

Hopkins, Debbie

From: Murdoch, Paula <pmurdoch@sccid.sc.gov>
Sent: Wednesday, May 9, 2018 1:47 PM
To: Lindsey S. Vann; emily@justice360sc.org
Cc: Hopkins, Debbie
Subject: Stephen C. Stanko v. The State
Attachments: Trans Aug 1, 2016.pdf

Good afternoon,

Attached is the PCR hearing transcript of August 1, 2016 regarding the above case.

Paula Murdoch
Appellate Defense Division
Commission on Indigent Defense
803-734-1330

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State of South Carolina) Court of Common Pleas
County of Horry) 2014-CP-26-00035

Stephen C. Stanko)
vs.) Transcript of Record
State of South Carolina)

August 1, 2016
Conway, South Carolina

BEFORE:

Honorable Benjamin H. Culbertson, Judge.

APPEARANCES:

Emily C. Paavola, Esq.
Lindsay S. Vann, Esq.
Attorneys for the Applicant

Donald J. Zelenka, Esq.
Caroline M. Scrantom, Esq.
Attorney for the State

Teresa J. F. Bautz, RPR
Official Court Reporter

E X H I B I T S

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	No exhibits submitted.		
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	Exhibits retained by Clerk of Court.		
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1 (The hearing commenced at approximately 9:46 a.m.)

2 THE COURT: Good morning, please be seated. All
3 right, first thing we have is 2014-CP-26-00035, Stephen
4 C. Stanko versus State of South Carolina. The matter
5 is before the Court on a motion to alter, amend or
6 reconsider the Court's order which denied
7 post-conviction relief in this case.

8 Please give the court reporter your names and who
9 you represent.

10 MS. VANN: I'm Lindsay Vann, I represent the
11 Applicant, Stephen Stanko.

12 MS. PAAVOLA: I'm Emily Paavola, and I also
13 represent Mr. Stanko.

14 MR. ZELENKA: Don Zelenka with the Attorney
15 General's office. I represent the Respondent.

16 MS. SCRANTOM: Caroline Scrantom, I also represent
17 the Respondent, with the Attorney General's office.

18 THE COURT: Thank you very much. Anyone else
19 involved in the case or participating in the hearing?
20 All right, Ms. Vann, Ms. Paavola, this is your motion.
21 Who wants to argue it?

22 MS. VANN: I'll argue it, Your Honor. Before I
23 get started, can Mr. Stanko have one of his hands free
24 so that he can take some notes during the hearing?

25 THE COURT: I'll leave that up to security. I'll

1 let y'all decide. All right.

2 MS. VANN: Good morning, Your Honor. May it
3 please the Court.

4 THE COURT: Yes, ma'am.

5 MS. VANN: Probably the biggest defect in
6 Mr. Stanko's case was the Defense theory chosen by
7 trial counsel and how that theory was arrived upon. In
8 short, Mr. Stanko, his attorney referred to him as a
9 psychopath who had brain damage and couldn't help
10 killing people, and therefore, he was insane and should
11 be found not guilty of murder.

12 The way trial counsel came to this theory
13 should -- needs to be discussed in order to determine
14 the strategic decision and the reasonableness of that
15 decision.

16 Prior to Mr. Stanko's first trial which was in
17 Georgetown County, Mr. Stanko's trial counsel, Bill
18 Diggs, was appointed to the case. And before a single
19 expert had evaluated Mr. Stanko, they arrived at this
20 theory and decided that Thomas Stachy (phonetic) would
21 be the expert to testify.

22 Previously Mr. Stachy had testified in a case in
23 Georgia called Rivera where it had resulted in a death
24 sentence where Mr. Stachy had used a similar defense
25 theory that the client had brain damage and that he was

1 a psychopath, and therefore he was insane and should be
2 held not guilty of murder.

3 From that point on the testimony at the PCR
4 hearing showed that Mr. Diggs was razor focused on this
5 theory of this psychopath defense and could not be
6 swayed from that. Dale Davis, an experienced
7 mitigation investigator who was working on this case
8 informed Mr. Diggs that she thought this was not good
9 theory and that this was going to walk Mr. Stanko to
10 death's door.

11 Nevertheless, Mr. Diggs presented this theory at
12 the first trial. And the first trial ended in a death
13 sentence. As a 48 Hours episode that aired after the
14 first trial said, one of the jurors said that he felt
15 like the experts in the case were just baffling them
16 with BS. Nevertheless, despite the fact that the case
17 theory did not work at the first trial, there was no
18 discussion or consideration of changing the theory
19 before the second trial which occurred here in Horry
20 County.

21 Ms. Davis, the mitigation investigator, was asked
22 to continue her work on the second trial but said that
23 she did not want to be involved in a case where they
24 were presenting this theory. And she told -- and she
25 sent an article to Mr. Diggs telling him that there was

1 a study that showed that labelling a client as a
2 psychopath increases the likelihood that somebody would
3 be locked up indefinitely or sentenced to death.

4 Nevertheless, Mr. Diggs, without conducting any
5 significant investigation, presented virtually the same
6 theory at the Horry County case. During the Horry
7 County case, Mr. Diggs pointed out repeatedly that
8 Mr. Stanko's family did not like him and was not in
9 attendance at the trial.

10 And witnesses repeatedly called Mr. Stanko a
11 psychopath. And psychopaths cannot be treated. They
12 referred to him as having antisocial personality
13 disorder, another non-treatable personality disorder,
14 and also referred to him as dehumanizing labels like a
15 great white shark, referred to him as similar to Ted
16 Bundy and Jeffrey Dahmer.

17 In this Court's order, you found that the trial
18 attorney made a strategy decision to tell the jury that
19 his family did not like him and that he was a
20 psychopath and made a strategy decision to not
21 reinvestigate the case for a new life history or mental
22 health evidence.

23 The Court's order ignores the fact that a trial
24 strategy must be reasonable in order to be effective
25 assistance of counsel. A strategy decision that is

1 unreasonable does not prohibit an ineffective
2 assistance of counsel finding.

3 This was found in Counsel versus State, where the
4 South Carolina Supreme Court found that a trial
5 counsel's decision to rely on residual doubt rather
6 than investigating mitigating evidence was not a
7 reasonable strategy and therefore was ineffective
8 assistance of counsel because the jury had previously
9 rejected that theory during the guilt phase of the
10 trial.

11 In this case, trial counsel's strategy was not
12 reasonable. First, it was unreasonable to tell the
13 jury that the family did not like Mr. Stanko and that
14 they were not in attendance. Because as Mr. Stetler
15 testified at the PCR hearing, the goal of mitigation at
16 a sentencing phase is to present evidence that
17 humanizes the Defendant. And telling them that the
18 family was not there and in attendance did not do that.

19 Further, labelling Mr. Stanko as a psychopath was
20 also dehumanizing and not a reasonable strategy. This
21 was evident by the fact that it did not work at the
22 first trial in Georgetown County and also because it
23 was presented as a theory that he was a psychopath, and
24 therefore he was insane and should be found not guilty
25 by reason of insanity.

1 That specifically does not fit South Carolina Code
2 17-24-10 which is the insanity defense which
3 specifically says that evidence of repeated criminal or
4 other antisocial conduct which is the definition of
5 psychopathy is not sufficient to prove a defense of
6 insanity. The same expert testified at trial, so the
7 jury knew that it did not fit the statute. And even at
8 the PCR hearing, Mr. Diggs conceded that the statute
9 was not written to encompass the facts that they had in
10 this case.

11 Further, Mr. Stetler, who testified to what is
12 reasonable for trial counsel to do in preparing for a
13 capital case, testified that insanity defenses almost
14 never work, and also that an insanity defense at a
15 guilt phase is not a unified theory with what happens
16 at a sentencing phase.

17 So basically an insanity defense in the guilt
18 phase is supposed to be an excuse and a way to find the
19 Defendant not guilty. But then in the sentencing
20 hearing, it's used as something that is supposed to
21 just spare the person's life. And so that unified
22 theory that he spoke of at the PCR hearing was not
23 present in this trial.

24 Further, calling Mr. Stanko a psychopath
25 dehumanizes him and has been called the kiss of death

1 by researchers when it is used in capital trials. And
2 Mr. Stetler testified that it is just not mitigating
3 evidence, and he would never urge a defense lawyer to
4 use that at trial. In addition, Ms. Davis sent an
5 article that indicated that calling a client a
6 psychopath will increase the sentence and even lead to
7 a death sentence.

8 And finally, the decision not to investigate
9 between the two trials was not reasonable because a
10 trial counsel cannot make a strategic decision without
11 connecting an investigation that is shown in Wiggins
12 versus Smith and in White versus State by the Supreme
13 Court in South Carolina.

14 Further, Mr. Stetler testified that anytime an
15 attorney is representing a Defendant in a second
16 proceeding, they have a duty to reinvestigate the case
17 to look for whether there is an alternative strategy
18 and trial theory that should be presented.

19 Additionally, we submit that the order that was
20 entered by this Court was insufficient in that it does
21 not address Mr. Stetler's lengthy discussion of the
22 requirements of capital trial counsel. And under South
23 Carolina Code 17-27-80, a PCR Court is required to make
24 specific findings of fact and to state expressly the
25 conclusions of law related to each issue presented.

1 And so we believe that the order should be amended to
2 address Mr. Stetler's testimony.

3 On the conflict of interest claims, I think a
4 brief discussion of the facts is in order, namely, that
5 Mr. Diggs was appointed to represent Mr. Stanko in his
6 Georgetown County case. Before he was appointed to
7 represent him in the Horry County case, the second
8 trial, Mr. Stanko had filed an application for
9 post-conviction relief stating that Mr. Diggs was
10 ineffective in providing assistance of counsel at his
11 first trial.

12 There were a number of hearings about this before
13 the Horry County trial, but Mr. Diggs admitted at those
14 hearings that he had never even seen the PCR
15 application that was filed in the Georgetown County
16 case. And the judge informed Mr. Stanko that he was
17 not asking him to waive any IAC claims in order to keep
18 Mr. Diggs in the second case.

19 All this demonstrates that Mr. Stanko was never
20 adequately informed of what the conflict of counsel
21 was. Instead, the judge said that they would revisit
22 this after the final PCR application was filed. It was
23 never revisited before the trial started. And trial
24 went forward with Mr. Diggs.

25 The South Carolina Rules of Professional Conduct

1 say that a conflict of interest exists when there is a
2 risk that the attorney's representation will be limited
3 by a personal interest of the lawyer. And a Defendant
4 cannot knowingly waive anything that he doesn't know
5 about.

6 And so in this case there was a conflict of
7 interest in that Mr. Diggs had a personal and
8 professional interest in avoiding a finding that he was
9 ineffective in the Georgetown County case. This means
10 that he would have been tempted to present the exact
11 same defense at the Horry County case in order to
12 provide evidence that he thought he somehow did
13 something wrong at the first case.

14 So the actual conflict that Mr. Stanko was never
15 told about was that his counsel in order to avoid being
16 called ineffective would try to present as similar a
17 case as possible so that there was no evidence that he
18 thought his performance at the first trial was
19 deficient. There couldn't be no waiver in this case
20 because that conflict was never actually explained to
21 Mr. Stanko.

22 We also argue that Mr. Diggs himself was the
23 conflicted attorney, and so he could not provide the
24 proper advice to Mr. Stanko about the conflict. It
25 should have been an independent attorney to describe to

1 Mr. Stanko what the conflict was and what the
2 consequences of Mr. Diggs operating under that conflict
3 would be.

4 There was prejudice in this case as can be seen by
5 the fact that Mr. Diggs represented basically the same
6 evidence at the second trial. It was virtually
7 identical, and Mr. Diggs even admitted at the PCR
8 hearing that he never even considered changing the
9 strategy. And the prejudice is even more profound in
10 this case than in some others because it affected the
11 entire trial. This isn't where we're talking about a
12 conflict with a particular witness or a piece of
13 evidence; this is the entire trial theory.

14 The PCR application also raises a claim that trial
15 counsel was ineffective for failing to advise the Court
16 and advise Mr. Stanko that there was a conflict. And
17 appellate counsel was ineffective for failing to
18 adequately brief this issue.

19 The order of this Court never identifies the
20 specific conflict that Mr. Diggs was operating under,
21 and it fails to address the legal standards that are
22 relevant to the conflict of interest claim. And so we
23 would argue that the order should be amended in order
24 to address those issues.

25 Additionally, we presented some funding requests

1 prior to Mr. Stanko's PCR hearing asking for funding
2 for a mental health expert and for a social historian
3 to present evidence that could have been uncovered and
4 developed to be presented at the jury trial. This
5 Court denied those services reading the reasonable and
6 necessary clause of the statute to mean that it would
7 be necessary only if the Applicant could demonstrate
8 what the outcome of the requested expert services would
9 have been and that there would have been a winning
10 claim as a result of that expert's services.

11 The interpretation cannot be correct. No other
12 court in South Carolina has interpreted the statute
13 this way. And to require knowing the outcome of the
14 investigation and of the evaluation prior to approving
15 funding would -- is something that experts just will
16 not do. And it would actually be unethical for them to
17 do such a contingent fee basis where they would only be
18 paid if they provided information that resulted in a
19 winning claim.

20 The funding denials affected the change of venue
21 claims that we raised as 10 and 11, B-1 and two. It
22 also affected our ability to present evidence on the
23 State's presentation of false testimony claims 10 and
24 11-D and also our ineffective assistance of counsel
25 sentencing phase 10 and 11-E, one through four.

1 So the result of not having funding was that we
2 were unable to adequately prepare and present
3 Mr. Stanko's claims for relief. And we believe that
4 you did not have sufficient evidence to address the
5 merits of the claim and to fully adjudicate these
6 federal claims for relief. And so we assert that the
7 Court should grant funding and provide further
8 proceedings where we could present that evidence to the
9 Court.

10 Another claim that was raised in the
11 post-conviction relief application was a claim that the
12 death penalty statute was unconstitutional. And that
13 trial counsel was ineffective for failing to raise that
14 prior to trial. The Court's order finds that the trial
15 counsel did challenge the constitutionality of the
16 death penalty which is true, we agree to that.

17 But we presented this in a different way than
18 trial counsel did because we argued that the death
19 penalty statute is unconstitutional because it fails to
20 adequately narrow the class of offenders who are
21 eligible for the death penalty. And that specific
22 challenge to the death penalty was not addressed in
23 this Court's order, and we believe it should be
24 addressed.

25 Finally, we had a claim that appellate counsel was

1 ineffective in failing to raise the issue of evidence
2 presented about the first murder trial, the Ling trial
3 in Georgetown County. And this order found that it was
4 reasonable for appellate counsel to not raise that
5 because it was -- because the prior murder was evidence
6 of aggravation and would be admissible.

7 However, that fails to address the prejudicial
8 nature of the actual evidence that was presented, for
9 example, a 16-minute 911 call by one of the teenage
10 victims in the case. And so the order finds only that
11 the prior conviction was admissible, and we think the
12 order should be amended.

13 Also, we raised a motion to supplement the record.
14 We submitted a complaint from North Carolina, their
15 disciplinary action against Mr. Diggs, evidence that
16 showed Mr. Diggs took over a hundred thousand dollars
17 from two of his minor clients. That was provided to us
18 by the Attorney General's office, and they have not
19 objected to that being added into the record.

20 We believe that it is relevant to Mr. Diggs'
21 character for truthfulness as a witness in this case.
22 And so we would ask that the Court supplement the
23 record with that information.

24 THE COURT: All right.

25 MS. VANN: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. ZELENKA: Thank you, Your Honor, may it please
3 the Court. Your Honor, I respectfully submit that
4 judgment of this case need not be altered or amended.
5 We believe that your conclusions with each of the
6 allegations which was set forth were reasonable
7 applications of the facts that you were presented with
8 and was a reasonable application of the law in South
9 Carolina.

10 With respect to -- I'll try to follow through on
11 the claims that they presented to the Court -- the
12 strategic determination with the defense theory in the
13 case at the guilt phase of the case, respectfully, the
14 record is clear, we believe, that Mr. Diggs in
15 preparing for the Georgetown case, and in addition, in
16 preparing for the Horry County case, did a reasonable
17 investigation concerning the facts and circumstances of
18 this case and of the other case.

19 In making that factual determination, he employed
20 a series of forensic experts who assist him in making
21 that determination and presenting what he determined
22 would be a reasonable strategy in the case based upon
23 the information that he received.

24 In the guilt phase of this particular case, he did
25 present Dr. Bernard Albeniak, a psychologist, who

1 testified about brain damage which the Defendant
2 appeared to have in his frontal lobes. He presented
3 Brian Wilson who had noted that he was in school with
4 the Defendant and tried to create a cause for some of
5 that brain damage by noting that he had been hit in the
6 head with a bottle.

7 Dr. Thrasher, another psychiatrist, testified
8 again about some potential with organic brain problems
9 which may have occurred based upon the birth records
10 that he had reviewed. Dr. Ruben Gerr testified about
11 the functional MRI that he took and evidence which he
12 had which suggested that there was some brain damage.

13 In that particular case and Dr. Marc Einhorn,
14 again, a neuropsychologist and clinical psychologist,
15 also testified in this case in the guilt phase
16 concerning what he perceived to be an abnormal PET
17 scan.

18 Then Dr. Wu testified again about the PET scan
19 that was done in the particular case and suggested,
20 again, an abnormal brain functioning that occurred.
21 And then Dr. Stachy testified and asserted that based
22 upon his opinion, that the Defendant was insane as a
23 matter of law.

24 The State's not agreeing that he was insane, but
25 there was reasonable evidence that was presented that

1 the trial judge in this case allowed the evidence to be
2 presented and allowed, therefore, to be an instruction
3 to the jury upon that particular defense.

4 Looking at the guilt phase, Mr. Diggs testified
5 that he had reviewed, he thought it was a sound
6 strategy. His client agreed with that strategy that he
7 presented. This was not a situation where his client
8 wanted to concede guilt, that there was some evidence
9 of brain damage, some evidence of psychopathy that was
10 presented and Mr. Diggs thought reasonably would have
11 allowed him to make that argument in the guilt phase.

12 We submit that the fact that there was an
13 extensive investigation subsequent to the Georgetown
14 case does not reflect deficient performance. It
15 reflects that counsel was of the opinion that he had
16 reasonably investigated that case as far as a guilt
17 situation prior to his presentation and that he was
18 able to present what he thought was a reasonable
19 defense based upon the facts and circumstances, based
20 upon his reasonable investigation in this case.

21 We submit that under Wiggins v. Smith, the test is
22 whether counsel performed a reasonable investigation in
23 the case and then made strategic decisions based upon
24 that reasonable investigation. And we submit that in
25 this case, as reflected by the evidence that was

1 presented to the Court at the time of the Horry County
2 case, that that was done reasonably.

3 I will note that there was a bit of a difference
4 between some of the testimony from the Georgetown case
5 and the testimony in this case. And particularly, Dr.
6 Thrasher had an opinion that his opinion was that the
7 Defendant in this particular crime did not act with
8 insanity based upon the particular facts and
9 circumstances.

10 However, the Defense was able to not present that
11 part of Dr. Thrasher's testimony. And the State did
12 not inquire as to whether Dr. Thrasher had an opinion
13 of insanity in this particular case. Therefore, there
14 was no prejudice by the fact that you put up Dr.
15 Thrasher in this particular case because the potential
16 dysfunction which may have occurred if those questions
17 would have been asked undermining a potential defense
18 in that case simply did not occur in this particular
19 case.

20 Counsel made the strategic decision. But there
21 was some reasonable evidence in the guilt phase of the
22 case that Thrasher could have presented. He was able
23 to present that, supportive of the existence of that
24 side issue of the existence of brain damage to try to
25 explain why this Defendant acted in the way he did and

1 why his relationship with others were of that
2 particular nature.

3 As counsel Diggs testified, he had a difficult
4 situation in this case both factually and legally in
5 presenting the personality of this particular
6 Defendant. The way counsel saw it was he had to try to
7 explain why the Defendant in this case would have
8 essentially murdered the two people that he appeared to
9 be closest to after he was released from custody from
10 some earlier conviction.

11 And the way he sought to present this was by the
12 presentation of Defendant's antisocial personality
13 disorder, the existence of brain damage which occurred
14 and there was some evidence to support in this case.
15 And his client was consistent in making that desire to
16 have that presented.

17 If I may now jump to the penalty phase issues,
18 again, if we looked at the record before this Court, in
19 the post-conviction relief proceeding there was
20 evidence that Dale Davis, the mitigation investigator
21 in the Georgetown case, fully investigated the facts
22 and circumstances of the case and provided that
23 information to the social worker who testified in this
24 particular case, Evelyn Califf, and also to defense
25 counsel to assist them in making whatever

1 determinations they needed to make about the
2 presentation of mitigation evidence.

3 As Ms. Davis testified, she had basically
4 completed everything. She had the school records, the
5 health records, the inmate records of the Defendant and
6 had had and developed a relationship both with the
7 Defendant and also with the fact investigator in this
8 particular case prior to the time of the Horry County
9 case.

10 She specifically was not involved in the
11 preparation of the Horry County case, but the work she
12 did in the Georgetown case was complete as far as she
13 could tell concerning the evidence in mitigation.
14 Although she may have had some differences about the
15 strategy to have been presented in that particular
16 case, that is an attorney's decision. That is not run
17 by a mitigation investigator. That rests solely on how
18 Mr. Diggs perceived and received that information and
19 how he thought best to present that information to
20 either trial, and in this particular situation, the
21 Horry County case.

22 In making that mitigation case he presented,
23 again, Dr. Thrasher. And Dr. Thrasher then presented
24 information that, in fact, he opined that in the
25 initial trial of this case, excuse me, involving the

1 Ling matter, that the Defendant in fact was insane at
2 that particular time and that that defense was a
3 mitigating factor, a mitigating factor to basically
4 blunt what the State's case in aggravation was
5 presenting inasmuch as they presented the Ling matter
6 before the jury for making -- and insisting in making
7 their determination about the character of the
8 Defendant.

9 The first witness out of the box was Dr. Thrasher
10 who was attempting to show that there were some
11 uncontrollable bases in his mind as to why the
12 Defendant acted in the way he acted. Again, there was
13 some evidence of individuals that had known Mr. Stanko
14 previously presented in mitigation to try to humanize
15 the Defendant and characterize basically the course of
16 his life and how he got to where he was in this
17 particular setting.

18 Wanda Brooks, who had been a neighbor of the
19 Stanko family, noted that the Defendant wanted to go to
20 the Air Force Academy. Lisa Wentz, a teacher of his in
21 high school, said that Mr. Stanko stood out for his
22 achievements, that in fact he was part of an academic
23 team that was very successful in school.

24 Barbara Bolan (phonetic) was a counselor who had
25 been a teacher in middle school, found that he had been

1 popular at that particular time while he was in school.
2 And she had maintained a relationship with him while he
3 was in the Department of Corrections, again, noting
4 that there was some redeeming feature of Mr. Stanko
5 that the jury was worthy of considering.

6 A chaplain in the particular case, Herbert Shealy,
7 found him as an extraordinary person, extraordinary
8 inmate trying to blunt the possibility that this
9 Defendant consistently acted violently towards others
10 and was uncontrollable, a theme that the State had been
11 trying to present.

12 He also testified that he found that the Defendant
13 was, in fact, a leader on death row while he was there
14 as a result of the Georgetown case. Another teacher,
15 Don Formal, was a teacher and principal at the high
16 school, found the Defendant was in the top 20 percent
17 of his class. And he had participated in college prep
18 courses, and he had been well-received, and he was an A
19 top student.

20 He was surprised that he was accused of murder,
21 again, showing some dysfunctioning in people's
22 relationships with him as a youth and the way he was
23 acting at that particular time.

24 A couple of guards in the Department of
25 Corrections also testified on his behalf and found that

1 he was a model inmate. Those were Lieutenant Roger
2 Stewart and Ralph Biersley (phonetic) of the Department
3 of Corrections, and that he had more interaction with
4 others in the case. Evelyn Califf (phonetic), the
5 licensed social worker who testified in mitigation of
6 this case, also commented about the family background.

7 She did comment about the family not attending the
8 particular proceedings and trying to start blunting --
9 or there was a comment during her testimony, and there
10 was an attempt to basically blunt a perception that
11 jurors may have had as to why aren't any family members
12 here and testifying.

13 Stanko made, in fact, a statement to the jury at
14 the conclusion of that particular case essentially
15 expressing remorse for what had occurred in this
16 particular situation. That was a reasonable
17 presentation under the facts and circumstances that
18 defense counsel was given in this particular case, but
19 a difficult case for any defense counsel to try where
20 guilt truly was not at issue in the particular case.

21 And you had a Defendant who had a history in the
22 Department of Corrections based upon his own criminal
23 record, a very significant criminal record, as it came
24 up at that particular scenario.

25 That was a reasonable strategy. And we think,

1 Your Honor, in making the determination that it was a
2 reasonable strategy, I think, is well-founded on the
3 facts and circumstances in this case. The fact that
4 there was evidence presented that the Defendant
5 suffered under antisocial personality disorder was a
6 fact. That is what he suffered under.

7 So the Defense team had to try to present that
8 information in a way best to try to mitigate the
9 Defendant's character with that. As Your Honor is
10 aware and as their expert witness, Mr. Stetler, may not
11 have been aware, the South Carolina Supreme Court has
12 held in State versus Ricky Tim Caldwell that antisocial
13 personality is a mitigating factor as a matter of law
14 in South Carolina and, based upon information being
15 presented, would have authorized and does authorize the
16 giving of certain statutory mitigating circumstances
17 involving emotional and mental health and the ability
18 to rationally appreciate the criminality of his conduct
19 in a particular case.

20 The Defense counsel presumably was aware of that
21 and was utilizing those factors in a way best to
22 attempt to get some mitigation in this particular case.

23 We would agree, the use of the phrase psychopath
24 may not be a phrase that any defense lawyer wants to
25 present. But the fact of the matter was that was the

1 evidence that the Defense team had at that particular
2 time, and they were seeking to use that information.
3 It wasn't a secret that the Defendant had that
4 diagnosis in the mental health area.

5 The Defense team tried to present that in a way
6 that assisted them. It wasn't an ignorance of trial
7 strategy or reasonable trial strategy, it was an
8 attempt to use the information that they had and that
9 they were presented with in an attempt to try to
10 present the Defendant in a way that the jury could best
11 understand why he had committed these particular crimes
12 at that time of his life.

13 As to the conflict of interest conclusions of this
14 Court, I would submit that there were reasonable
15 determinations. As the Court is aware, the South
16 Carolina Supreme Court was directly faced with this
17 issue in the direct appeal. A significant portion of
18 the Court's opinion clearly addressed the existence of
19 a conflict of interest based upon the allegations
20 raised or the application for post-conviction relief
21 raised with respect to the Georgetown case, which
22 coexisted at the time with Mr. Diggs' representation in
23 the Horry County case.

24 The Court thoroughly analyzed the series of
25 pretrial hearings which the Court occurred at the

1 request of the State to make a determination as to
2 whether the Defendant was aware of the potential
3 conflict of interest which existed inasmuch as he has
4 filed the application challenging the competency of
5 Mr. Diggs on the Georgetown case and whether he wanted
6 to continue to have Mr. Diggs represent him in this
7 particular case.

8 There is nothing that has been presented, I would
9 submit, in this particular proceeding which would
10 suggest that Mr. Stanko or the statements which
11 Mr. Stanko said to the trial judge at the time of the
12 Horry County case were not cogent, were not knowing,
13 were not truthful at that particular time to undermine
14 the determination by the South Carolina Supreme Court
15 and the trial judge that his waiver of his right to a
16 conflict of interest based upon his application for
17 post-conviction relief against Mr. Diggs on the
18 Georgetown case was other than knowing, reasonable and
19 intelligent under those circumstances.

20 Again, issues which could have been raised at
21 trial and on appeal are not supposed to be reasserted
22 in a post-conviction relief proceeding. I'm pretty
23 sure Your Honor is well aware of the decision in
24 Drayton versus Evan in which the South Carolina Supreme
25 Court in a capital case confirmed that that standard

1 set forth in Simmons versus State applies even in a
2 death penalty case.

3 And that's an alternative finding that we submit
4 Your Honor was making with respect to this issue. And
5 with respect to the change of venue issue, again, an
6 issue which was raised and decided on the merits by the
7 South Carolina Supreme Court in its opinion in this
8 particular case.

9 With respect to the narrowing issue, again, the
10 issue we acknowledge was a little different than was
11 raised in the South Carolina Supreme Court and the
12 direct appeal. But that doesn't authorize that
13 freestanding claim to be raised in this particular
14 proceeding.

15 Again, in reliance upon Drayton versus Evan, the
16 way I read your order in that -- in this particular
17 case is that was essentially the determination that I
18 understood that you were making that it's something
19 that is not available to be raised in a post-conviction
20 relief proceeding. It is raised and could have been
21 raised in, at trial or on the direct appeal. It's
22 presented here as a freestanding claim.

23 Alternatively, the South Carolina Supreme Court
24 has held in a number of cases that South Carolina
25 statutory procedures for seeking the death penalty and

1 making a determination of the existence of statutory
2 aggravating factors complies with the narrowing
3 function set forth in Gregg v. Georgia, set forth in
4 Vant v. Stevens by the United States Supreme Court and
5 its progeny. Because unless a statutory aggravating
6 circumstance is found, the death penalty cannot be
7 sought.

8 There are two fact finding determinations by the
9 jury in this case on the existence of the statutory
10 aggravating factors. The first was murder was
11 committed while in the commission of armed robbery.
12 Again, that provided a narrowing function in the
13 particular case.

14 The second one was the murder was committed
15 while -- with the intent for pecuniary gain. Again,
16 that was a narrowing function. That particular
17 narrowing function was the one that was raised in
18 direct appeal as to whether that was too vague or void
19 for vagueness in the particular case and was rejected
20 by the South Carolina Supreme Court.

21 But the existence of those aggravating factors and
22 the existence of our statutory aggravating factors do
23 provide that narrowing function. And we would submit
24 that the South Carolina Supreme Court determination is
25 essentially binding upon this Court in a State

1 post-conviction relief proceeding seeking to raise a
2 due process claim, a freestanding claim, as they are
3 attempting to do. And the post-conviction relief
4 concept is, under Simmons and under Drayton versus
5 Evan, not properly presented.

6 As far as ineffective assistance of appellate
7 counsel, as Your Honor is aware of the standard similar
8 to the standards of ineffective assistance of trial
9 counsel is whether counsel acted reasonably. And if he
10 acted deficiently, whether in fact that deficient
11 performance to a reasonable probability would have
12 resulted in a different result.

13 They've asserted two claims that they are seeking
14 to present that Mr. Dudek was -- excuse me --
15 ineffective. The first one is essentially that the
16 presentation of the evidence concerning the Ling murder
17 in the penalty phase of the case which had been
18 objected to by trial counsel was ineffective because he
19 failed to raise it on appeal.

20 As Mr. Dudek acknowledged, South Carolina law
21 essentially since State versus Truesdale has allowed
22 for the introduction of bad acts by a Defendant in the
23 penalty phase of a case to show the existence of the
24 Defendant's character in the presentation of his
25 defense and the presentation of evidence and

1 aggravation by the State.

2 In this particular case, we'd submit that counsel
3 Dudek did not perform deficiently in failing to raise
4 that claim. He understood that claim would lack merit
5 if presented before the Court. This evidence was
6 essentially almost even evidence of circumstances of
7 the crime, based upon the continuous actions of the
8 Defendant in this case, which made it more relevant and
9 more probative as to the actions that the Defendant
10 took in the circumstances of this particular case
11 involving the death of Mr. Turner.

12 We submit that he's failed to show prejudice.
13 Even if it had been deficient, which we don't submit
14 that it was, based upon South Carolina law which
15 existed at the time and still exists, the second issue
16 concerning whether he adequately presented the evidence
17 on the conflict of interest, I think the South Carolina
18 Supreme Court opinion and the evidence which we submit,
19 they discuss concerning the nature of his waiver of the
20 conflict of interest, adequately presented that matter
21 before the Court, reasonably presented that matter
22 before the Court, and resulted in a decision by the
23 South Carolina Supreme Court, alternatively on the
24 merits of that particular case, and that they have
25 failed to show any error any need to adjust or alter or

1 amend your order in this particular case.

2 Now, concerning Mr. Diggs' background, we did
3 provide the information once we learned it about the
4 pending matters in the North Carolina Bar. We simply
5 asked your Court to consider those matters. We are not
6 opposing those matters being considered, and we do not
7 submit that it should alter or amend your judgment or
8 your conclusion about your findings with respect to
9 Mr. Diggs' representation in this particular matter.

10 But we would be remiss, I would submit, if we
11 precluded that information from coming before Your
12 Honor for your consideration. Unless the Court has any
13 questions, I'll rest on that point.

14 THE COURT: All right, thank you. You can reply.

15 MS. VANN: Very briefly, Your Honor. Regarding
16 the trial theory, even if there was adequate
17 investigation conducted prior to the first trial or
18 between the two trials, the question is whether the
19 strategy was reasonable. And in this case the strategy
20 chosen by trial counsel was not reasonable. The rule
21 is that a reasonable strategic decision after adequate
22 investigation is virtually unchallengeable. But
23 because the strategic decision was not reasonable, it
24 was ineffective assistance of counsel.

25 The strategy was not reasonable because counsel

1 selected a theory which he admitted at the PCR hearing
2 was legally impossible to succeed. It simply would not
3 qualify as insanity under the statute the way it was
4 presented.

5 Regarding the conflict, the South Carolina Supreme
6 Court found that the issue was not preserved which was
7 because Mr. Diggs did not raise it in the trial court,
8 which means that he was ineffective in failing to raise
9 that to the Court. And additionally, Mr. Stanko simply
10 could not have made a knowing waiver because he did not
11 know what he was giving up. Specifically, he was
12 giving up the opportunity to have new counsel review
13 his case and present a different strategy. And because
14 he did not know that that was what he was giving up,
15 there was no knowing and intelligence waiver.

16 And finally, too, the unconstitutionality of the
17 death penalty statute, that was raised as both a
18 freestanding claim and as an ineffective assistance of
19 counsel claim for Mr. Diggs failing to raise that prior
20 to trial. So the arguments regarding the freestanding
21 claim simply do not apply. And unless you have any
22 further questions, thank you.

23 THE COURT: Well, I do have one question. This
24 supplemental record from the North Carolina
25 Disciplinary Commission, when did they make these

1 findings; was that before or after the PCR hearing in
2 this case?

3 MS. VANN: I believe it was after the PCR hearing,
4 Your Honor.

5 THE COURT: Okay.

6 MS. VANN: But the conduct was prior to the
7 hearing.

8 THE COURT: Conduct was prior. But it was
9 allegations at that stage, and they did not actually
10 complete their -- make their decision until after the
11 PCR hearing in this case; is that correct?

12 MS. VANN: That's correct.

13 MS. PAAVOLA: Sir, if I could add just one note to
14 that, the documents provided by the Attorney General's
15 office do contain a letter signed by Mr. Diggs and, I
16 believe, admitting or at least acknowledging the
17 allegations. And we therefore think that that letter
18 would predate our PCR hearing and is relevant because
19 at the PCR hearing Mr. Diggs testified that he did not
20 know what the nature of the allegations against him
21 were.

22 THE COURT: Okay. All right, thank you, ma'am.

23 MS. VANN: Thank you.

24 MR. ZELENKA: Your Honor, just, you have a
25 transcript of the proceeding.

1 THE COURT: It's in the office. I did not bring
2 the whole transcript.

3 MR. ZELENKA: All right. I would just like to
4 refer to the transcript of the proceeding, page 83.
5 The questions that were asked were asked with respect
6 to the South Carolina Office of Disciplinary Counsel's
7 investigation in the case. That was my understanding
8 of the inquiry that was done.

9 THE COURT: All right. All right, Mr. Zelenka, if
10 I could get you to prepare an order that denies the
11 motion to alter or amend or to reconsider the PCR
12 ruling based upon the arguments presented. In your
13 arguments against the motion, if you could prepare an
14 order as to supplementing the record.

15 I'm not going to supplement the record, but the
16 materials that's attached to their motion I'll -- it
17 can be proffered, in other words, it will be there
18 available if the appellate court wants to look at it.
19 But since the ruling by the North Carolina Disciplinary
20 Commission came out after the PCR, I'm not going to
21 supplement the record with it.

22 But whatever is attached to their motion to
23 supplement the record, that will come in as just
24 proffered exhibits. So it will be there if the
25 appellate court wants to take a look at it; okay?

1 MR. ZELENKA: Thank you very much, Your Honor.

2 THE COURT: Thank you very much, okay.

3 MS. PAAVOLA: Yes, Your Honor, just very quickly,
4 if we may, we would like to pass up to you, we are
5 asking the Court to re-allocate some previously
6 approved hours. Ms. Vann has worked substantially more
7 attorney hours than I have on this matter. And so we
8 are asking the Court to reallocate some of my
9 previously approved hours to her, so that she may be
10 properly compensated for her time.

11 THE COURT: Okay. So in other words, what was
12 coming to you is now going to her?

13 MS. PAAVOLA: Yes, Your Honor. It's my
14 understanding Mr. Zelenka has no objection to that.

15 MR. ZELENKA: No objection to that.

16 MS. PAAVOLA: Thank you.

17 THE COURT: Now, is this the motion that I've had
18 sitting on my desk?

19 MS. PAAVOLA: I think it was previously filed,
20 yes.

21 THE COURT: Okay. You've looked over this order?

22 MR. ZELENKA: No, I haven't.

23 THE COURT: Okay. Do you want to take a look at
24 it?

25 MR. ZELENKA: I didn't ask for it. I'm not

1 faulting them.

2 THE COURT: As I understand, I haven't really
3 looked at it, all it's doing is money has already been
4 approved for use.

5 MS. PAAVOLA: Yes, Your Honor. We're simply
6 asking for a reallocation between the two of us.

7 THE COURT: Okay.

8 MS. PAAVOLA: And if I might simply note, our
9 attorney time sheets are attached as exhibits to those.
10 I would just -- I believe those are work product, and I
11 don't have a problem with the...

12 THE COURT: I'm not going to look into it.

13 MS. PAAVOLA: The motion itself.

14 MR. ZELENKA: No objection.

15 THE COURT: All right, thank you. Mr. Zelenka,
16 then prepare an order, then make sure you submit it to
17 them for review before you get it to me; okay?

18 MR. ZELENKA: I will.

19 THE COURT: Thank you very much.

20 MR. ZELENKA: Is there a time deadline?

21 THE COURT: No. Let me see the attorneys for a
22 second.

23 (The hearing concluded at approximately
24 10:37 a.m.)

25 (End of Transcript of Record)

