (Final PCR App. allegation 10&11(b)(2); 59(e) Motion, pp. 17-18). Counsel in this PCR action sought funding to

[5] Where courts find trial counsel's actions reasonable, an evaluation of trial counsel's actions under *Strickland's* prejudice prong is not required. *Bell v. Evatt,* 72 F.3d 421, 430 (4th Cir. 1995).

obtain such an expert to proffer testimony in furtherance of this ineffective assistance of counsel allegation. (59(e) Motion, p. 17 n.4). The undersigned denied the funding request on the basis that this type of expert was not reasonably necessary to further the present allegation. (PCR Tr. p. 4, lines 5-22); *see* S.C. Code Ann. § 16-3-26(C)(1) (standard for granting funding). The undersigned also denied relief upon the basis that trial counsel presented a psychologist at trial to testify in furtherance of the change of venue motion. He testified that potential jurors often fail to be totally forthcoming in their responses to voir dire. (Order of Dismissal, p. 4).

The undersigned declines to alter or amend its judgment on the totality of this claim. Applicant has not demonstrated that counsel's representation fell below an objective standard of reasonableness or caused Applicant prejudice in regards to counsel's moving for change of venue. *Strickland* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064 (1984).

In presenting a change of venue motion, the defendant bears the burden of demonstrating actual juror prejudice resulting from pre-trial publicity. *Sheppard v. State*, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004) (citing *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). "[T]he relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.*

Relevant to this PCR allegation, the South Carolina Supreme Court found that no jurors stated they could not ignore exposure to pretrial publicity. That court opined on the issue in full:

> Refusal to Grant Change of Venue
>
> As referenced in Issue II, a jury in neighboring Georgetown County convicted Appellant of murder, and recommended death, prior to the trial of the instant case. Of the one hundred and twelve potential jurors questioned by the trial court, fifty-six knew about Appellant through pretrial publicity. According to Appellant, of the forty-five qualified jurors, twenty-seven knew about Appellant's previous trial, conviction, and death sentence. Of the seated jurors, at least eight knew the Appellant by name, and as discussed previously, Juror # 480 knew of his prior

conviction and sentence. Based on these facts, Appellant argues that the trial court erred in refusing to grant a change of venue. We disagree.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Sheppard v. State,* 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. *State v. Caldwell,* 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990), *overruled on other grounds by State v. Evans,* 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker,* 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999). It is the defendant's burden to demonstrate actual juror prejudice as a result of pretrial publicity. *Caldwell,* 300 S.C. at 494, 388 S.E.2d at 816.

In *State v. Evins,* 373 S.C. 404, 645 S.E.2d 904 (2007), the defendant requested a change of venue due to pre-trial publicity regarding his connection to two murders. In September 2002, the body of a woman was found in Spartanburg. *Id.* at 411, 645 S.E.2d at 907. The victim had been strangled, and the crime went unsolved until the defendant's arrest for a February 2003 murder. *Id.* Subsequently, an investigation revealed that semen found on the victim's body matched the defendant's DNA. *Id.*

Trial counsel moved for a change of venue, noting that thirty-nine members of the sixty-eight person jury pool had heard something about the case, and seven of the twelve jurors seated had some knowledge of the case. *Id.* at 412, 645 S.E.2d at 907–08. The trial court concluded that all jurors who had any prior knowledge of the case indicated they could set aside any information, and denied trial counsel's motion. *Id.* at 412, 645 S.E.2d at 908.

In reviewing Evin's appeal, this Court found the United States Supreme Court's decision in *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), instructive. In that case, the people of Calcasieu Parish in Lake Charles, Louisiana, were "exposed repeatedly and in depth to the spectacle of the defendant personally confessing in detail to the crimes for which he was later charged." *Id.* at 726, 83 S.Ct. 1417. In addition, three members of the jury had watched the defendant's televised "interview" in which he confessed to the sheriff, and two members of the jury were "honorary" deputy sheriffs themselves. *Id.* at 725, 83 S.Ct. 1417. The failure to change venue in that case compromised the defendant's due process rights. *Id.* at 727, 83 S.Ct. 1417.

Clearly the facts of the instant case are more similar to those of *Evins* than of *Rideau.* In denying Appellant's change of venue motion, the trial court concluded that the vast majority of the jurors knew nothing about the case:

> A few of them know [Appellant's] name. That's on the questionnaire they were given . . . . It's no kind of pretrial publicity of any kind. And the one person that said they had some kind of information, again, without equivocation of any kind, indicated that they could set it aside.

> This finding is similar to the trial court's conclusion in *Evins* that all members of the jury with any knowledge of the murder due to pretrial publicity indicated they could set that knowledge aside. *Evins,* 373 S.C. at 413, 645 S.E.2d at 908. Interestingly, the defendant in *Evins,* as here, seized on statements by one juror that she had read about his prior crimes, and overstated the juror's knowledge:

>> The juror testified on voir dire that the only thing she heard was that the crime had taken place; she specifically testified that she knew no details, did not know the location, she had formed no opinion, could put aside what she had heard, and could be fair and impartial.

> *Id.*

> **In the instant case, Appellant fails to present even one juror who stated he or she could not ignore exposure to pretrial publicity prior to serving as a juror.** In the case of Juror # 480, she did not claim to know specific details of the instant case or Appellant's prior conviction, and stated that she could be fair and impartial. Appellant advances broad and unsupported arguments regarding the publicity of this case, but fails to meet his burden of demonstrating actual juror prejudice as a result of that publicity. *See Sheppard,* 357 S.C. at 655, 594 S.E.2d at 468 ("Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant."). **The Record does not support a finding that the trial court ignored actual juror prejudice related to pretrial publicity, and thus, the trial court did not abuse its discretion in denying Appellant's motion to change venue.**

State v. Stanko, 402 S.C. at 276–79, 741 S.E.2d at 720–22 (emphasis added).

With no juror testimony demonstrating undue prevalence of any media saturation, the record fails to support Applicant's claim. The record instead demonstrates that counsel duly moved to change venue at the appropriate time and that the trial court correctly denied the motion in accord with our State's legal standard on this issue.

In support of its change of venue motion, trial counsel presented Dr. Bernard Albiniak

who the court qualified as an expert in psychology. (R. p. 1348, lines 18-20).[6] Dr. Albiniak testified that in a number of organized settings, including the courtroom, social pressures may influence a person's answering questions in conformity with what they believe to be the desired answer. This behavior results from a longing to appear fair and open-minded. (R. p. 1349-62). He testified that a potential juror's questionnaire, filled out in the comfort of their own home, is "probably a better reflection of what their views are than the rehabilitation they might occur in the courtroom" during voir dire. (R. p. 1369, lines 2-7). The mere presence of authority figures inherent in the courtroom setting "create the potential" for witnesses or potential jurors to say things with which they may not necessarily agree. (R. p. 1373, lines 4-24). He also testified that it would be preferable for a potential juror to have no prior knowledge of the case upon which they may be called to serve in judgment. (R. pp. 1354-56, 1376). Dr. Albiniak's testimony in this case comports with the type of evidence the Applicant must put forward in order to meet his burden on a change of venue motion. *See Shepphard v. State, supra.* The psychologist presented testimony which may cause the court to question the validity of a juror's answers regarding their ability to be impartial in light of information they may have gleaned from the media prior to being called as a potential juror.

But regardless of Applicant's efforts in putting forward Dr. Albiniak, Applicant could not succeed upon his motion because no juror testified to knowing any particular detail at the case in a manner which would influence their ability to sit impartially. Only one juror had any previous knowledge about Applicant's prior crimes. (R. pp. 624-46). This juror said she did not "remember that much about [the crimes], and just kind of wiped it out." (R. p. 631, lines 16-17). The remainder of the eleven jurors and the four alternates either knew nothing about the case or

[6] Citations to "R." reflect the Record on Appeal in this case, which this Court judicially noticed upon motion by the Respondent. (PCR Tr. pp. 277, lines 4-9).

only had heard the name of the defendant. (R. pp. 1418-1421). In fact, each seated juror independently testified that he or she would set aside anything that they had heard or seen outside the courtroom and decide the case and issues therein based only on the evidence introduced at trial. (R. pp. 81-97, 98-113, 165-77, 246-59, 259-22, 274-86, 399-412, 414-29, 434-47, 624-46, 684-97, 704-19, 730-42, 746-57, 826-40, 904-16).

Ultimately, trial counsel could not prevail upon his motion because, in accord with well-settled South Carolina law on this topic, at the conclusion of voir dire, there were enough duly qualified jurors to select a jury without the need to change venue. The record demonstrates that trial counsel moved to change venue and put forward expert testimony in furtherance of the standard necessary for granting such a motion. The fact that trial counsel did not prevail in garnering a change of venue does not render his performance *per se* deficient. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984).

Moreover, a media saturation expert does not further the finding needed to prevail upon one's change of venue motion. Applicant's PCR counsel sought and was denied funding for a media saturation study, believing the study would "demonstrate that the media surrounding Stanko's case saturated the Horry County community, making it impossible to select an impartial jury from that location." (Oct. 14, 2014, Motion to Reconsider; 59(e) Motion, p. 17 n.4). The saturation expert requested would not have furthered the allegation because that expert's purported testimony did not reach to the standard necessary to grant a change of venue motion. Again, "mere exposure to pretrial publicity does not automatically disqualify a prospective

juror." *State v. Manning*, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) (citing *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert.* denied, 522 U.S. 853, 118 S.Ct. 146 (1997); State *v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). Thus, it is not relevant how much publicity Applicant may have stirred up prior to trial. Instead, the relevant inquiry is whether the jurors demonstrated that they could indeed refrain from partiality. Only one juror testified to knowing about the case. The record demonstrates that the degree of media saturation was not at issue during media selection. Therefore, funding for such a study was not reasonably necessary in furtherance of this ineffective assistance of counsel claim. S.C. Code Ann. § 16-3-26(C)(1).

Considering the foregoing, the undersigned fails to find any error and prejudice in trial counsel's handling of the change of venue motion. The record fails to support Applicant's allegation of deficient performance in counsel's pre-trial representation regarding said motion, even had Applicant put forward an expert in media saturation. *Strickland* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064 (1984).

IV. Denial of Due Process in Guilt-or-Innocence Phase of Criminal Trial

Applicant claims that the State's rebuttal witness Dr. Kenneth Spicer offered false and misleading testimony, rendering the guilt phase of Applicant's trial fundamentally unfair and violating his due process rights. (Final PCR App. allegation 10&11(d); 59(e) Motion, pp. 17-18). The undersigned denied this allegation, finding that Applicant challenged the validity of Dr. Spicer's testimony through cross-examination and during its own examination of Dr. Joseph L. Chong-Sang Wu. (Order of Dimissal, p. 6). The undersigned also denied Applicant's funding request made in relation to this due process allegation, which sought monies "to obtain an expert who could dispute Dr. Spicer's [trial] testimony." (*Id.* at n.6; *see* 59(e) Tr. p. 13, lines 16-19). This denial was premised upon the basis that any expert hired for the purpose of disputing a

State's trial witness testimony would only offer evidence in corroboration with that put forward by the defense during its guilt-phase presentation. (*Id.*; *see* Applicant's Second Motion to Supplement the Record, Pleadings 5-8).

South Carolina Code Section 16-3-26(C) "does not require the trial judge to honor every [funding] request made by defense counsel. But only those requests that are reasonably necessary for the representation of the defendant. The court is empowered to decide which requests are appropriate." *State v. Yates*, 280 S.C. 29, 35, 310 S.E.2d 805, 809 (1982) *overruled on other ground by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (internal quotation omitted). The underlying issue regards Applicant's disagreement with the independent critique offered by the State's reply witness at trial. The expert Applicant's PCR counsel sought to obtain did not appear to further any due process violation.[7] There exists in the record no indication that the State's reply witness testified in any untruthful manner. Rather, the record shows that the State put forward a reply witness offering a different opinion from that of Applicant's expert witnesses. The undersigned finds no basis to alter or amend his denying funding and relief on this issue.

Foremost, this allegation is not appropriate in an action for PCR because Applicant raises the issue as a due process violation and not as an ineffective assistance of counsel allegation. "The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." *Drayton v. Evatt,* 312 S.C. 4, 430 S.E.2d 517 (1993)

[7] To the extent Applicant may have sought funding to uncover a due process violation, the undersigned granted $4,000 in funding for a private fact investigator, Mark Harris. (Applicant's Second Request to Supplement the Record, Attachments 5-8). At the evidentiary hearing, Applicant presented no evidence in furtherance of the claims upon which this funding request was premised.

(citing *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975)); S.C. Code Ann. § 17-27-20(B) PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. . . .").

Second, Dr. Spicer was called by the State in rebuttal to counter the trial theory promulgated by the defense. (R. pp. xii, 2346-83). The State was entitled to present its own expert testimony in refutation of Applicant's case-in-chief. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5, 10 (1944) ("He upon whom lies the burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of true reply and not such as should have been offered in the case in chief."). Dr. Spicer's testimony did not include any new diagnosis or previously un-introduced information related to Applicant's mental or physical condition. The state called Dr. Spicer in reply to critique the methodology utilized by defense witnesses Drs. Wu and Sachy in their PET scan analysis as well as to offer a competing opinion that Applicant's PET scan was indicative of a normal brain. (R. pp. 2366-82). Dr. Spicer built his opinion upon the same facts and data utilized by Applicant's own experts. (*Id.*). A surrebuttal was not appropriate in these circumstances. *Contra United States v. Barnett*, 211 F.3d 803, 822 (4th Cir. 2000) (finding reversible error in trial court's refusing capital defendant a surrebuttal because the State's rebuttal case included an expert who diagnosed defendant, for the first time during trial, as a psychopath, and the surrebuttal evidence would not have been cumulative or repetitive) (ordering new sentencing hearing).

Moreover, Applicant had the opportunity to, and did, challenge Dr. Spicer. On cross-examination, Applicant's counsel contested the methodology behind each of Dr. Spicer's conclusions. (R. pp. 2383-410). Applicant's counsel made clear during that cross-examination that Dr. Spicer appeared unfamiliar with the continuous performance test and PET methodology

utilized by Applicant's experts. (R. pp. 2398-99). Even more, trial counsel testified at PCR that he anticipated Dr. Spicer's testimony and spearheaded his contrasting theory during his direct examination of Dr. Wu during the guilt phase. (PCR Tr. pp. 101-04). Trial counsel formulated his presentation of Dr. Wu's PET scan analysis accordingly, eliciting testimony from Dr. Wu regarding the specifics of the continuous performance test, and how his administration of that test in conjunction with his PET scan analysis differed from that that of other clinicians. (R. p. 2114-23 (explaining, *inter alia*, that MUSC typically conducts a resting scan)).

The testimony at the heart of this PCR allegation is indicative not of a due process violation, but of a battle between experts, which denotes the purpose of the adversarial fact-finding process that is a criminal trial. The State was entitled to present rebuttal evidence regarding the PET analysis conducted by defense experts.[8] This Court declines to alter or amend its dismissal of this claim.

V. Ineffective Assistance of Counsel in Sentencing Phase of Criminal Trial

Again, on any ineffective assistance of counsel allegation, a PCR applicant bears the burden of proving that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington, supra*; *Butler v. State, supra*.

"[W]here counsel articulates a valid reason for employing a certain strategy, such

[8] Even if viewed as an ineffective assistance of counsel claim, trial counsel's failure to request a surrebuttal on this issue was not in error. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). Dr. Spicer's testimony did not incorporate new findings or evidence and was restrained to that of a reply witness. As stated above, Applicant's counsel effectively challenged Dr. Spicer on cross-examination as well as in an anticipatory manner during Dr. Wu's direct examination. Accordingly, this Court finds no error or prejudice flowing from trial counsel's handling of Dr. Spicer's reply. *Strickland v. Washington*, 466 U.S. at 687–89, 104 S.Ct. at 2064-65. The record demonstrates trial counsel was familiar with this testimony even before it was taken and prepared his case-in-chief accordingly.

conduct will not be deemed ineffective assistance of counsel." *Watson v. State,* 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). The court reviews the strategic decision "an objective standard of reasonableness." *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[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 v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003). 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*." *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 2537 (citing *Williams v. Taylor*, *supra*, at 415, 120 S.Ct. at 1495). "In assessing counsel's investigation, we must conduct an objective review of their performance . . . which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* (quoting *Strickland v. Washington*, *supra*, at 689, 104 S.Ct. at 2052).

If counsel's performance is found to be unreasonable, the court's assessment of resulting "prejudice" differs on penalty phase issues. Prejudice may be found in a capital penalty-phase proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v.* State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting *Strickland, supra*).

1. Counsel Informed the Jury that Applicant's Family did not Like Him

This Court denied Applicant's PCR allegation that trial counsel wrongfully pointed out

that Applicant's family was not in attendance at trial, finding that counsel elicited that information as a conscious trial strategy. (Order of Dismissal, pp. 7-8). Applicant complains this finding does not take into account whether these comments were elicited in a reasonable exercise of professional judgment. (59(e) Motion, pp. 18-20; *see* Final PCR App. allegation 10&11(e)(1)).

During his sentencing phase opening and closing arguments, trial counsel told the jury that Applicant's family was not present. (R. pp. 1450, 2450-51, 2455, 2462). Trial counsel also questioned social historian Evelyn Califf whether she knew if any of his family members were at the trial, to which she answered, "No, and it was sad to talk with them about it and to ask them to come . . . ." (R. p. 2800, lines 14-18). She speculated that they did not attend because "they had some deep issues maybe of sadness . . . ." (R. p. 2800, lines 19-25).

Second-chair trial counsel specifically recalled Diggs' strategic decision to frame the absence of Applicant's family at trial as a mitigating factor. She testified:

> I recall Bill saying that . . . as bad as it may sound it's like you're trying to understand he really does haven an issue and his issue is so bad that even his family doesn't have anything to do with him. . . . [T]he jury can impart life for any reason whatsoever, even if they just feel sorry for you, and so you're using, as a defense lawyer I think you've got to use everything you possibly can, but the reason behind that is Bill's thinking and I can tell you because we had this conversation was that, look, he – I mean, I – we didn't say this, but it's kind of like he's so bad, he's got all these issues that even his family doesn't have anything to do with him. . . . [T]hese issues are very real.

(PCR Tr. p. lines 3-18).

At PCR, trial counsel Diggs fully explained his intention in framing his mitigation case during the sentencing phase. He testified that he pointed out the absence of Applicant's family from the courtroom as a means of explaining to the jury that Applicant was "not a normal rational thinking person." (PCR Tr. p. 64, lines 8-25). He testified that any statements isolated

from his closing argument during sentencing had to be considered in the context of whole body of evidence before the jury. (PCR Tr. pp. 62-63). As a whole, Diggs had to provide the jury with a reason for why Applicant killed what Diggs described as his only two friends. (*Id.*). It is clear from the totality of Diggs' PCR testimony that during the sentencing phase he was tactically attempting to curry sympathy with the jury in hopes of a life sentence. (*See* PCR Tr. pp. 61-67). Counsel did not render ineffective assistance in doing so. Given that the record supports the undersigned's finding on this issue, Applicant's motion to alter or amend is denied.

2. Counsel Elicited Expert Testimony that Applicant was a Psychopath

This Court found that trial counsel treated any references to psychopathy in a reasonably strategic manner as "an attempt to corroborate Stanko's defense of insanity and mitigate his culpability by showing that he could not control his actions." (Order of Dismissal, pp. 7-8). Applicant disagrees with this finding and seeks alteration of this Court's order to reflect that the presentation of the psychopathy defense during the sentencing phase dehumanized Applicant to his detriment.[9] (59(e) Motion, pp. 20-23; *see* Final PCR App. allegation 10&11(e)(2)). However, where, as here, counsel again "articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel," so long as the decision to exercise such strategy is objectively reasonable. *Wiggins v. Smith, supra*; *Watson v. State, supra*; *Ingle v. State, supra.*

The facts and circumstances of the chosen defense exemplify an effective mitigation strategy considering the totality of the circumstances surrounding Applicant's culpability. Diggs laid the framework for the purpose of the challenged testimony in his opening argument. He told the jury that they would hear evidence which would explain why Applicant committed these

[9] The references to the record Applicant cites in support of this allegation all occur in the guilt phase of trial. (R. pp. 1451-52, 1842-43, 2046-47, 2191-97, 2200, 2209-12, 2232-35, 2241).

criminal acts. (R. pp. 1451-52). That is, why Applicant essentially murdered the two people that he appeared to be closest to after he was released from custody from an earlier conviction. And then, Diggs presented evidence in support of that theory. As explained by Diggs at PCR, he did not develop psychopathy as a theory of the case, but rather believed Applicant had "a defect in the frontal lobe that interferes with his ability to evaluate and control limbic system impulses." (PCR Tr. pp. 17-18). In an exercise of reasonably professional strategy, Diggs called upon forensic experts to explain the nature of Applicant's brain function and purported neurological deficits. In doing so, Applicant was, at times, referred to as a psychopath in furtherance of the experts' well-supported opinions regarding Applicant's diagnosis of antisocial personality disorder and his purported temporary inability to distinguish moral right from moral wrong.

Initially, Dr. Ruben Gur explained the distinction and interrelation between antisocial personality disorder and psychopathy, laying a framework for the later diagnosis by Dr. Thomas Sachy. (R. pp. 1908, 2046-47). Dr. Gur stated that psychopathy disorder "is a diagnosable disorder that involves a history of growing up with an antisocial attitude . . ." and that antisocial personality disorder is a personality defect that "can qualify for a diagnosis of psychopathy" when combined with other features. (R. p. 2047).

The medical evidence put forward by Diggs during trial supported his defense theory by logically building a basis for the jury to grasp Dr. Sachy's ultimate diagnosis. He called Dr. Bernard Albiniak, a physiological psychologist, to testify regarding brain structure, the impulse-control function of the frontal lobes, and apparent structural damage to that area of Applicant's brain in the form of missing tissue. (R. pp. 1912-50). Dr. Albiniak also mentioned what he believed led to this structural damage, citing to Applicant's medical history. (R. pp. 1951-52). To corroborate that medical history, Applicant's childhood friend Brian Wilson testified next,

explaining that he witnessed Applicant get hit in the back of his head with a full beer bottle when they were in high school. (R. pp. 1958-60). Psychiatrist Dr. James Thrasher also testified to corroborate the cited deficiencies in Applicant's birth records. Dr. Thrasher oversaw Applicant's birth at Guantanamo Bay and testified about a complicated pregnancy, a poor moro reflex at birth, low oxygen levels and jaundice as a newborn, and how the aforementioned complications may lead to neurological deficits. (R. pp. 1964-90).

Dr. Gur, a neuropsychologist and neuroimaging expert, next testified regarding his volumetric analysis of the PET and MRI scans taken of Applicant's brain. (R. pp. 2035-62). He testified that damages to the frontal lobe can produce serious malfunctions in impulse control (R. pp. 2048-52). Applicant's brain scans, according to Dr. Gur, showed reduced volume in the frontal lobe, which would lead to reduced emotion and/or empathy. (R. p. 2052-62). Specifically, Dr. Gur identified volumetric damage four standard deviations below the normal to the medial gray matter structure in both hemispheres of Applicant's brain, and two standard deviations below in the frontal lobe. (R. pp. 2061-62). He characterized this type of damage as extreme. (R. p. 2062).

Next came testimony regarding the continuous performance test and PET scan results provided by Drs. Wu and Sachy, which ultimately led to Dr. Sachy's opining that Applicant acted in a moment of insanity. But first, neuropsychologist Dr. Mark Einhorn testified that he administered Applicant's continuous performance test and PET scan in accord with proper procedure, and sent the results to Dr. Sachy and Dr. Wu for their analyses. (R. pp. 2081-90). Drs. Wu and Sachy then testified at length regarding the outcome of Applicant's PET scan and its suggestion of abnormal brain function. (R. pp. 2105-257).

According to Dr. Wu, the PET imagery of Applicant's brain did not compare with that of

a normal brain; the floor of Applicant's frontal lobe showed a defect. (R. pp. 2136-38, 2145). Dr. Wu also corroborated Dr. Gur's volumetric analysis of Applicant's frontal lobe, testifying that the lobe was additionally abnormal due to its shrunken size. (R. p. 2153).

Finally, Dr. Sachy testified, diagnosing Applicant with specific neurologic deficits. (R. p. 2185). He testified that Applicant's brain lacked activity in the area where, if damaged, one becomes "more likely to act in an impulsively aggressive or psychopathic manner." (R. p. 2191; *see* R. pp. 2197, 2200). Dr. Sachy opined that given his diagnosis and history, Applicant lacked the capacity to distinguish moral or legal right from moral or legal wrong during his criminal acts. (R. pp. 2205-06); *see* S.C. Code Ann. 17-24-10 (defining insanity as an affirmative defense). He opined that Applicant was insane at the time of the incident. (R. p. 2205). On cross-examination, Dr. Sachy synonymized psychopathy and antisocial personality disorder. He went on to explain that Applicant could not control himself at the time of the crimes due to neurological deficits resulting in psychopathy and, therefore, could not distinguish moral or legal right from moral or legal wrong. (R. pp. 2209-12).

As to the sentencing phase, trial counsel initiated that phase by re-calling Dr. James Thrasher, who at this time corroborated Dr. Sachy's diagnosis. (R. pp. 2747-50). Dr. Thrasher testified that he diagnosed Applicant with antisocial personality disorder after conducting an interview and after becoming familiar with Applicant's records of past incidences of criminal conduct. (*Id.*). Dr. Thrasher opined that the Ling murder was committed by Applicant while his capacity to conform or appreciate the criminality of his conduct was substantially impaired.[10] (R.

[10] Digg's PCR testimony reveals that Dr. Thrasher opined that Applicant was insane at the time of the Georgetown County crimes, but would not render the same opinion in regards to the Horry County crimes, indicating a recalculation in trial strategy prior to the Horry County trial. (PCR Tr. pp. 46-48). Another difference was this trial's inclusion of a crime scene reconstructionist who offered testimony consistent with the remainder of the defense by explaining the sequence

pp. 2749-50). The State did not cross-examine Dr. Thrasher and therefore did not challenge the jury's receipt of this diagnosis during sentencing. (R. p. 2750).

Also during the sentencing phase, no defense witness characterized Applicant as a psychopath. Rather, the testimony in this phase sought to continue to humanize Applicant by reminding the jury of the antisocial personality disorder diagnosis which had been presented during the guilt phase, and by progressing into a presentation of mitigation witnesses who individually spoke to Applicant's character and excellence as a student and model inmate. (R. pp. 2747-2812).

In presenting each of the foregoing witnesses, trial counsel attempted to rationalize Applicant's behavior to the jury. Trial counsel testified at PCR that he was concerned with investigating and selecting the best way to defend Applicant, and wanted to explain "what was going on in his mind that doesn't go on in other people's minds" that would cause him to commit the acts at hand. (PCR Tr. p. 13, lines 8-22). Counsel believed that if his chosen insanity defense did not succeed during the guilt phase, that the evidence in support of that defense would become "more obvious in the sentencing phase [as a reason] why this conduct occurred" and would thus serve as a mitigating factor as well.[11] (PCR Tr. pp. 16-17). The crux of the defense, therefore, became that Applicant acted a result of a brain defect both at the time of the Horry County crimes and in past incidences of criminal behavior. (PCR Tr. pp. 58-60 ("Not all times in that can we say that Stephen was insane. That's not what I ever said, but what he did, you know, a con game here, a con game there is not inconsistent with the insanity defense that we presented based

---

of Horry County events. (PCR Tr. pp. 50-52).

[11] Counsel Brana Williams' testimony echoed Digg's sentiment. She testified that their philosophy was to enter the mitigation case accepting the jury's rejection of the affirmative defense of insanity, while also giving the jury additional factors to consider to "try to spare the life." (PCR Tr. p. 245; *id.* at p. 260, lines 22-25).

on the blackouts that Stephen was experiencing at the time of these incidents.")). Counsel testified that he did not believe that the presentation of this defense would provide the jury with an independent reason to sentence Applicant because it was not logical to extend his insanity argument as advocating for a reason to kill Applicant. (PCR Tr. p. 64, lines 13-25). The undersigned agrees.

Taken together, the evidence consistently furthered the affirmative defense of insanity and the related mitigation strategy. The record demonstrates that at all stages, trial counsel reasonably bolstered his pursuit of this defense through a network of able expert witnesses who at all times worked to explain the reason why Applicant committed the criminal acts. At all times trial counsel appeared to exercise professional judgment in presenting this defense in an objectively reasonable manner. (*See* PCR Tr. p. 65). Each assertion presented was supported by specific evidence, with the overall intention of lessening Applicant's culpability for the crimes in hopes of garnering a life sentence. The undersigned finds no basis upon which to alter or amend his judgment on this allegation. *See William v. Taylor, supra*; *Wiggins v. Smith, supra.*

3. Counsel Failed to Investigate and Present Mitigating Evidence of Applicant's Life History, Background, and Mental Health

On the point of trial counsel's mitigation investigation and penalty-phase representation, the undersigned found that Applicant's counsel reasonably chose not to conduct a brand new investigation into Applicant's life history, background, and mental health in preparation for mitigation, but rather used the information obtained in preparation of his initial Georgetown County case and presented it through social worker Evelyn Califf, *et al*, during the Horry County penalty phase proceeding. (Order of Dismissal, p. 8). Applicant claims that this Court's finding ignored evidence presented at PCR that purportedly demonstrated that trial counsel's mitigation investigation was not sufficient in regards to the Horry County trial. (59(e) Motion, pp. 23-28;

see Final PCR App. allegations 10&11(e)(3-4)). The undersigned disagrees.

"During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so. *Weik v. State*, 409 S.C. 214, 234–35, 761 S.E.2d 757, 767–68 (2014) (citing *Rompilla v. Beard*, 545 U.S. 374, 390–93, 125 S.Ct. 2456 (2005)). *Weik* quotes *Wiggins v. Smith, supra*, and delineates "[i]mportant sentencing phase considerations includ[ing] 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.'" *Id.* (emphasis in original) (quoting *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527) (citing *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989) ("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."); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954 (1978) (invalidating an Ohio law that did not permit consideration of aspects of a defendant's background); *Wilson v. Sirmons*, 536 F.3d 1064, 1088 (10th Cir. 2008) (finding "there is no substitute for the information counsel can glean from the family when researching the defendant's background, as they are almost always the only people who can provide a complete narrative of the defendant's life")). In *Weik*, our South Carolina Supreme Court found that the PCR court erred by finding counsel presented all available mitigation evidence to the jury because counsel introduced psychological testimony regarding the defendant's mental illness, but failed to present even a skeletal version of a known and abundant social history. *Weik, supra*

at 235, 761 S.E.2d at 768.

Weik's outcome is inapposite to this case. Testimony taken at the PCR hearing demonstrate that Dale Davis and Vicki Childs completed a full mitigation investigation prior to the Georgetown County trial, and trial counsel selected to utilize the fruits of that investigation in preparation for the Horry County trial as well. The facts bear out the reasonableness of that decision. The crimes that became the subject of the Georgetown and Horry County trials were committed by Applicant in succession across county lines. As a result of the crimes' successive nature, Applicant embodied the same social and psychological history during the time leading up to their commission. Accordingly, trial counsel reasonably presented a similar version of Applicant's psychological and social histories during the Horry County trial.

At PCR, trial counsel Diggs testified that he hired mitigation investigator Dale Davis and fact investigator Vicki Childs for the Georgetown County case. (PCR Tr. p. 34). Diggs recalled that Davis' investigation "focused on [Applicant's] family setting and school, those areas that were personal to [Applicant] that kind of showed who he was as an individual, as a human being." (PCR Tr. p. 110). Referencing her time sheet, Diggs commented that he believed Davis "did about everything that was reasonable" in contacting Applicant's family, corrections facility guards, and other mitigation contacts. (PCR TR. pp. 114-15). Childs continued to work on the Horry County case; Davis did not, but Diggs hired Evelyn Califf to fill the mitigation role, and Califf testified at the finale of the defense's penalty-phase case to present Applicant's social history. (PCR Tr. p. 35; R. pp. 2793-2812).

Also at PCR, Dale Davis testified that she was an experienced mitigation specialist by the time of her retention in Applicant's case. (PCR Tr. p. 174). She detailed her social history investigation. She testified that she spent time with Applicant interviewing him about where and

how he grew up. Using that information, she recovered school and medical records, including those from his birth at Guantanamo Bay in Cuba. (PCR Tr. p. 185). She spoke with his teachers, collected and reviewed his prison records, and found photographs of Applicant throughout his childhood. She located witnesses regarding an incident where Applicant received a blow to the head and was taken to the naval hospital. She provided all of this information to trial counsel. (PCR Tr. p. 186). Davis testified that she was aware that Diggs hired social worker Evelyn Califf to testify regarding the information collected during Davis' investigation because, as stated by Davis, "[she] [does not] testify, [she] just gather[s] the information." (PCR Tr. p. 190). In regards to her own mitigation preparation role, fact investigator Vicki Childs testified that she recalled contacting Applicant's siblings, but ultimately they would not appear at trial. (PCR Tr. p. 225).

The sentencing phase at trial is representative of a full presentation of the mitigation evidence uncovered by Davis and Childs. Califf, a licensed master social worker, testified regarding Applicant's family history. (R. pp. 2794-95). She presented a genogram of Applicant's family, spoke of each of his siblings, including trouble concerning one of Applicant's brothers who died in a suspicious manner when Applicant was fairly young. (R. pp. 2796-98). She described Applicant's father as tough and a "Navy man." She characterized his opinion as being the only opinion allowed in his household. (R. pp. 2798-99). At the time of trial, Califf explained that Applicant's father was saddened by Applicant's convictions, was not in good health, and did not want to talk with Califf. (R. p. 2800). But from photographs, Califf testified that his father always appeared proud of Applicant's accomplishments while retaining his stern demeanor. (R. p. 2811). Also according to Califf, large gaps in age between Applicant's eldest and youngest siblings caused them to "almost" feel "like two different families." (R. p. 2800). Applicant's other siblings came across to Califf as saddened by Applicant's convictions as well, and did not

attend the proceeding as a result. (R. pp. 2800-01).

Califf went on to present pictures of Applicant growing up as a "normal young child," going on vacations with his family, becoming involved in sports and after-school activities, and excelling in school. (R. pp. 2801-12). She referred to him as "smiley." (R. pp. 2801-02). She noted, however, that as Applicant reached his junior year in high school, he appeared less and less "smiley," and eventually "expressionless." (R. p. 2804-07). Califf also spoke to Applicant's birth records, explaining how he had jaundice and was consequently separated from his mother for a week after his birth. (R. p. 2812). She described the first year of Applicant's life as a period of familial dysfunction due to the need to care for Applicant's health. (R. p. 2812). Finally, Califf testified that she did not believe the Stanko children ever expressed feeling truly happy or safe growing up, indicating a weak family foundation which may have impacted the children's development of self-esteem and self-actualization. (R. pp. 2812-13).

In addition to Califf's trial presentation, trial counsel presented penalty-phase witnesses who spoke to Applicant's psychological and social past. Trial counsel called Dr. Thrasher as the first penalty-phase witness. He testified that personally evaluated Applicant, finding him to have antisocial personality disorder, and finding that his capacity to conform was substantially impaired at the time of the Georgetown crimes. (R. pp. 2747-50). As a matter of law in this State, antisocial personality disorder has been recognized as a mitigating factor. *State v. Caldwell*, 300 S.C. 494, 506, 388 S.E.2d 816, 823 (1990).

Additionally, the defense team put forward Wanda Brooks, a neighbor of the Stanko family, who testified that Applicant was friendly and social during middle school, "very nice, very polite, [and] went out of his way to help if he could." (R. pp. 2751-53). Brooks testified that she had limited contact with Applicant's father and felt uncomfortable any time she entered their

home. (R. p. 2753). Brooks testified that Applicant was known for attaining educational achievements. (R. p. 2754). So did Applicant's high school science teacher and academic team supervisor Clarissa Wenz, and his former assistant principal John Fulmer. (R. pp. 2755-59, 2772-79). Christian counselor and former middle school teacher Barbara Boland recalled Applicant as very popular and "the most likely to succeed" in middle school. She testified to contacting Applicant after learning of his imprisonment and visiting him thereafter. (R. pp. 2760-65). Three SCDC officers testified that Applicant was a model inmate. (R. pp. 2767-68, 2781-92).

Finally in mitigation, Applicant himself addressed the jury in the sentencing phase, delivering a closing argument wherein he expressed remorse for what had occurred. (R. pp. 2843-47, 2856). Applicant also spoke about the PET scan analysis of his brain, expressing relief for the doctors' ability to provide Applicant with a reason for his actions. (R. pp. 2847-54, 2858).

Moreover, on the point of this Court's denying funding for a forensic psychologist and for a licensed social worker to address the mitigation presentation at trial, the undersigned reiterates its previous ruling that the funding request made did not further an ineffective assistance of counsel allegation, but rather sought to critique whether the investigators and experts employed by trial counsel missed anything. (Order of Dismissal, p. 8, n.7; Applicant's Second Motion to Supplement the Record, Pleadings 5-15). Applicant put forward no specific, articulable facts in support of its denied funding requests which made the expert services of either a forensic psychologist or licensed social worker reasonable and necessary. None of the facts cited in Applicants' requests differed from those presented in mitigation at trial. (*Compare* Applicant's Second Motion to Supplement the Record, Pleadings 9-15 *and* R. pp. 2747-2813). Counsel could provide no articulable facts supportive of a condition or other reason that funding was reasonable and necessary to Applicant's pursuit of PCR. (Applicant's Second Motion to

Supplement the Record, Pleadings 5-15). Also, the undersigned authorized funding for mitigation specialist Drucy A. Glass. (Applicant's Second Motion to Supplement the Record, Pleading 6). Applicant's counsel did not utilize the fruits of Ms. Glass' funded investigation at PCR. Nor did Applicant's counsel utilized the fruits of Ms. Glass' funded investigation in the making of any renewed, particularized funding request which might have rendered a previously denied funding request reasonable and necessary.

Given the mitigation record in this case, the undersigned declines to alter or amend its order on the issue of counsel's investigation and presentation of Applicant's life history, background, and mental health.

VI. Ineffective Assistance of Counsel During Appellate Proceedings

This Court found that appellate counsel made the strategic choice not to brief the issue of whether the trial court erroneously admitted evidence related to the Georgetown County crimes immediately preceding the Turner murder because a defendant's prior murder conviction is admissible in the sentencing phase of a capital trial as evidence of an aggravating circumstance. (*Id.* at pp. 8-9 (citing S.C. Code Ann. § 16-3-20(c)(a)(2))). Applicant seeks amendment of the order dismissing this claim, citing that this Court failed to consider the purported prejudice caused by the trial court's admission of this evidence. (59(e) Motion, pp. 30-32; Rule 59(e) Tr. p. 15, lines 2-8; *see* Final PCR App. allegations 10&11(f)(1)). This Court denies Applicant's motion.

The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). The Supreme Court has noted "it is difficult to demonstrate that counsel was incompetent" as, for the most part, deficient

performance may be shown "only when ignored issues are clearly stronger than those presented[.]" *Smith v. Robbins, supra* at 288, 120 S.Ct. at 766, (quoting *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986)). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State,* 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Applicant has shown neither error nor prejudice in this regard due to the admissibility of the underlying evidence.

While Applicant is entitled to the effective assistance of appellate counsel, deficient performance will not be found where appellate counsel fails to raise on appeal an issue which would not have merit. Effective assistance of appellate counsel does not require that all issues that may have merit be pursued on direct appeal. *Bell v. Jarvis,* 236 F.3d 149, 164 (4th Cir. 2000) (en banc). "Appellate counsel accordingly enjoys a 'presumption that he decided which issues were most likely to afford relief on appeal,' a presumption that a defendant can rebut 'only when ignored issues are clearly stronger than those presented.'" *United States v. Baker,* 719 F.3d 313, 318 (4th Cir. 2013) (quoting *Bell v. Jarvis, supra*). Applicant fails to demonstrate how the overruled objections to the admissibility of the Georgetown County crimes is stronger than those issues pursued on appeal, and this claim does not warrant a grant of post-conviction relief. *Hill v. State,* 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016) (counsel need not raise every nonfrivolous issue to be considered effective on appeal).

During the trial's guilt phase, the court ruled that the State could not inject the extent of the Georgetown County crimes into evidence, but that the State could question an expert defense witness about those crimes to the extent the questioning was relevant to evidence introduced and relied upon by that defense expert in reaching his opinion. (R. p. 2221-23). Evidence is admissible for this purpose. *See* Rule 705, SCRE. Moreover, evidence of another murder is

admissible as *res gestae* in the guilt phase where, as in this case, the additional murder occurs during a continuous pattern of criminal activity. *See State v. Bixby*, 388 S.C. 528, 539, 698 S.E.2d 572, 578 (2010).

During the trial's penalty phase, the State introduced evidence concerning the Georgetown County crimes (the Ling murder) as part of its case in aggravation. South Carolina Code § 16-3-20(C) specifically allows this type of evidence in the penalty phase of a capital trial. *See State v. Torrence*, 305 S.C. 45, 54, 406 S.E.2d 315, 320 (1991) ("The state introduced evidence that appellant had previously pled guilty to an unrelated murder and received a life sentence.").

Appellate counsel recognized the admissibility of such evidence in his PCR testimony, pointing out that "the penalty phase of a capital trial is about the circumstances of the crime and the character of the Defendant, and our Supreme Court has been very broad on the admissibility of such evidence." (PCR Tr. p. 232, lines 18-22; p. 237, line 1 – p. 238, line 4). The undersigned finds appellate counsel's testimony on this point persuasive as it comports with the applicable law.

Considering the foregoing, the likelihood that appellate counsel would prevail on appeal on this particular issue is low due to the evidence's admissibility under the circumstances of Applicant's criminal acts. Consequentially, the failure to raise the issue on appeal does not constitute ineffective assistance of counsel. *United States v. Baker, supra*; *Bell v. Jarvis, supra*; *Hill v. State, supra.* Applicant also cannot demonstrate that he was prejudiced by the failure to raise this issue on appeal for the same reason. It was not likely to prevail due to controlling law. *Smith v. Robbins, supra*; *Anderson v. State, supra.*

VII. Unconstitutionality of South Carolina Death Penalty Statute

Applicant sought post-conviction relief upon the claim that the South Carolina death penalty statute, S.C. Code § 16-3-20, does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment. (Final PCR App. allegation 10&11(h) (citing *Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia,* 428 U.S. 153 (1976))). Applicant also alleged at PCR that trial counsel was ineffective for failing to make this motion pre-trial. (Final PCR App. allegation 10&11(b)(3)).

This Court found the constitutionality of the statutory scheme at issue well-settled in South Carolina. (Order Denying Relief, p. 9 (citing *State v. South,* 285 S.C. 529, 331 S.E.2d 775 (1985), *cert. denied,* 106 S.Ct. 209, 474 U.S. 888 (1985))). This Court additionally found the present issue addressed by the South Carolina Supreme Court in its consideration of Applicant's direct appeal. (Order Denying Relief, p. 9). In so finding, this Court recognizes that in order to raise a cognizable allegation in his PCR action, "a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel." S.C. Code Ann. § 17-27-20(B) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. . . ."); *Drayton v. Evatt,* 312 S.C. 4, 430 S.E.2d 517 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.") (citing *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975)).

This Court denies Applicant's motion to alter or amend judgment on this claim. It does not form a basis for post-conviction relief. *Id.* Additionally, the constitutionality of South Carolina's capital punishment scheme has been consistently upheld as genuinely narrowing the class of eligible offenders as required by the Eighth Amendment and United States Supreme

Court precedent. *State v. South, supra* ("South's constitutional attack on the Death Penalty Act is without merit. Its constitutionality is well settled."). Our State's statutory scheme limits the application of capital punishment in a manner consistent with the United States Constitution. *See* S.C. Code Ann. § 16-3-20. "In response to *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726 (1972), South Carolina adopted a death penalty statute that provided for bifurcated proceedings in which consideration of specified aggravating and mitigating circumstances was required before a sentence of death could be imposed." *State v. Cain*, 297 S.C. 497, 514–15, 377 S.E.2d 556, 565 (1988) ("our Death Penalty Act statutes do no leave capital sentencing to the unguided discretion of a jury") (citing S.C. Code Ann. § 16–3–20(C)(a), (b) (1985); *State v. Thompson,* 278 S.C. 1, 292 S.E.2d 581, *cert. denied,* 456 U.S. 938, 102 S.Ct. 1996 (1982); *State v. Shaw,* 273 S.C. 194, 255 S.E.2d 799, *cert. denied,* 444 U.S. 957, 100 S.Ct. 437 (1979); *State v. Rumsey,* 267 S.C. 236, 226 S.E.2d 894 (1976)). Our state's death penalty statute reduces "the likelihood that a sentencing body would impose a death sentence capriciously," by limiting the class of eligible offenders. *Id.*

In this very case, our state's high court found South Carolina's statutory scheme constitutionally limits the State's pursuit of capital punishment to those offenders "who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Stanko II*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 (2013) (quoting *Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 1194 (2005)); *see* S.C. Code Ann. § 16-3-20, *et. seq.* (statutory aggravating circumstances must be present to seek capital punishment for small class of offenders). Indeed, the jury in this case made two factual determinations regarding the existence of statutory aggravating factors which rendered Applicant's case death-penalty-eligible: that the Turner murder was committed while in the

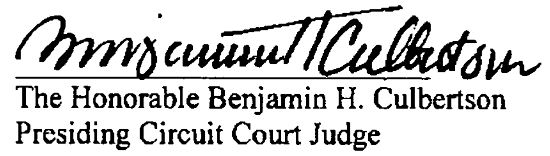
commission of an armed robbery, as well as with the intent for pecuniary gain. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(e) and (a)(4).

Moreover, the United States Supreme Court continues to reaffirm the constitutionality of the death penalty and statutory capital sentencing schemes like South Carolina's, where the jury determines whether to return a capital verdict after weighing aggravating and mitigating factors. *Kansas v. Marsh*, 548 U.S. 163, 165–66, 126 S. Ct. 2516, 2520 (2006) ("We must decide whether this statute, which requires the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise, violates the Constitution. We hold that it does not."); *see e.g. Glossip v. Gross*, __ U.S. __, __, 135 S. Ct. 2726, 2739 *reh'g denied*, 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015) ("we have time and again reaffirmed that capital punishment is not *per se* unconstitutional"). The Court recently warned against a State's invalidation of a death sentence premised upon federal law. *Kansas v. Carr*, __ U.S. __, __, 136 S. Ct. 633, 641 (Jan. 20, 2016) (where a state supreme court "invalidates death sentences because it says the Federal Constitution *requires* it, review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it. 'When we correct a state court's federal errors, *we return power to the State, and to its people.*'") (quoting *Kansas v. Marsh, supra* at 184, 126 S.Ct. at 2516) (emphasis in original)

NOW, THERFORE, based upon the above findings of fact and conclusions of law, it is hereby ORDERED that Applicant Stephen C. Stanko's Rule 59(e), SCRCP, Motion to Alter or Amend is **DENIED.**

[signature block on following page]

AND IT IS SO ORDERED.



The Honorable Benjamin H. Culbertson
Presiding Circuit Court Judge

Sept. 27, 2017
Conway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT

Stephen C. Stanko, #6022,

Applicant,

v.

State of South Carolina,

Respondents.

C/A No. 2014-CP-26-00035

FILED HORRY COUNTY
2017 OCT -2 PM 1:32
RENEE ELVIS
CLERK OF COURT
HORRY COUNTY, SC

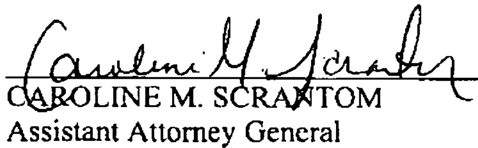
CERTIFICATE FOR SERVICE

I, Caroline M. Scrantom, hereby certify that I have served the ***Order Denying Applicant's Motion to Alter or Amend Judgment*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Emily C. Paavola, Esquire
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201

Lindsey Vann, Esquire
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201

This 29th day of September, 2017.



CAROLINE M. SCRANTOM
Assistant Attorney General

Retail

P

US POSTAGE PAID

$9.85

Origin: 29201
Destination: 29211
4 Lb 5.60 Oz
Oct 30, 17
4518040202-05

1024

PRIORITY MAIL 1-Day ®

Expected Delivery Day: 10/31/2017

B099

USPS TRACKING NUMBER

9505 5103 2371 7303 1523 85

JUSTICE (360) ADVANCING EQUALITY IN CAPITAL CASES

900 Elmwood Avenue
Suite 200
Columbia, SC 29201

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211