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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002281

STEPHEN C. STANKO #6022.....PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

APPENDIX
VOLUME 9 OF 14

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Joanna Beaufort, and from time to time, I also practice with my son, Parnell Diggs, whose office is at Garden City, south of Myrtle Beach.

THE COURT: Thank you, sir. Yes, ma'am.

MS. WILLIAMS: My name is Brana Williams. I have my own office here in Conway, and I practice by myself.

THE COURT: Thank you. All right, is there any member of the jury panel that is related by blood or marriage, close personal friends, acquaintances of the lawyers that have been identified to you, and in regards to Mr. Diggs and Ms. Williams, have you ever been clients of theirs either in the past or currently? If you need to respond to any part of that question, please stand at this time.

All right, yes, ma'am, over here, your name and juror number.

JUROR 557: Lisa Sapochak, 557.

THE COURT: And who do you know?

JUROR 557: Ms. Beaufort.

THE COURT: All right. Thank you very much. Yes, sir.

JUROR 372: Andrew Langway, 372. My family is in the legal business.

THE COURT: Very good. Thank you very much. All right, yes, ma'am, over here.

JUROR 93: Number 93, Lisa Carver. I know all the attorneys involved.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 101: Juror number 101, Allyson Chambers, acquaintances of these attorneys.

THE COURT: Thank you very much, ma'am. Yes, ma'am, in the back.

JUROR 647: Heidi Vukov, 647. I know the Hembrees.

THE COURT: Thank you very much. Yes, sir.

JUROR 512: Number 512, Dave Priest. I am an acquaintance of Greg Hembree.

THE COURT: All right, sir, and you were juror number 512?

JUROR 512: Yes, sir.

THE COURT: All right, thank you, sir. All right, Yes, ma'am, in the back there.

JUROR 60: I am Gina Boggs, number 60, Greg Hembree, acquaintance.

THE COURT: Thank you very much, ma'am. Yes, ma'am.

JUROR 213: Jamie Franklin, 213. I taught Mr. Hembree's children at North Myrtle Beach Middle School.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 378: Juror number 378, Tonja Leidig. I go

to church with Greg Hembree and his family.

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

JUROR 236: Judy Glymph, 236, and I am a neighbor of Greg Hembree and also attend a church with them.

THE COURT: All right, thank you, ma'am. Yes, sir.

JUROR 580: 580, Chester Skowronski. I work with Mr. Hembree and Ms. Brana Williams.

THE COURT: All right, thank you, sir.

All right, the next question, ladies and gentlemen, is going to be noted for the Court's information and the information of the lawyers. I will not question you further at this point in time. If you respond to this question, we would wait for that until your individual questioning.

Does any member of the jury panel believe you have any kind of personal, political, religious, philosophical belief that you believe would prevent you from being a fair and impartial juror? If so, please stand.

Yes, ma'am, your name and juror number.

JUROR 35: Mary Bates, number 35.

THE COURT: Thank you, ma'am.

JUROR 372: Andrew Langway, 372.

THE COURT: Thank you, sir. Yes, ma'am.
JUROR 284: Arcissia Herndon, 284.
THE COURT: I'm sorry; I didn't hear your name.
JUROR 284: Arcissia Herndon, 284.
THE COURT: Thank you, ma'am. Yes, sir.
JUROR 631: 631, Danny Todd.
THE COURT: Thank you, sir.
JUROR 397: John Lopes, 397.
THE COURT: All right, behind him.
JUROR 237: Kimberley Goh, 237.
THE COURT: Thank you, ma'am. Yes, ma'am, right here.
JUROR 281: Tammy Henderson, 281.
THE COURT: Thank you.
JUROR 477: Sandra Norton, 477.
THE COURT: Thank you.
JUROR 602: 602, Susan Starr.
THE COURT: Thank you. Yes, ma'am.
JUROR 290: Brenda Holderfield, 290.
THE COURT: I'm sorry; you need to repeat that, ma'am. I didn't hear you.
JUROR 290: Brenda Holderfield, 290.
THE COURT: Thank you, ma'am. Yes, sir.
JUROR 41: Daniel Becker, 41.
THE COURT: All right. Yes, sir.

JUROR 494: Carey Payne, 494.
THE COURT: Thank you, sir.
JUROR 386: Barbara Linderman, 386.
THE COURT: Thank you.
JUROR 307: Bonnie Hutto, 307.
THE COURT: Thank you, ma'am. Yes, sir, in the aisle.
JUROR 462: Joseph Morrow, 462.
THE COURT: Thank you, sir. In the back.
JUROR 580: Chester Skowronski, 580.
THE COURT: Thank you, sir. Ma'am, in the back.
JUROR 195: Donna Ferrebee, 195.
THE COURT: Thank you. Yes, sir.
JUROR 351: Brian Keane, 351.
THE COURT: Thank you, sir. In the back, ma'am.
JUROR 549: Linda Russ, 549.
THE COURT: Thank you. Yes, ma'am.
JUROR 60: Gina Boggs, 60.
THE COURT: Thank you. All right, in the back, ma'am.
JUROR 68: Susan Briggs, 68.
THE COURT: Thank you. Next to her.
JUROR 668: Jeremie West, 668.
THE COURT: All right, sir. Yes, sir, right there.

JUROR 149: Ronaldo De Los Reyes, 149.
THE COURT: Thank you. Going across.
JUROR 539: Ryan Rodriguez, 539.
THE COURT: Thank you. Yes, ma'am, there on the side.
JUROR 208: Jill Fowler, 208.
THE COURT: All right, yes, ma'am, again on the side.
JUROR 326: 326, Amanda Johnson.
THE COURT: Thank you. Yes, sir.
JUROR 234: John Gira, 234.
THE COURT: Thank you. Yes, ma'am.
JUROR 57: Gwen Blondmonville, 57.
THE COURT: Thank you. Yes, ma'am.
JUROR 607: 607, Katherine Steighner.
THE COURT: Thank you, ma'am. Yes, sir.
JUROR 150: Vance Defelice, 150.
THE COURT: Thank you, sir. Yes, sir.
JUROR 377: Paul Leckie, 377.
THE COURT: Thank you very much, sir.
UNIDENTIFIED JUROR: Judge, could you please say that again. I kind of got ---
THE COURT: All right. The question is, and I'm just reminding everybody I'm not looking for anything other than your name and your juror number because we

would question you further in your individual questioning. Does any member of the jury panel have any kind of religious, philosophical, personal belief that you believe would prevent you from being a fair and impartial juror?

Yes, sir, your name and juror number.

JUROR 320: Lewis Janes, 320.

THE COURT: Thank you. Yes, ma'am.

JUROR 690: Delphia Wilson, 690.

THE COURT: Thank you.

JUROR 115: Darlene Novak, 115.

THE COURT: Thank you.

JUROR 243: Nancy Goss, 243.

THE COURT: Thank you.

JUROR 693: Thomas Wood, 693.

THE COURT: Thank you, sir.

JUROR 393: Christopher Lombardi, 393.

THE COURT: Thank you.

JUROR 575: William Simril, 575.

THE COURT: Thank you.

JUROR 682: Alexandra Wilcken, 682.

THE COURT: Thank you.

JUROR 342: Bradley Jordan, 342.

THE COURT: I'm sorry, sir. I didn't hear you.

JUROR 342: Bradley Jordan, 342.

THE COURT: Thank you.

JUROR 564: Lisa Sellers, 564.

THE COURT: Thank you.

JUROR 573: Dorothy Simpson, 573.

THE COURT: 573, ma'am?

JUROR 573: Yes.

THE COURT: Thank you. Yes, ma'am.

JUROR 329: Glenda Johnson, 329.

THE COURT: Thank you.

JUROR 4: Anntanette Aklin, 4.

THE COURT: All right, thank you, ma'am, and I will state for the record, and everyone would understand, obviously having personal opinions and beliefs is not a disqualification.

Is there any member of a -- any member of the jury panel that either you, yourself, or a member of your immediate family was a former law enforcement officer or you've got a family member who is a current law enforcement officer, so it's either you in the past were a former law enforcement officer or you've got family members who in the past or are currently law enforcement officers?

All right, we'll start over here. Yes, sir, your name and juror number, please.

JUROR 13: Number 13, James Alvey.

THE COURT: All right, sir, and who -- was it yourself or someone else?

JUROR 13: Yes, it was me.

THE COURT: All right, sir, and where were you a law enforcement officer?

JUROR 13: Military police.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 215: Lynn Frick, 215, retired South Carolina Highway Patrol.

THE COURT: All right, thank you, ma'am. Yes, sir.

JUROR 246: Norman Graham, 246, got a nephew, and my niece's husband is in law enforcement.

THE COURT: And where might they be officers, please?

JUROR 246: Horry County in the Sheriff's Department.

THE COURT: Thank you very much.

JUROR 121: Thomas Cooper, 121. My son is a police officer for the City of Conway.

THE COURT: Thank you. Yes, sir.

JUROR 418: Richard McAbee, 418, a former Myrtle Beach city police officer.

THE COURT: Thank you. Yes, ma'am.

JUROR 35: Mary Bates, number 35. My father

retired from the City of North Myrtle Beach.

THE COURT: Thank you. Yes, sir.

JUROR 396: Billy Lookabill, 396. I was a former police officer with the City of Nichols.

THE COURT: The City where?

JUROR 396: Nichols, South Carolina.

THE COURT: Thank you. Yes, sir.

JUROR 372: Andrew Langway, 372, a brother-in-law in Pennsylvania.

THE COURT: And what type of law enforcement?

JUROR 372: A police officer.

THE COURT: But, I mean, highway patrol, state police, or ---

JUROR 372: The city, I believe, sir.

THE COURT: All right, very good. Thank you. Yes, sir.

JUROR 389: David Lloyd, 389. I have two brother-in-laws in Horry County, Myrtle Beach police officers.

THE COURT: Thank you very much. Yes, sir.

JUROR 181: Gerald Ellis, 181, retired police officer, City of Myrtle Beach.

THE COURT: Thank you very much. Behind him, ma'am.

JUROR 391: Linda Lockner, 391. The father of my children who has been a police officer in the State of

New York and a Sheriff in Texas.

THE COURT: All right, and what relationship was that, please, ma'am?

JUROR 391: The father of my children.

MR. DIGGS: Your Honor, could we get the number for the last juror, please, sir.

THE COURT: I'm sorry. Could you tell us your juror number again, please, ma'am.

JUROR 391: 391.

THE COURT: Thank you, ma'am. Yes, ma'am, behind her.

JUROR 448: Vickie Miller, 448. My son is with the County; my niece is with the County; my brother-in-law is with Wildlife.

THE COURT: All right, thank you. All right, across the aisle right here.

JUROR 247: Terry Graham, 247. My husband was an ex-jailer at the J. Reuben Long Detention Center.

THE COURT: Thank you, ma'am. Behind.

JUROR 166: Sybil Dupie, 166. My ex-husband was a cop for the City of Myrtle Beach.

THE COURT: All right, thank you. Yes, sir.

JUROR 255: Richard Gregory, 255. My dad was a cop in New Jersey.

THE COURT: Thank you very much. All right, just

starting at the wall and going across over there.

JUROR 208: Jill Fowler, 208. My father-in-law was ---

THE COURT: I'm sorry; your father-in-law was what, ma'am?

JUROR 208: He's the chief of police in a little town just north of Florence currently. My brother-in-law is currently active military police.

THE COURT: Thank you very much. Yes, sir.

JUROR 539: Ryan Rodriguez, 539. My uncle is a prosecuting attorney for the State of Florida.

THE COURT: Thank you. The next one.

JUROR 333: Karen Johnson, 333 ---

THE COURT: Who was that, ma'am?

JUROR 333: My son is an Horry County police officer.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR 149: Ronaldo De Los Reyes, 149.

THE COURT: I'm sorry, sir; I didn't hear you.

JUROR 149: I was a United States Marshal in Washington, D.C.

THE COURT: Thank you, sir. Yes, sir.

JUROR 320: Lewis Janes, 320. My brother is a retired police officer, City of Atlantic City, New Jersey.

THE COURT: Thank you.

JUROR 99: Johnny Causey, juror number 99. My father was a police officer for forty-three years for the City of North Myrtle Beach.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 549: Linda Russ, 549. My nephew was with the police in Iowa.

THE COURT: Could you repeat your name and jury number, please, ma'am.

JUROR 549: Linda Russ, 549.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 569: Brenda Shoemaker, 569, was a state police officer in New Hampshire.

THE COURT: Thank you. Yes, sir, right here in the front row.

JUROR 375: Michael Laughter, 375, and I have two son-in-laws that's with Horry County and Conway Police Department.

THE COURT: All right. What's your juror number again?

JUROR 375: 375.

THE COURT: Thank you, sir. Yes, ma'am.

JUROR 3: Gwendolyn Agripino, number 3. My brother-in-law is a police officer.

THE COURT: Thank you. Yes, sir.

JUROR 632: Bernard Tomayko, 632, a retired police officer in Pennsylvania.

THE COURT: Thank you; very good. Right behind him.

JUROR 261: Donna Hallaran, 261. My brother-in-laws, one is retired and one is a police officer on Long Island.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 577: Joyce Singleton. My number is 577. My brother-in-law is ---

THE COURT: All right. 567, ma'am?

JUROR 577: 577.

THE COURT: 577. All right, thank you. Yes, sir.

JUROR 397: 397, John Lopes, an uncle.

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

JUROR 158: Tiffany Dixon, 158. My husband is a City of Conway police officer.

THE COURT: Thank you. Yes, ma'am.

JUROR 612: Deborah Stuhlemmer, 612. My nephew is a policeman.

THE COURT: Thank you. Yes.

JUROR 415: Anne Mateer 415. I was a dispatcher in New Jersey, and I have four brothers who are police officers in Jersey City.

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

JUROR 172: Lynn Edmonds, 172. My brother-in-law was the ex-police chief of Briarcliffe Acres.

THE COURT: And your number again, please, ma'am.

JUROR 172: 172.

THE COURT: All right. Behind her.

JUROR 428: Melvin McKinney, 428. Retired from County Police.

THE COURT: Here in Horry County?

JUROR 428: Horry County.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 294: 294. My husband is a detective with Myrtle Beach.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR 370: David Lally, 370, retired from the New Jersey Police Department. Both of my sons are on the Police Department.

THE COURT: Thank you. Yes, ma'am, next to him.

JUROR 44: Madgie Bell, 44. My nephew is an Horry County Police.

THE COURT: What is your number, please, ma'am?

JUROR 44: 44.

THE COURT: Thank you, ma'am. In the back there.

JUROR 33: Margaret Bartomeo; my number is 33. My son is a Myrtle Beach police officer.

THE COURT: Thank you. Yes, sir.

JUROR 377: Paul Leckie, 377. My brother is a retired police officer in Pittsburgh.

THE COURT: Thank you. Yes, ma'am.

JUROR 329: Glenda Johnson, 329. I have a nephew that works for the Sheriff's Department.

THE COURT: Thank you very much. Yes, sir.

JUROR 580: Chester Skowronski, 580. I worked for Myrtle Beach City Police, Horry County Police, and South Carolina Highway Patrol.

THE COURT: All right, very good. Up front, yes, sir.

JUROR 466: Thomas Murray, 466, retired police officer from New York.

THE COURT: Thank you. Next to him.

JUROR 662: I'm Jimmy Watson, 662. My brother is a captain with the Horry County Police.

THE COURT: Thank you, sir. Yes, ma'am.

JUROR 451: 451, Sherrie Mitchell. My husband is a police officer with Horry County.

THE COURT: Thank you. Across the aisle.

JUROR 21: Jennifer Araujo, number 21. My father is a retired correctional officer in New York.

THE COURT: Thank you. Next to her.

JUROR 240: Donna Gore, 240, my brother-in-law is a current police officer in Maryland.

THE COURT: Thank you. Yes, ma'am.

JUROR 275: Shannon Headley, 275. My husband is an Horry County police officer.

THE COURT: Very good. Across, yes, sir.

JUROR 9: Layton Allen, number 9, a former North Carolina police officer.

THE COURT: Thank you, sir. Yes, ma'am, behind him.

JUROR 573: Dorothy Simpson, 573. My brother-in-law is a retired detective, undercover.

THE COURT: Thank you, ma'am. Yes.

JUROR 424: Lisa McGee, 424. My nephew is an officer for Myrtle Beach.

THE COURT: Could you tell me your juror number again, please?

JUROR 424: 424.

THE COURT: Thank you. Yes, sir.

JUROR 180: I'm Dale Ellis, juror number 180. My father was in the Horry County Sheriff's Department and the Horry County Police.

THE COURT: All right, thank you, sir. Yes, sir.

JUROR 433: Russel McMahon, 433. My brother is a Deputy Sheriff in Pender County, North Carolina.

THE COURT: Thank you. Yes, sir.

JUROR 131: Walter Cumbow, 131. My uncle was

captain in Bristol, Virginia, of the police force, and a cousin was Chief of the Kingsport, Tennessee, police force.

THE COURT: Thank you very much. Yes, sir.

JUROR 106: Zachary Clark, 106. My uncle worked for the Myrtle Beach Police Department.

THE COURT: Thank you, sir. Yes, ma'am.

JUROR 250: Diane Graziano, number 250. My grandpa was a police officer in New York.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 602: Susan Starr, number 602. My husband is a former Horry County and City of Myrtle Beach police officer.

THE COURT: Thank you, ma'am. Behind her, yes, sir.

JUROR 88: My name is Sonny Cannon, number 88. My father is a retired police officer.

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

JUROR 343: Lakenya Jordan, 343. My husband is a U.S. Marshal for Florence, and my dad is a North Carolina police officer.

THE COURT: Thank you, ma'am.

All right, we've got a couple more -- a couple more questions here before we take a break. All right, the next -- the next question is, ladies and gentlemen, I'm

going to ask you whether you, yourself, or a member of your immediate family has ever been the victim of a crime. Now, I don't want you to tell me anything about it. I don't want you to volunteer anything about what happened. I'm not going to ask you anything about it. It's going to be straightforward, was it yourself or a family member, so is there any member of the jury panel as a whole that either you, yourself, or a member of your immediate family has ever been the victim of a crime. If so, please stand.

Yes, ma'am, your name and juror number, please.

JUROR 656: Susan Ward, 656.

THE COURT: Thank you, ma'am. I'm sorry, was it yourself or a family member?

MS. WILLIAMS: I'm sorry; I did not catch that.

THE COURT: All right. Your name and juror number again, please.

JUROR 656: Susan Ward, 656.

THE COURT: Yourself or a family member?

JUROR 656: Myself.

THE COURT: All right, please be quiet. We need to hear. Thank you. We'll take a break shortly. Thank you. Yes, ma'am.

JUROR 473: Andrea Nobles, 473.

THE COURT: Yourself or a family member?

JUROR 473: Myself.
THE COURT: Thank you. Yes, sir.
JUROR 300: Richard Hudson, number 300, myself.
JUROR 102: Johnny Chestnut, 102, myself and family members.
THE COURT: Thank you, sir. Yes, sir.
JUROR 83: Tim Caldwell, 83, myself.
THE COURT: Thank you. Yes, sir.
JUROR 372: Andrew Langway, 372, myself and family.
THE COURT: Thank you, sir. Yes, ma'am.
JUROR 402: Rebecca Lyons, 402, a family member.
THE COURT: Thank you. Yes, ma'am, on the side.
JUROR 600: Barbara Stanley, 600, a family member.
THE COURT: Thank you, ma'am. Yes, ma'am.
JUROR 399: Catherine Lowery, 399, myself.
THE COURT: All right, thank you. Yes, ma'am.
JUROR 391: Linda Lockner, 391, self and family.
THE COURT: Thank you. Yes, ma'am.
JUROR 313: Melissa Isaacson, myself.
THE COURT: Thank you. Yes, ma'am.
JUROR 166: Sybil Dupie, 166, a family member.
THE COURT: Thank you. Yes, ma'am.
JUROR 31: Karen Barr, 31, myself and family.
THE COURT: Thank you. Against the wall, please,

ma'am.

JUROR 326: 326, Amanda Johnson, myself.

THE COURT: Thank you. Yes, sir.

JUROR 234: John Gira, 234, a family member.

THE COURT: Thank you. Yes, ma'am.

JUROR 57: Gwen Blondmonville, 57, a family member.

THE COURT: Thank you. Yes, ma'am.

JUROR 607: Katherine Steighner, 607, self.

THE COURT: Thank you, ma'am. Against the wall, please, ma'am.

JUROR 208: Jill Fowler, 208, both.

THE COURT: Thank you. Yes, ma'am, on the aisle.

JUROR 45: Rosanne Bell, 45, both.

THE COURT: Thank you. Yes, sir.

JUROR 200: Steven Finley, 200, self.

THE COURT: Thank you. Yes, sir, on the aisle.

MS. WILLIAMS: Your Honor, I'm sorry. I did not ---

THE COURT: All right, the last one, sir, you need to repeat your name and your juror number again, please, sir.

JUROR 200: Steven Finley, 200, self.

THE COURT: All right, thank you. In the back.

JUROR 558: Linda Scheyd, 558, self.

THE COURT: Thank you, ma'am. On the aisle, please.

JUROR 119: Mike Cooper, 119, both.

THE COURT: Thank you, sir. Behind him.

JUROR 351: Brian Keane, 351, family member.

THE COURT: Thank you. Behind that.

JUROR 690: Delphia Wilson, 690, myself.

THE COURT: Thank you very much. Yes, sir.

JUROR 571: Robert Simeone, 571, self.

THE COURT: Next end, please, ma'am.

JUROR 195: Donna Ferrebee, 195, both.

THE COURT: Thank you. In the back, please, ma'am.

JUROR 115: Darlene Novak, 115, a family member.

THE COURT: Thank you. Next to her.

JUROR 647: Heidi Vukov, 647, self.

THE COURT: Thank you, ma'am. Yes, ma'am, right here.

JUROR 378: 378, Tonja Leidig, myself.

THE COURT: Thank you. Yes, sir.

JUROR 277: Martin Hemingway, number 277, both.

THE COURT: Thank you. Yes, sir.

JUROR 513: Samuel Pringle, 513, myself and my family.

THE COURT: Thank you. Yes, sir.

JUROR 392: Michael Loehr, 392, family.
THE COURT: Thank you. Behind him.
JUROR 466: Thomas Murray, 466, family.
THE COURT: Thank you. Behind him.
JUROR 446: Jane Miller, 446, family.
THE COURT: Thank you, ma'am. Yes, ma'am, right here in the aisle.
JUROR 284: Arcissia Herndon, 284, family.
THE COURT: Thank you. Right here at the end, yes, sir.
JUROR 397: John Lopes, 397, self.
THE COURT: Thank you. Next, sir.
JUROR 631: Danny Todd, 631, family.
THE COURT: Thank you, sir. Yes, sir.
JUROR 331: Joseph Johnson, 331, both.
THE COURT: Thank you. At the end.
JUROR 451: Sherrie Mitchell, 451, family.
THE COURT: Thank you. Next.
JUROR 346: Wanda Jordan, 346, family.
THE COURT: Yes, ma'am.
JUROR 265: Sandra Hardin, 265, family.
THE COURT: Thank you very much. Yes, ma'am, right here.
JUROR 552: Sharon Safford, 552, myself.
THE COURT: All right. Right here in the middle,

ma'am.

JUROR 93: 93, Lisa Carver, both.

THE COURT: Thank you, ma'am. Right behind her.

JUROR 237: Kimberley Goh, 237, self.

THE COURT: Thank you. Behind her.

JUROR 612: Deborah Stuhlemmer, 612, family.

THE COURT: Thank you, ma'am. Behind her.

JUROR 610: Pauline Strickland, 610, myself.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 172: Lynn Edmonds, 172, family.

THE COURT: Thank you. Next to her.

JUROR 42: Leroy Beckwith, 42, both.

THE COURT: I'm sorry; your juror number again, please, sir.

JUROR 42: 42.

THE COURT: All right. Yes, ma'am.

JUROR 44: Madgie Bell, 44, family.

THE COURT: Thank you. Yes, sir.

JUROR 393: Christopher Lombardi, 393, both.

THE COURT: Thank you. Next to him.

JUROR 370: 370, David Lally, family.

THE COURT: Thank you. Behind.

JUROR 592: Sandra Smith, 592, self.

THE COURT: Thank you, ma'am. Yes, in the back.

JUROR 638: Kathryn Ubel, 638, family.

THE COURT: And, I'm sorry, your number again was?

JUROR 638: 638.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 183: Tamira Elvis, 183, family.

THE COURT: Thank you. Yes, sir.

JUROR 580: Chester Skowronski, 580, both.

THE COURT: Thank you very much. Yes, ma'am, right here on the end, ma'am.

JUROR 472: Sara Newton, 472, a family member.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR 131: Walter Cumbow, 131, both.

THE COURT: Thank you. Yes, ma'am.

JUROR 236: Judy Glymph, 236, myself and a family member.

THE COURT: Thank you, ma'am. Yes, sir, right here.

JUROR 199: William Files, 199, myself and family members.

THE COURT: Thank you, sir. Yes, ma'am, right here.

JUROR 388: Jeanetta Livingston, number 388, self and family member.

THE COURT: Thank you.

JUROR 477: Sandra Norton, 477, self.

THE COURT: All right. Yes, ma'am.

JUROR 380: Sharon Lemon, 380, both.
THE COURT: Thank you, ma'am. Yes, ma'am.
JUROR 602: Susan Starr, 602, both.
THE COURT: Thank you. Yes, sir.
JUROR 88: Sonny Cannon, number 88, both.
THE COURT: Thank you. Yes, ma'am.
JUROR 634: Kyna Triplett, 634, self.
THE COURT: All right, right here at the end, ma'am, please.
JUROR 145: Laura Davis, 145, self.
THE COURT: Thank you. Yes, ma'am.
JUROR 179: Toni Elliott, juror number 179.
THE COURT: Was it yourself, ma'am?
JUROR 179: Family.
THE COURT: Family; I'm sorry. Yes, ma'am.
JUROR 480: Bonnie Oguin, 480, a family member.
THE COURT: Thank you, ma'am. All right, yes, sir, right here, you with your arms crossed.
JUROR 664: Dennis Webb, 664, family.
THE COURT: Thank you, sir. Yes, ma'am.
JUROR 87: 87, Amanda Cannon, family.
THE COURT: Thank you, ma'am. Yes, ma'am, behind her.
JUROR 240: Donna Gore, 240, both.
THE COURT: Thank you. Yes, sir.

JUROR 494: Carey Payne, 494, both.
THE COURT: Thank you very much. Yes, ma'am.
JUROR 424: 424, Lisa McGee, family.
THE COURT: Thank you.
JUROR 90: Barbara Carr, 90, self.
THE COURT: I'm sorry; your juror number again was?
JUROR 90: 90.
THE COURT: Thank you, ma'am. Yes, ma'am.
JUROR 567: Renee Shaw, 567, both.
THE COURT: Thank you very much. Yes, ma'am.
JUROR 156: Rose Diaz, 156, both.
THE COURT: Thank you very much. Anyone else?
(No response.)
All right, is there any member of the jury panel that you, yourself, or a member of your immediate family has ever been the member of any kind of victims' rights or law enforcement support organizations? Let me give you some examples. It's not an exhaustive list of any kind. It's just examples of what I'm talking about. It would be like Citizens Against Violent Crime, Mothers Against Drunk Driving, the South Carolina Law Enforcement Officers Association, South Carolina Sheriff's Association. Those are just examples, so some kind of victims' rights or law enforcement support

organization. If you or a member of your immediate family is a member, please stand.

Yes, ma'am, name and juror number, please.

JUROR 215: Lynn Frick, 215, member South Carolina ---

THE COURT: Law Enforcement Officers Association?

JUROR 215: --- Law Enforcement Officers Association.

THE COURT: Very good, ma'am. Yes, sir.

UNIDENTIFIED JUROR: Was it was a member at any time, ---

THE COURT: Yes.

UNIDENTIFIED JUROR: --- is that the question?

THE COURT: It's currently, but since you've already stood, why don't you stand and identify yourself.

UNIDENTIFIED JUROR: Fraternal Order of Police in Maryland. My father was a member.

THE COURT: Very good. Thank you, you, sir. Yes, sir.

JUROR 181: Gerald Ellis, 181, F.O.P.

THE COURT: Thank you, sir. Yes, sir.

JUROR 632: Bernard Tomayko, 632, F.O.P. 91, it was South Carolina.

THE COURT: Thank you, sir. Yes.

JUROR 149: Ronaldo De Los Reyes, 149, Fraternal Order of Police.

THE COURT: Thank you. Yes, ma'am.

JUROR 333: 333, Karen Johnson, South Carolina Law Enforcement.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR 363: Norine Klebach, 363, South Carolina Troopers.

THE COURT: Association. Very good. Thank you, ma'am. Yes, ma'am.

JUROR 451: Sherrie Mitchell, 451, F.O.P.

THE COURT: Thank you, ma'am. Yes, sir, in the back.

JUROR 370: David Lally, 370, T.P.A., New Jersey.

THE COURT: Thank you very much. Yes, ma'am.

JUROR 294: 294, Andrea Hollemback, my husband, South Carolina Law Enforcement.

THE COURT: Thank you very much. Yes, sir.

JUROR 428: Melvin McKinney, 428, Horry County Crimestoppers Board of Directors, and F.O.P.

THE COURT: Thank you very much. Yes, sir.

JUROR 9: Layton Allen, number 9, F.O.P.

THE COURT: All right, sir.

JUROR 53: James Berry, juror number 53, wife's a Rape Crisis Counseling Center volunteer.

THE COURT: All right, thank you, sir. Yes, ma'am, next to him.

JUROR 275: Shannon Headley, 275, my husband is a member of F.O.P.

THE COURT: Thank you very much. Yes, sir, right here.

JUROR 466: Thomas Murray, P.P.A., New York.

THE COURT: Thank you very much. In the back.

JUROR 580: 580, Chester Skowronski, P.P.A., South Carolina Law Enforcement Association, ---

THE COURT: All right, sir; thank you.

JUROR 580: --- and Horry County Crimestoppers.

THE COURT: Very good. Thank you, sir.

All right, ladies and gentlemen, there's one other question, but I'm not going to ask it at this time because it is something that we would need to cover with you in your individual questioning, so I'm just going to state the question, and y'all think about it.

Again, if there is necessity for you to bring it up when you are individually questioned, you need to bring it up to the Court and the lawyers. If you don't do it then, later on it's too late, so do you know of any reason, have any question in your mind, any doubt in your mind that you believe you cannot give to the State of South Carolina and to the defendant a fair and

impartial trial? That is for any reason whatsoever you believe you cannot be a fair and impartial juror.

If that -- you need to respond to that question, please remember, bring that up when you are individually questioned by the Court and the lawyers. That is the time to bring it up.

If you feel more comfortable writing something out and handing it to the Court when you come, I'll be glad for you to do that, but please remember, that's the time to bring it up. Later on, it's too late.

All right, further questions in that category from the State?

MR. HUMPHRIES: Nothing from the State, Your Honor.

THE COURT: From the Defense?

MR. DIGGS: No, Your Honor.

THE COURT: Very good. All right, ladies and gentlemen, we're going to take a break. The Clerk is going to get organized to start putting you in panels, so we'll let you know when you need to report back, and I'll have a few other instructions that I must give you at that point in time.

All right, ladies and gentlemen, we're going to take a break for about twenty minutes. Y'all be back in your seats in twenty minutes. Thank you very much.

(OFF THE RECORD - 20 minute recess)

ON THE RECORD

(Reporter's Note: Members of the South Carolina Law Enforcement Division and members of law enforcement are administered their oath by the Clerk and state their names for the record.)

Douglas Hyman, Lorraine Avant, Lounella Williams, Glenn McClellan, Grady Richardson, Douglas Rogers, Pamela Williamson, Roxanne Bethea, Steve Causey, Teresa Fulton, Rebecca Graham, Wade Petty, Billy Howser, Randall Truss, James K. McKenzie, Philip Thompson, Sherry Smith, Oliver Parmley, Sam Johnson, Brooks James, Chris Graham, Ronnie Jordan, John Ellison, Roy Hemingway, Dana Sarvis.

THE CLERK: Please raise your right hand. Do you swear that you will keep the jurors sworn of this jury during the time you have them in your custody at the motel or restaurant during the meal and then return the jury to the jury room and that you will suffer no person to speak to them, nor any of them, as it pertains to this case while you have them in your custody, so help you, God?

(All SLED agents and members of law enforcement respond in the affirmative.)

THE CLERK: They are all under oath.

A SLED AGENT: You've got one more.

THE CLERK: Just state your name for the record.

MR. FLOYD: Joe Floyd, Jr.

THE CLERK: Please raise your right hand.

Do you swear that you will keep the jurors sworn of this jury during the time you have them in your custody at the motel or restaurant during the meal and then return the jury to the jury room and that you will suffer no person to speak to them, nor any of them, as it pertains to this case while you have them in your custody, so help you, God?

MR. FLOYD: I do.

THE COURT: You may be seated. Thank y'all. All right, ladies and gentlemen, we are hopefully winding down the process a little bit for today anyway. There are some other things I do need to go over with you.

As you obviously realize, this case is a capital case, and we will take time in a capital case to question jurors individually and privately under oath, and that process will take a couple of days before we can actually select a jury for this particular case.

Now, thus far, I've only asked you some questions regarding basically your general eligibility as you are in the process to serve as a juror in this case. When we question you individually, now we will be discussing

specific questions. An example could be, as I told you when you first come in, you're going to have a witness list. You're going to need to circle whether or not you know any of the witnesses. Obviously if you circle somebody, then we'd need to ask you about that.

Obviously we will want to know if you already know anything about this case, or heard anything about this, or recall anything about the press, and we expect that, and certainly that's perfectly all right.

We'll be asking you whether or not you've already formed an opinion or have an opinion about the case, whether or not you can be a fair and impartial juror, because that's obviously what we need, fair and impartial jurors.

You will need to be able to accept the law that the Court gives you, follow the law that the Court gives you without regard to your personal feelings about it. You will need to follow the law as I direct you, follow the law that I give you.

It will be part of your oath to find the truth from the evidence that is presented in the case, because the jury that's ultimately selected is going to be the judges of the facts. The Court will give you no opinion as to what I believe the facts of the case are. That's not my job. That's the job of the jury, is to find the

truth from the evidence and see whether or not the State carries its burden to prove the defendant guilty beyond a reasonable doubt, and then we will further instruct you if there is a second phase to this trial.

There aren't any right or wrong answers. We have to know that when you answer a question, you are answering that question honestly and truthfully, because as I told you, we need fair and impartial jurors. That's what we have to have in this case.

Now, what we're going to do is, and the Clerk -- and we'll call it out in just a second, the Clerk has randomly selected through a computer program individual panels of five jurors, and you're going to be assigned a certain day and a certain time, and they'll have a little piece of paper to give to you and tell you what day and time you come in.

What we're going to first do is have, I believe, a hundred and thirty that are going to be given a day and a time. The rest of you will not be given a day and a time, but that doesn't mean you're excused. That means that you are still in the process and are subject to be called at any time during the process by the Clerk. We're just starting off with a hundred and thirty, so everybody is still in the process.

Now, we'll proceed in that fashion and going

through those individual jurors until we get a jury selected. Now, when a jury is selected in this case, when we've got our twelve jurors and our four alternates, those individuals will be sequestered. That means you will be staying at a motel that the County has selected at the County expense. Your meals will be provided.

You will -- your lives during the course of this trial will be governed by the process, and you will have licensed agents from the South Carolina Law Enforcement Division around you at all times. Your access to other people will be controlled, because again we have to have a fair and impartial jury that is not influenced by any outside matters. This is a process that we have used in capital cases since -- basically since we have had them as a formal process in the State of South Carolina.

Now, obviously nobody is going to be sequestered until we actually select the jury, but from this moment on, you may not read any news accounts. You cannot watch or listen to any television or radio accounts about this case. You may not talk about this case with your prospective jurors or the other fellow jurors. You can't talk about it with anybody, your family, your friends, anyone.

Again, and this won't be the last time I tell you,

if anybody tries to contact you about this, if you can do so, you find out who that person is and the Court will deal with them. Don't expose yourself to any publicity about this particular case.

What we're going to do now is the Clerk will call out the randomly selected jurors for the panel. As I told you, that's going to be a hundred and thirty of you. She'll give you a little slip of paper that will tell you to report on whatever day, whatever time, and the remainder of you, please remember you remain on call by the Clerk's Office, so don't -- though I don't need to say this, probably will, please understand if you don't report when we ask you to or you don't respond, then what I have to do is ask one of the fine deputies of the Horry County Sheriff's Office to go out and find you and bring you in. I don't want to do that, so please cooperate with us, all right? Thank you.

All right, at ease; at ease. The Clerk's got to call out the names, so you need to know.

THE CLERK: This is for 11/9 at nine o'clock.

572, Robert Simmons ---

THE COURT: That's Monday; Monday at nine o'clock.

THE CLERK: 612, Deborah Stuhlemmer, ---

THE COURT: All right, wait a minute, ma'am. Have y'all got a slip of paper to hand to them?

THE CLERK: Yes, sir.

THE COURT: All right. When your name is called, stand up, and the Clerk is going to go and give you that slip. All right, start with the first name again, Madam Clerk.

THE CLERK: Okay. The first name is 572, Robert Simmons. Can you see him?

THE COURT: 572, Robert Simmons. Madam Clerk, did he answer the rollcall this morning?

THE CLERK: He must have. He's on the list.

THE COURT: Check and see.

MR. HUMPHRIES: He did. He responded to one of the individual questions.

THE COURT: Deputy ---

A BAILIFF: Order in the Court.

THE COURT: All right, Madam Clerk, you contact the Sheriff's Office. You have them find that juror and bring him in.

Go to the next name.

THE CLERK: 612, Deborah Stuhlemmer. 281, Tammy Henderson. 343, Lakenya Jordan. 102, Johnny Chestnut. Okay, and that's nine o'clock Monday.

Ten-fifteen, Monday: 199, ---

When I call your name, instead of just standing up, please come up here. That would take less time, okay?

199, William Files. 236, Judy Glymph. 446, Jane Miller. 685, Stephen Williams. 695, Teresa Woolard.

Eleven-thirty, Monday. 22, Matthew Arbaugh. 564, Lisa Sellers. 231, Telia Gibbons. 67, Bobby Branton. 64, Brandon Boyd.

Okay, one forty-five, Monday. 33, Margaret Bartomeo. 53, James Berry. 542, Victor Romano. 479, Francisco Nunez. Okay, 479, Francisco Nunez. That might be ---

THE COURT: Okay, Madam Clerk, write their name down.

THE CLERK: 298, Elizabeth Holton.

Three o'clock, Monday. 466, Thomas Murray. 137, Lonnie Daniels. 522, Michael Ray. 115, Darlene Novak. 258, Virginia Grissett.

137, Lonnie Daniels, did he come up? All right, 137.

THE COURT: 137, Madam Clerk.

THE CLERK: Okay, just hold on to that.

Four-fifteen, Monday. 150, Vance Defelice. 372, Andrew Langway. 122, Richard Corkum. 5, Linda Morrison, and 601, Waverly Stanley.

Who do you have left?

CLERK'S ASSISTANT: 122.

THE CLERK: 122, Richard Corkum.

VOLUME EIGHT OF EIGHT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

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**** DEFENDANT'S EXIBITS 2-19 (NORMAL BRAIN/STANKO BRAIN) HAVE BEEN TRANSPORTED TO THIS COURT****

Nine o'clock, Tuesday. 539, Ryan Rodriguez. 99, Johnny Causey. 181, Gerald Ellis. 330 Jennifer Johnson. 654, Michael Walsh.

Ten-fifteen, Tuesday. 377, Paul Leckie. 510, Jane Powell. 658, Kristal Warren. 38, Richard Beasley. 411, Sharon Maples.

CLERK'S ASSISTANT: 38 and 411.

THE CLERK: 38, Richard Beasley. 411, Sharon Maples.

THE COURT: Have you got those, Madam Clerk?

THE CLERK: Yes, sir.

Tuesday at eleven-thirty. 290, Brenda Holderfield. 488, Vickie Miller -- 448, Vickie Miller. 251, Russell Greene. 90, Barbara Carr. 103, Joyce Chestnut.

CLERK'S ASSISTANT: 251.

THE CLERK: 251, Russell Greene.

One forty-five, Tuesday. 660, Sylvia Waterston. 594, Sandra Snyder. 690, Delphia Wilson. 424, Lisa McGee. 46, James Bellamy.

Three o'clock, Tuesday. 634, Kyna Triplett. 69, Randall Broughton. 508, Beverly Pitman. 484, Linda Orsimarsi, something like that. 347, Ariane Joyce.

Four-fifteen, Tuesday. 157, David Dimaio. 480, Bonnie Oguin. 459, Gloria Morris. 597, Joyce Spengler. 378, Tonja Leidig.

CLERK'S ASSISTANT: That leaves 157.

THE COURT: 157, Madam Clerk.

THE CLERK: Okay, 157.

Nine o'clock, Wednesday morning. 608, Siobhan Stevens. 662, Jimmy Watson. 35, Mary Bates. 19, Tina Angelo. 167, Linda Dupree.

CLERK'S ASSISTANT: That leaves 19.

THE CLERK: 19, Tina Angelo.

THE COURT: Have you got it down, Madam Clerk?

THE CLERK: Yes.

Wednesday at ten-fifteen. 95, Angel Castillo. 642, Velvadean Vaught. 131, Walter Cumbow. 208, Jill Fowler. 200, Steven Finley.

Wednesday at eleven-thirty. 156, Rose Diaz. 11, Wesley Allen. 257, Celeste Griffin. 106, Zachary Clark. 352, Lisa Keane.

One forty-five, Wednesday. 337, Rhonda Johnson. 275, Shannon Headley. 234, John Gira. 380, Sharon Lemon. 472, Sara Newton.

Wednesday at three o'clock. 88, Sonny Cannon. 375, Michael Laughter. 668, Jeremie West. 568, Thomas Shelley. 60, Gina Boggs.

Three o'clock, Wednesday -- that's the one I just did.

Okay, four-fifteen, Wednesday. 351, Brian Keane.

329, Glenda Johnson. 240, Donna Gore. 237, Kimberley Goh. 345, Timothy Jordan.

Thursday at nine o'clock. 41, Daniel Becker. 4, Anntanette Aklin. 224, Terry Gartner. 107, Andrew Claybrook. 615, Robert Summers.

THE CLERK: 107 and 615 were left.

Okay, ten-fifteen on Thursday. 260, Robert Hall. 393, Christopher Lombardi. 215, Lynn Frick. 468, Hattie Myers. 326, Amanda Johnson.

Thursday at eleven-thirty. 573, Dorothy Simpson. 12, James Allison. 3, Gwendolyn Agripino. 313, Melissa Isaacson. 389, David Lloyd.

Thursday at one forty-five. 622, Beverly Thalman. 661, Barry Watson. 43, Daniel Begley. 134, Nancy Custard. 322, Gary Jeffcoat.

Thursday at three o'clock. 162, Jeremiah Doyle. 246, Norman Graham. 166, Sybil Dupie. 170, Patrick Duvall. 294, Andrea Hollemback.

Thursday at four-fifteen. 557, Lisa Supochak. 548, Valerie Renala. 518, Tammy Rosinski. 505, Cynthia Phipps. 571, Robert Simone.

THE COURT: Just read them over again, Madam Clerk.

THE CLERK: Okay. 557, Lisa Sapochak. She got hers, didn't she?

CLERK'S ASSISTANT: Yes.

THE CLERK: 548, Valerie Ruonala. 518, Tammy Radzinski. 505, Cynthia Phipps. 571, Robert Simeone.

CLERK'S ASSISTANT: We need 548 and 518.

THE CLERK: Okay, Friday at nine o'clock. 370, David Lally. 54, Jamie Bess. 672, Elaine Wheaton. 65, Jeannemarie Brady. 227, Solomon Gause.

Friday at ten-fifteen. 250, Diane Graziano. 632, Bernard Tomayko. 467, George Myers. 586, Gene Smith. 190, James Faircloth.

All right, ladies and gentlemen, for today, we are almost at the end of the process. The next thing that I need to do is I need to administer an additional oath to you at this time, so if all of the potential jurors would stand at this time. Everyone stand at this time.

Raise your right hand. Will you faithfully comply with the instructions the Court has given you, including your duty not to expose yourself to any further information about this case from the press or any person. If you agree to be bound by this oath, please say, "I will," and sit down. (The jurors comply by stating "I will" and are seated.)

If there is any member of the jury panel that did not take the oath, please stand at this time. (No response.)

All right, ladies and gentlemen, this will be probably the final time that I will remind you about this. You remember under your oath you are a potential juror in this case. You are prohibited from watching, reading, listening to any news about this case, or any aspect of the law. You may not use the Internet or any other research tool to read about or to investigate this case. You may not discuss the matter with anyone.

The answers to the questions that we will pose to you, any decision you make must be yours alone, not influenced by anyone. When you are individually questioned, you will be asked if you have kept true to your oath and these instructions by the Court. Failure to do so could subject you to being held in contempt of court.

I know you will accept the challenge of citizenship that has been given to you today, and you will respond properly to this request for civic responsibility. I appreciate your patience in this matter. It's an extremely important matter. We will do our best to work with you in good faith and in a professional manner. We will do our best, and I assure you that you will be treated with courtesy and respect, and if you are not, you will report that to me and I will take care of that.

I have tried to arrange the scheduling of these

jury panels so as to minimize the inconvenience to you. I have elected obviously not to sequester the whole bunch of you, and we will not sequester anyone until we have the jury for this particular case, and if you are selected, I will give you further instructions about this.

I am confident that you will honor the oath that you just took. In the meantime, if you have any questions, please let the Clerk's Office know, let the bailiffs know.

Anything further from the State at this time?

MR. HUMPHRIES: Nothing from the State.

THE COURT: From the Defense?

MR. DIGGS: No, Your Honor.

THE COURT: Thank you very much.

All right, ladies and gentlemen, Thank you very much. You are now excused. Thank you very much.

(Conclusion of Transcript of Record.)

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

I, the undersigned Bettye S. Gum, Certified Court Reporter and Notary Public in and for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the captioned case, as taken by Dixie Cox Eubank, Official Reporter, and transcribed by me, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 15, 2010

BETTYE S. GUM, CCR-CVR-CM

Certified Court Reporter and

Notary Public for South Carolina

My Commission Expires: 7/13/14

3506

WITNESSES

Pitts/HCPD

ARREST WARRANT NO.
1742833 CDR: 0116 16-03-0010,0020

1742842 CDR: 0139 16-11-0330(A)

DOA: 4/14/05

ACTION OF GRAND JURY

TRUE BILL

Carolyn A Bowden AUG 25 2005
Foreman of Grand Jury

VERDICT

Count 1 Guilty
Count 2 Guilty

Johnny Marvin Chestnut 11/16/05
Foreman of Petit Jury *Date:*

DOCKET NO. 2005-GS-26-2927

The State of South Carolina,

County of HORRY

JGH 77099

COURT OF GENERAL SESSIONS

AUGUST TERM 2005

THE STATE

vs.

STEPHEN C. STANKO W/M

DOB:
SSN:

Atty:

Indictment for

COUNT 1: MURDER

COUNT 2: ARMED ROBBERY

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:

COUNT ONE: MURDER
COUNT TWO: ARMED ROBBERY

At a Court of General Sessions convened on August 25, 2005, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: MURDER

(CDR: 0116 16-03-0010,0020)

That STEPHEN C. STANKO did in Horry County, on or about the 8th day of April, 2005, willfully, feloniously, and intentionally, with malice aforethought, kill the victim, Henry Lee Turner, by means of shooting the victim with a handgun in the chest and back, and the victim did die as a proximate result thereof in Horry County on or about April 8, 2005, in violation of Section 16-3-10, S. C. Code of Laws, 2004, as amended, and the Common Law of South Carolina.

COUNT TWO: ARMED ROBBERY

CDR: 0139 16-11-0330(A)

That STEPHEN C. STANKO did in Horry County on or about the 8th day of April, 2005, while armed with a deadly weapon, to wit: a Taurus .357 Magnum caliber revolver and/or a Derringer handgun, take and carry away goods or monies of the victim, Henry Lee Turner, from the immediate presence of Henry Lee Turner, to wit: a Mazda truck, a cell phone, a Taurus .357 Magnum caliber revolver and /or a Derringer handgun, in violation of Section 16-11-330(A), S. C. Code of Laws, 2004, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. Gregory Hembree
SOLICITOR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	INDICTMENT 2005-GS-26-2927
COUNTY OF HORRY	)	
STATE OF SOUTH CAROLINA	)	
	)	
	)	
VS.	)	ORDER APPOINTING COUNSEL
	)	(Death Penalty Case)
STEPHEN C. STANKO,	)	
	)	
DEFENDANT.	)	

The State of South Carolina has served a Notice of Intent to Seek the Death Penalty in the above-captioned matter pursuant to S. C. Code of Laws, as amended. I find that it is necessary pursuant to Section 16-3-26(B) of the South Carolina Code of Laws, 1976, as amended, for counsel to be appointed in this matter. A hearing was held on November 15, 2006, at the Georgetown County Courthouse for the purpose of appointing counsel. Pursuant to said hearing, it is hereby

ORDERED that William I. Diggs, Esquire, is appointed to serve as first chair in the defense of Defendant Stephen C. Stanko in the above matter. The appointment of second chair in the defense of the defendant is taken under advisement by the Court.

AND IT IS SO ORDERED.

Hartsville, South Carolina

November 21, 2006

J. MICHAEL BAXLEY
CIRCUIT COURT JUDGE

38	04-29-08	talking to opposing counsel about the judge's decision, discussing the issues in the trial	0.50	0.00
39	12-05-08	talking to judge baxley, being advise client will be in conway on monday the 8th for PCR hearing to appoint an attorney for him	0.50	0.00
40	12-08-08	travel to conway and back to office	1.00	0.00
41	12-08-08	meeting with client and discussing the possible outcome of that hearing	0.50	0.00
42	12-10-08	call from client discuss the hearing on monday and discuss the list of attorneey's for him to use on PCR hearing	0.50	0.00
43	02-05-09	meeting with the co-counsel and discuss the status conference with the judge	0.50	0.00
44	02-05-09	status conference with Judge John	0.00	1.00
45	02-05-09	travel to conway and back to office	1.50	0.00
46	02-05-09	meeting with client before and after the status conference	0.50	0.00
47	02-13-09	traveling to go to see the client	6.00	0.00
48	02-13-09	meeting with client	1.00	0.00
49	06-05-09	travel to conway and back to office	1.50	0.00
50	06-05-09	meeting with client before and after the hearing talking to co-counsel about the motion hearing	1.00	0.00
51	06-05-09	motion hearing in front of judge John (motion from the state to clear the issue of removing Mr. diggs as counsel for the defendant on the second trial)	0.00	0.50
52	06-20-09	Preparing orders for Expert witnesses for Judge John to sign	1.00	0.00
53	07-01-09	travel to see client	6.00	0.00
54	07-01-09	meeting with client discuss the case	1.50	0.00
55	08-24-09	travel to conway and back to office	1.00	0.00
56	08-24-09	meeting with client before and after the hearing with the judge	1.00	0.00
57	08-24-09	hearing in front of judge John	0.00	1.00
58	09-21-09	meeting with Brana about the stanko case and the motions	4.00	0.00
59	09-21-09	travel time in Conway and back to office	1.00	0.00
60	09-24-09	travel time to conway and back	1.00	0.00
61	09-24-09	meeting with Brana about motion to be filed on Friday	4.00	0.00
62	09-24-09	working in the office on the motions, research and preparing for filing	3.00	0.00
63	09-25-09	reviewing the motions before filing making copies and prepare package	3.00	0.00
64	09-25-09	meeting with Vicki Child and Brana about the case	3.00	0.00
65	10-05-09	travel to conway to get the pictures and back to office	1.00	0.00
66	10-05-09	meeting with solicitor and discuss the pictures and the case	1.00	0.00
67	10-05-09	meeting with crime scene expert and the investigator and Brana	2.00	0.00
68	10-05-09	going to Horry county PD to look avidence and comming back	3.00	0.00
69	10-06-09	Henry Turner's house and to brana's office with expert back to office	5.00	0.00
70	10-07-09	discuss the hearing in the morning with dr. sachy	1.00	0.00
71	10-08-09	travelto conway and back to office	1.00	0.00
72	10-08-09	hearing in front of judge John	0.00	3.00
73	10-09-09	meeting with Evelyn Califf our expert witness discuss the case	1.00	0.00
74	10-09-09	talking to Brana about to do list for next week	0.50	0.00
75	10-18-09	research and wrie motions to be heard on October 23, 2009	2.00	0.00
76	10-19-09	research and complete and e-mail motions for the judge and solicitor	4.00	0.00
77	10-20-09	travel to conway and back to office	1.00	0.00
78	10-20-09	file the motions and serve a copy to solicitor and Judge John	0.50	0.00
79	10-22-09	prepare for the motion hearing in the morning, reseach and review	2.00	0.00
80	10-23-09	motion hearing in front of Judge John and Jury qualification, excuse the 65years and older medical excuses and student	0.00	6.50
81	10-23-09	travel time to conway and back to office	1.00	0.00
82	10-24-09	travel to Gray Georgia to meet with doctor sachy discuss the trail strategy and	10.00	0.00

		go over the exhibits for trial		
83	10-25-09	meeting with doctor Sachy, strategy for trial, expert witness list who testify when, exhibits prep for testimony	10.00	0.00
84	10-26-09	printing out 1940 pages from the copmuter Juror questionnaaire and separate by muber put sticker on ones that I have to go back and review	10.00	0.00
85	10-27-09	contacting the expert's witnesses checking with their calendar and the date and time to be here for trial	2.00	0.00
86	10-28-09	review expert report and reseach	2.50	0.00
87	10-28-09	prepare consent order for exhibits	0.50	0.00
88	10-28-09	travel to conway, get solicitors signature gettting Judge John's signature in the order deliver a copy of the order to solicitor and back to office	2.00	0.00
89	10-28-09	meeti9ng with Brana the co-counsel discuss to do list before the trial starts	2.00	0.00
90	10-29-09	meeting with Co-counsel and Evelyn Califf our expert witness and discuss strategy in this case	2.50	0.00
91	10-29-09	going through jurors resposes that know about the case and that they pro death and they think he is guilty	3.00	0.00
92	10-30-09	prepare the amended order in regard to Evelyn Califf and the affidavit to go with it	1.00	0.00
93	10-30-09	travel to conway and back to office	1.00	0.00
94	10-30-09	hearing in front of Judge John	0.00	3.00
95	10-30-09	going to solicitor's office and making copies of the documents needed for trial	1.00	0.00
96	10-31-09	talking to dr. Wu expert witness and meeting with Christine Demsey fron the Hermis company regarding Stanko's Pat Scan	3.00	0.00
97	10-31-09	preparing and e-mailing order for Judge John	1.00	0.00
98	11-04-09	travel to J rueben long , to conway and back to office	2.00	0.00
99	11-04-09	meeting with Pam crawford and stanko and brana williams, Pam interview client being present for that	1.00	0.00
100	11-04-09	discuss the blair hearing with co counsel and client	1.50	0.00
101	11-04-09	Blair hearing in front of judge John and juror list	0.00	2.00
102	11-05-09	prepare the witness list and the exhibits list	1.50	0.00
103	11-05-09	organize the experts testimony from the first trial	3.00	0.00
104	11-05-09	meeting with Evelyn Califf discuss the case and the witness list she has, discuss her strategy	1.50	0.00
105	11-06-09	travel to conway and back to office	1.00	0.00
106	11-06-09	jury panel day	0.00	4.00
107	11-06-09	getting the 26 panels ready for monday each juror with their questionnaire and any questions answers during the panel selection	4.00	0.00
108	11-07-09	meeting with Dr. Thrasher and Dr. Albiniak and the co-counsel discuss the testimony from last trial and prepare for this trial	2.00	0.00
109	11-08-09	searching case law regarding voir dire and preparing a note book for monday court	4.00	0.00
110	11-09-09	travel to conway and back to office	1.00	0.00
111	11-09-09	Jury selection	0.00	9.00
112	11-09-09	looking the panels for tommorrow making notes	4.00	0.00
113	11-10-09	travel to conway and back to office	1.00	0.00
114	11-10-09	jury selection	0.00	8.00
115	11-10-09	review the panels for next morning and reseach for change of venue motion	5.00	0.00
116	11-11-09	travel to conway and back to office	1.00	0.00
117	11-11-09	jury selection	0.00	9.00
118	11-11-09	research about change of venue motion and review the juror answers for court in the morning	3.00	0.00
119	11-12-09	travel to conway and back to office	1.00	0.00
120	11-12-09	jury selection	0.00	8.00
121	11-12-09	reseach about change of venue motion, prepare the argument on change of venue motion	2.00	0.00
122	11-13-09	travel to conway and back to office	1.00	0.00

12211-13-09	travel to conway and back to office	1.00	0.00
12311-13-09	selecting 12 jurors, first day of trial	0.00	9.00
12411-13-09	talking to our esperts witnesses that will testify in this case Dr. Gur ; Dr. Wu; Dr. Albiniak and Dr. Sachy	4.00	0.00
12511-14-09	travel time	1.00	0.00
12611-14-09	talking to co-counsel and expert witnesses	2.00	0.00
12711-14-09	second day of trial	0.00	8.00
12811-14-09	review testimony of the expert prepare for tomorrow testimony of our expert witnesses	4.00	0.00
12911-15-09	travel to conway and back to office	1.00	0.00
13011-15-09	talking to expert witness before and after their testimony	4.00	0.00
13111-15-09	third day of trial	0.00	8.00
13211-16-09	travel to conway and back to office	1.00	0.00
13311-16-09	fourth day of trial jury verdict	0.00	9.00
13411-17-09	meeting at the office with co-counsel, investigator and mitigation expert discusssing the penalty part of the trial calling witnesses on the phone	4.00	0.00
13511-17-09	working on the power point with the mitigation expert at the office	4.00	0.00
13611-18-09	travel to conway and back to office	1.00	0.00
13711-18-09	penalty part of the trial fisrt day	0.00	8.00
13811-19-09	travel to conway and back to office	1.00	0.00
13911-19-09	second day penalty phase	0.00	8.00
14011-19-09	discussing the outcome with Dr. Sachy	2.00	0.00
14111-20-09	searching and preparing for filing the post trial motion and notice on appeal	4.00	0.00
	Hours Total	**258.49**	**106.50**

Defendant's Pretrial Motion # 1

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Conclusive Presumption #1)
Defendant.)	
)	

2009 SEP 25 PM 4:30
CLERK OF COURT
MELANIE THUGGINS
HORRY COUNTY

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in one area of the

[1] S.C. Code Ann. § 17-24-10 reads as follows:

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

brain, one maintains the free will to act accordingly as a result of executive analysis occurring in a distinct and different area of the brain, notwithstanding physical defects in the latter existing either in the form of missing volumetric mass or low brain activity or function.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 2

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Conclusive Presumption #2)
Defendant.)	
)	

FILED
HORRY COUNTY
2009 SEP 25 PM 4:38
MELANIE HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from moral or legal wrong in any area of the

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

brain, under any circumstances, one is guilty of criminal conduct under the circumstances presented in this case, notwithstanding the presence of physical defects in the brain in the form of missing volumetric mass or low brain activity.

Respectfully submitted

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Brana J. Williams
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843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 3

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE § 17-24-10 UNCONSTITUTIONAL**
Stephen Christopher Stanko,)	(Arbitrary Factor #1)
)	
Defendant.)	
)	

2009 SEP 25 PM 4:39
JEANIE HUGGINS
CLERK OF COURT
HORRY COUNTY

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder based solely on

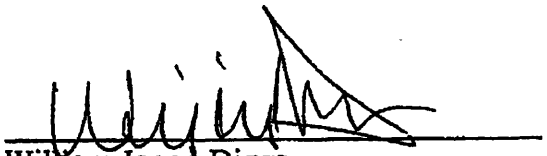
[1] S.C. Code Ann. § 17-24-10 reads as follows:

> (A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.
>
> (B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.
>
> (C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

the conduct of the accused, while the statute denies the accused the ability to establish insanity; or a mental disease, defect, or illness, based solely on the conduct of the accused.

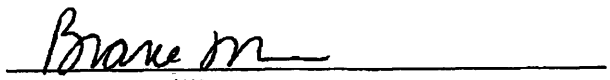
Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



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Brana J. Williams
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843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 4

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #2)
Defendant.)	
)	

FILED
HORRY COUNTY
2005 SEP 25 PM 4:30
MELANIE HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute contains an unconstitutional arbitrary factor that allows the prosecution to establish "malice aforethought" as a requisite element of murder, based solely on

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

the conduct of the accused, without requiring any corroborative evidence that the brain function of the accused at the time of the alleged criminal act, included the capacity to form the intent to commit malicious acts and the executive analysis to willingly act thereon.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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WILLIAMS LAW FIRM, LLC

Brana J. Williams
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Conway, SC 29526
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ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 5

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-10 UNCONSTITUTIONAL**
)	(Arbitrary Factor #4)
Defendant.)	
)	

FILED
2005 SEP 25 PM 4:30
MELANIE HUGGINS
CLERK OF COURT
HORRY COUNTY

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it labels "insanity" as affirmative defense thus shifting to the accused the burden of proof on each element

---

[1] S.C. Code Ann. § 17-24-10 reads as follows:

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

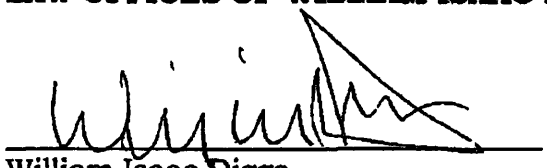
(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

of the defense. This relieves the prosecution from proving each element of the offenses charged.

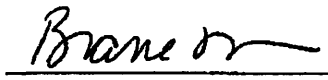
Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-4243

WILLIAMS LAW FIRM, LLC



Brana J. Williams
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843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 6

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-20 UNCONSTITUTIONAL**
)	(Arbitrary Factor)
Defendant.)	
)	

FILED
HORRY COUNTY
2005 SEP 25 PM 4:30
MELANIE HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15.[1]

---

[1] **§ 17-24-20. Guilty but mentally ill; general requirements for verdict.**

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute is arbitrary and violates due process of law because it contains an illusory defense of, "Guilty But Mentally Ill." Said defense is illusory because even if proved to exist by an accused by a preponderance of the evidence, the accused may still be sentenced to death under South Carolina law.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

William Isaac Diggs
1700 Oak Street, Suite D
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843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
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Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

Defense Pretrial Motion # 7

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ 17-24-20 UNCONSTITUTIONAL**
)	(Conclusive Presumption)
Defendant.)	
)	

FILED
2005 SEP 25 PM 4:30
CLERK OF COURT
HORRY COUNTY

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 17-24-20 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

---

[1] § 17-24-20. Guilty but mentally ill; general requirements for verdict.

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

Said motion is based on the grounds that the statute contains an unconstitutional conclusive presumption that if one can distinguish between moral or legal right from wrong in one area of the brain, the accused is guilty, notwithstanding the absence of ability to perform executive analysis which would occur in a different area of the brain but does not, due to physical defects (in the latter area of the brain) which exist either in the form of missing volumetric mass or low or dead brain activity or tissue.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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Myrtle Beach, SC 29577
843-626-4243

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Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

HISTORY: 1984 Act No. 396, § 2; 1988 Act No. 323, § 2; 1989 Act No. 93, § 2.

Defense Pretrial Motion # 8

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ § 16-3-10 et seq.**
)	**UNCONSTITUTIONAL**
Defendant.)	(Incomplete Evidentiary Basis)
)	

2005 SEP 25 PM 4:30
HORRY COUNTY
CLERK OF COURT
MELANIE HUGGINS

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. §§ 16-3-10 et seq. unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the entire statutory complex is arbitrary and violates due process because it is allows for a conviction of an accused based on an incomplete evidentiary base which excludes evidence of brain function in the determination of guilt or innocence which is necessary to form an accurate assessment of mental health and to render a reliable verdict.

[1] S.C. Code Ann.§ 16-3-10, defines "Murder" states as follows: *"Murder"* is the killing of any person with malice aforethought, either express or implied.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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Myrtle Beach, SC 29577
843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
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Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Defense Pretrial Motion # 9

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**S.C. § 16-3-10 UNCONSTITUTIONAL**
)	(Vagueness)
Defendant.)	
)	

FILED
2005 SEP 25 PM 4:30
HELEN HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. § 16-3-10 unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the arbitrary and vague and violates due process because it does not define the term "malice aforethought," and fails to acknowledge that malice is a complex concept that requires multiple brain functions or a number of different brain activities and the statute fails to identify which brain functions are

---

[1] **§ 16-3-10. "Murder" defined.**

"Murder" is the killing of any person with malice aforethought, either express or implied.

HISTORY: 1962 Code § 16-51; 1952 Code § 16-51; 1942 Code § 1101; 1932

Code § 1101; Cr. C. '22 § 1; Cr. C. '12 § 135; Cr. C. '02 § 108; G. S. 2453;

required by law to exist sufficiently to constitute the statutory element of murder of "malice aforethought."

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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Myrtle Beach, SC 29577
843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
1115 3rd Avenue
Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

R. S. 108; 1712 (2) 418.

Defense Pretrial Motion # 10 -

STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	INDICTMENT 2005-GS-26-2927
The State of South Carolina)	
)	
v.)	
)	**MOTION TO DECLARE**
Stephen Christopher Stanko,)	**§ § 16-3-20 et seq.**
)	**UNCONSTITUTIONAL**
Defendant.)	(Hypofrontality)
)	

FILED
HORRY COUNTY
2005 SEP 25 PM 4:30
HELEN T. HUGGINS
CLERK OF COURT

COMES NOW THE UNDERSIGNED, who would give notice of his intent to move before the Honorable Steven H. John, Judge, for the Fifteenth Judicial Circuit for the Court's proper Order declaring S.C. Code Ann. §§ 16-3-10 et seq. unconstitutional as being in violation of the Eighth and Fourteenth Amendments to the United States Constitution and S.C. Const. Art I, § 15. [1]

Said motion is based on the grounds that the entire statutory complex is arbitrary and violates due process because it is allows for the death sentence to be imposed upon an accused who has hypofrontality, who possesses no more moral culpability than a juvenile or an adult who suffers from mental retardation.

[1] S.C. Code Ann.§ 16-3-10, defines "Murder" states as follows: *"Murder"* is the killing of any person with malice aforethought, either express or implied.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS

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843-626-4243

WILLIAMS LAW FIRM, LLC

Brana J. Williams
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Conway, SC 29526
843-248-5100

ATTORNEYS FOR THE DEFENDANT

This 25 day of September, 2009
Myrtle Beach, South Carolina

Pending

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF GENERAL SESSIONS INDICTMENT 2005-GS-26-2927
STATE OF SOUTH CAROLINA VS. STEPHEN C. STANKO, DEFENDANT.	)	ORDER APPOINTING COUNSEL (Death Penalty Case)

FILED
2006 NOV 28 PM 4:28
CLERK OF COURT

The State of South Carolina has served a Notice of Intent to Seek the Death Penalty in the above-captioned matter pursuant to S. C. Code of Laws, as amended. I find that it is necessary pursuant to Section 16-3-26(B) of the South Carolina Code of Laws, 1976, as amended, for counsel to be appointed in this matter. A hearing was held on November 15, 2006, at the Georgetown County Courthouse for the purpose of appointing counsel. Pursuant to said hearing, it is hereby

ORDERED that William I. Diggs, Esquire, is appointed to serve as first chair in the defense of Defendant Stephen C. Stanko in the above matter. The appointment of second chair in the defense of the defendant is taken under advisement by the Court.

AND IT IS SO ORDERED.

Hartsville, South Carolina

November 21, 2006

J. MICHAEL BAXLEY
CIRCUIT COURT JUDGE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	INDICTMENT 2005-GC-26-2927
COUNTY OF HORRY	)	
	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
	)	ORDER APPOINTING
vs.	)	SECOND CHAIR COUNSEL
	)	(Death Penalty Case)
STEPHEN C. STANKO	)	
	)	

WHEREAS , the State of South Carolina has served a Notice of Intent to Seek the Death Penalty in the above referenced matter pursuant to South Carolina Law, and

WHEREAS, pursuant to Section 16-3-26(B) of South Carolina Code of Laws, 1976, as amended, it is necessary for second chair defense counsel to be appointed in this matter, and

FILED
HORRY COUNTY
07 FEB 28 PM 1:10
CLERK OF COURT
HORRY COUNTY

WHEREAS, this Court finds that Attorney Brana J. Williams is capable, qualified, and willing to serve in this important capacity; therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Brana J. Williams, Esquire, of the Horry County Bar, is appointed as second chair in the defense of defendant Stephen C. Stanko in this matter.

AND IT IS SO ORDERED.

J. Michael Baxley, Presiding Judge
Fifteenth Judicial Circuit

February 23, 2007
Hartsville, South Carolina

DEC-07-2011 13:45 From:HORRY CLERK COURT 8439156081 To:803 734 4035 P.3/3

STATE OF SOUTH CAROLINA COUNTY) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY 2009 APR 28 PM 2:52) INDICTMENT NO. 2005-GS-26-2927
STATE MELANIE HUGGINS CLERK OF COURT) MOTION AND TO NOTICE OF MOTION TO REVIEW STATUS OF COUNSEL FOR DEFENDANT IN LIGHT OF POST CONVICTION RELIEF ACTION IN COMPANION CASE
versus)
STEPHEN C. STANKO,)
Defendant.)
I-142833

The State, through J. Gregory Hembree, Solicitor of the Fifteenth Judicial Circuit, moves this Court to review the status of William I. Diggs, present counsel for the defendant, for conflict of interest and waiver of attorney-client privilege, as a result of the Post Conviction Relief petition filed by and/or on behalf of the defendant in the Georgetown County case of State v. Stephen C. Stanko in which the defendant was found guilty and sentenced to death. In support of the motion, the State would respectfully show to the Court:

1. William I. Diggs, Esquire, represented the defendant, as first chair, in the Georgetown County capital case in which the defendant was convicted and sentenced to death;
2. the defendant's case was affirmed on direct appeal by the South Carolina Supreme Court;
3. application for *cert.* was denied by the United States Supreme Court;
4. the Defendant filed a petition for Post Conviction Relief alleging, in part, the ineffective assistance of William I. Diggs, Esquire;
5. Rule 1.7 (a)(2) of Rule 407, SCACR, identifies a conflict of interest where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client . . . or by a personal interest of the lawyer.";
6. Rule 1.7 (b)(1) of Rule 407, SCACR, states the conflict of interest may only be waived if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;"
7. Section 17-27-130, Code of Laws of South Carolina, 1976, as amended, state, in pertinent part, "Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . ., the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney –client privilege shall be deemed automatic upon filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for the purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation."(emphasis added);

8. the State submits a non-waivable conflict of interest exists between William I. Diggs, Esquire, and the defendant, in that the defendant has, by the filing of his Post Conviction Relief petition, already waived attorney-client privilege in connection with the companion case;
9. William I. Diggs, Esquire, has represented to the Court in connection with the present case that he intends to offer a similar defense and similar mitigation utilizing the same experts from the companion case; and
10. waiver of the attorney-client privilege in the companion case would materially limit the representation of William I. Diggs, Esquire, in the present case.

Based upon the above, the State moves this Court to review the status of William I. Diggs, Esquire, as counsel for the defendant in the above captioned case and seeks a hearing so that this matter may be heard as soon as is practicable.

I SO MOVE:

J. Gregory Hembree, Solicitor
Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29528
(843) 915-8609

April 28, 2009

Conway, South Carolina

3536

IF SO, WHEN? ☐ YES ☐ NO

NAME AND/OR ADDRESS CORRECTION: If the information below is incorrect, pleas[redacted] the correct information in the space provided below.

[redacted]

INFORMATION BELOW WILL BE MADE AVAILABLE ONLY TO OFFICERS OF THE COURT

HOME PHONE #	BUSINESS PHONE #	SPOUSE'S BUSINESS PHONE #	EMERGENCY PHONE #	E-MAIL ADDRESS
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

JUROR RESPONSE SECTION INSTRUCTIONS

Retain the top portion of this form for your reference and return the bottom portion of the form along with any required affidavits or written statements in the self-addressed envelopes provided.
NOTE: Unless the Clerk of Court otherwise notifies you, you must report for jury duty as requested.

DISQUALIFICATIONS

- ☐ I am not a U.S. citizen
- ☐ I am not a resident of this country. (Note correct address above.)
- ☐ I cannot read, write, speak, or understand the English language. Translator's name and telephone #: _____
- ☐ I have less than a sixth grade education or its equivalent.
- ☐ I have a mental or physical condition that prevents me from serving as a Juror. (Doctor's statement required)
- ☐ I have been convicted in a state or federal court of a crime that carries a sentence of more than one year of imprisonment and I have not been pardoned or given amnesty for that conviction. List offenses, when and where convicted: _____
- ☐ I am a clerk of court, deputy clerk of court, constable, sheriff, commissioned law enforcement officer, probate judge, county commissioner, magistrate, or county officer, or I am employed within the walls of a courthouse. Occupation: _____
- ☐ I have served on a circuit court jury within this calendar year. Date of service: _____ County: _____

EXEMPTIONS

- ☐ I am 65 years of age or older and wish to be excused. (If you do not wish to serve on a jury, You may telephone the clerk of court to be excused. Unless you are excused by the clerk of Court prior to the term for which you are summoned, you must report for jury duty.)
- ☐ I am the primary caretaker of a disabled person or a person aged 65 or older who cannot care for himself. ***
- ☐ I have legal custody and duty of care of a child under the age of seven and I cannot provide Adequate childcare while serving as a juror. ***
  [When you return this form, you must also send an affidavit (notarized statement) stating that you have legal custody and duty of care of a child under the age of seven and you are unable to provide adequate childcare while performing jury duty.]
- ☐ I am a guard, keeper, employee or other officer at a state penitentiary.
- ☐ I have served on a circuit court jury during the previous four calendar years. Date of Service: _____ County: _____ Jury Type: ☐ Circuit Court ☐ Grand Jury
- ☐ I am a student or a school employee and wish to be transferred to a later date that will not Conflict with my school term. Date Available for Service: _____
  [When you return this form, you must also send evidence of school enrollment or Employment.]

***Affidavit (notarized statement) must be returned with this form attesting to the above statements ***

☐ I HAVE READ THE CONDITIONS FOR DISQUALIFICATION AND EXEMPTION ABOVE AND NONE OF THE CONDITIONS LISTED APPLY TO ME.
NOTE: THE FURNISHING OF FALSE OR MISLEADING INFORMATION OR THE FAILURE TO FURNISH INFORMATION TO THE COURT MAY SUBJECT YOU TO PENALTIES AS PRESCRIBED BY LAW.

YOUR SIGNATURE Brian O'Brien

NOTE: Participation of all eligible citizens as jurors is encouraged. If you need specific accommodations, courthouse staff will be available for assistance.

3698

12

480

JUROR QUESTIONNAIRE

YOU MUST ANSWER TO THE BEST OF YOUR KNOWLEDGE THE FOLLOWING QUESTIONS AND RETURN ALONG WITH THE JUROR QUESTIONNAIRE CARD TO THE CLERK OF COURT

1. Name: Bonnie (First) Smith (Middle/Maiden) O'Guin (Last)

2. Date of Birth [redacted] Age: [redacted] Sex: [redacted] Race: [redacted]

3. Birthplace: [redacted]

4. [redacted] Myrtle Beach, SC 29588

5. Length of Time at present address: 1 yr 4 months

6. How long have you lived in Horry County? 5 yrs

7. Telephone Numbers: (Home) [redacted] (Business) [redacted]
(Cell) [redacted]

8. In the past 10 years, list other cities you have lived in and how long you lived at each:

City/Town	No. of Years
Cameron, NC	10

9. Place of Employment: Alsco Linen, Little River, SC

10. Current job title or description: Exc Sales Consultant
Business Hours: 7:30-5:00 Length of Present Employment: 3 yrs

11. Please list your occupations or employment for the past 5 years:
Alsco - 3 yr
JT Davenport - 8 yrs

12. Marital Status: a) (Married) b) Single c) Divorced d) Spouse deceased

13. Spouse's Name: Larry O'Guin

14. Spouse's Employer: unemployed
Current Job Title or Description: _____
Length of Present Employment: _____
What other types of jobs has your spouse held? Construction Super

15. Please provide the following information about your children/stepchildren, if any:
(Name / Sex / Age / School or Occupation)
a. Brandon Thomas - m - 35 - Construction
b. Shane Thomas - m - 27 - Production worker
c. Justin O'Guin - m - 27 - Disabled
d. Adam O'Guin - m - 25 - Lawn Maint.
e. Morgan Keith - F - 22 - housewife
f. _____

16. Please provide the following information about your brothers and sisters, if any?
Name / Sex / Age / School or Occupation
a. Connie Atkins - 52 - F - housewife
b. Billie Smith - F - 47 - "
c. _____
d. _____
e. _____
f. _____

17. Please give your educational background. Include how far you went in school, the names of any technical or trade schools attended; any colleges or graduate schools you attended, together with degrees received, if any:
High School Diploma

18. Please give your spouse's educational background:
High School Diploma

19. Have you ever served in the military? No If yes, please give the following information:
Branch: _____ Years of Service: _____
Highest grade or rank attained: _____
Duties: _____
Year Discharged: _____ Type of Discharge: _____
Did you ever serve in the military police? _____

20. Do you have any difficulty in reading or writing? If yes, explain: No

21. Do you have any difficulty with sight or hearing, or do you have any other disability that would make jury service a hardship for you? No If yes, please explain:

22. Are you currently taking any medication? yes If yes, please give the name of the medication and the reason you take it. Plavis - blockage

23. Are you or any family members currently being treated for a medical illness which would prevent or impair your jury service? No If yes, please explain:

24. Have you worked in a mental health facility or hospital of any kind? No If yes, please describe:

25. Have you ever taken any courses in the fields of psychiatry or psychology? No If yes, please list when and where

26. Do you have any moral, religious, or personal beliefs that would prevent you from sitting as a juror in criminal case? No

27. To which civic clubs, societies, professional associations, or other organizations do you belong? NMB Clamber

28. Are you or your spouse a member of (or have you ever been a member of) any neighborhood, local, state, or nationwide victim rights, crime prevention or crime watch organizations, or any law enforcement support organization? No
If yes, please name the organizations.

29. What are your hobbies? Boating, motorcycles,

30. What is your primary source of news? Television ✓ Newspaper _____ Radio _____ Magazine _____ Internet _____ Personal Conversation_____ Other _____

31. Do you subscribe to and/or regularly read a newspaper? no If yes, which one(s)?

32. Have you ever been indicted, or convicted (including probation, deferred adjudication, conditional discharge, etc.) of a crime other than a traffic ticket? no
If yes, state what crime and when indicted or convicted:

33. Do you personally know anyone who has been to prison, or who is in prison?
yes

34. Have you ever been a witness or testified in a criminal case? no

35. Have you or any member of your immediate family ever worked with any program involved with the prevention of crime, the apprehension or punishment of offenders, or the rehabilitation of persons convicted of a crime?
no

36. Have you, or any immediate family member ever been the victim of a crime?
yes

37. Have you or any member of your immediate family ever had any matters whatsoever handled by any solicitor or prosecutor's office?
yes

38. Have you or any member of your immediate family ever had any matters whatsoever handled by any public defender's office? yes

39. Have you ever served on a Grand Jury? no

40. Have you ever served as a juror in a civil case? no

41. Have you, your spouse, or any member of your immediate family presently or in the past, been a member or employee of a law enforcement agency or organization? (Example: city, county, state or federal police officer; constable, deputy sheriff, ranger, department

of public safety, auxiliary or reserve of any such organization or agency?) If yes, please give name and describe. No

42. Do you know or have you heard of either of the defense attorneys in this case, William I. Diggs or Brana J. Williams? No If yes, explain

43. Do you know or have you heard of the prosecutors in this case, Solicitor, Gregory Hembree, and Deputy Solicitor, Fran Humphries? No If yes, explain

44. Do you know or have you heard of the defendant in this case, Stephen C. Stanko? Yes or any of the defendant's family? _____ If yes to either, in what capacity? News

45. Did you know the victim, Henry Turner, during his lifetime? No if yes, in what capacity?

46. Do you know any of the victim's family members? No If yes, in what capacity?

47. Do you know, or believe you know, anything about the facts or purported facts of this case, either from the newspaper, television, radio, internet, or from any other source? No
If yes, from what source?

48. Do you currently have any personal problem that would prevent you from giving your full attention to the testimony during the trial? No If yes, please explain.

49. Is there any information about you which you feel the judge and the attorneys should know in reference to your ability to serve as a juror in this case that has not been set forth above? No If yes, please explain.

_____

_____

_____

50. Do you believe that there is be any reason which would make it difficult or impossible for you to be completely fair and impartial to both sides in this case? No If yes, please explain. _____

_____

_____

I hereby swear or affirm that all the answers given on this questionnaire are true, correct, and complete to the best of my knowledge.

Dated: 9-24-09

Bonnie O'Sun

(Signature of Juror)

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 5th, 2012

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

ROBERT PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEYS FOR APPELLANT

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S.C. Supreme Court

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SC COMMISSION ON INDIGENT DEFENSE
APPELLATE DEFENSE

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2.

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6.

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where appellant raised the defense of insanity which constitutes an excusable homicide and puts the existence of malice in issue factually, and the instruction in this case was in direct violation of the reasoning and logic of State v. Belcher?

2.

Whether the court erred by accepting a truncated and inadequate waiver of his attorney's conflict of interest in this case where defense counsel represented appellant in his prior trial at which appellant was sentenced to death and defense counsel was the subject of a pending accusation of ineffective assistance of counsel and the court's direction to defense counsel and appellant not to discuss the prior case was impractical and erroneous where the murders were committed closely together, and the insanity defenses at both were inextricably entwined?

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subject of very wide-spread publicity, since appellant was entitled to a fair trial by a jury that was not contaminated?

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6.

Whether the court erred by ruling that appellant's execution as a brain damaged and mentally ill man did not violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should now shield an appellant with significant diminished capacity, as well as the mentally retarded from the death penalty?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for the murder and armed robbery of Henry Turner. R. p. 3506. After numerous pretrial hearings appellant's case came to trial on November 14, 2009 before the Honorable Steven H. John, and a jury. William I. Diggs and Brana J. Williams represented appellant. J. Gregory Hembree, Francis A. Humphries Jr., and Jimmy A. Richardson, II were the solicitors. R. p. 1.

At the conclusion of the guilt stage the jury found appellant guilty of murder and armed robbery. R. 2482 ll. 2-25. After a twenty-four hour waiting period, the sentencing hearing commenced. The jury recommended a sentence of death, and that sentence was imposed by the trial judge. R. 2896 ll. 14-23; R. 2905 l. 12 – 2906 l. 19.

This appeal follows.

ARGUMENT

1.

The court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where appellant raised the defense of insanity which constitutes an excusable homicide and puts the existence of malice in issue factually, and the instruction in this case was in direct violation of the reasoning and logic of *State v. Belcher.*

Relevant Facts

At the conclusion of the guilty phase the trial judge gave the jury four verdict options:

(1) Not guilty by reason of insanity;

(2) Guilty but mentally ill;

(3) Guilty of murder and armed robbery; or

(4) Not guilty

R. 2474 l. 14- 2476 l. 7.

The defense presented expert testimony that appellant's crimes, the murder of his girlfriend, and then shortly thereafter his friend, Henry Turner, were done without any foresight, caution, or thinking of the consequences. For example, appellant took his girlfriend's credit card to an ATM where he knew he would be photographed. Similarly, appellant went to church with a woman in Augusta a couple of days after the murder where the church service was televised. All of this was where any rational person would have known he was the subject of a giant manhunt and he would have been taking precautions not to be apprehended. R. 1845 l. 1 - 1871 l. 25.

Psychiatrist, Dr. Thomas Sachy testified, in camera, as the defense laid the foundation for its not guilty by reason of insanity defense that appellant did not know legal and moral right from wrong at the time he committed the crimes. R. 1898, l. 1- 1902, l. 25. Dr. Sachy is a neuropsychologist in private practice in Georgia. R. 2176, ll. 20-21. After completing his undergraduate degree at the University of Calgary, Sachy earned a Master of Science in Biology from Georgia State University and a medical degree from the Medical College of Georgia in Augusta. R. 2176, l. 24 – 2177 l. 4. After graduating medical school, Sachy completed a Psychiatry residency and a Behavioral Neurology Fellowship at MUSC. R. 2177, ll. 8-11. He then completed a Fellowship in Forensic Psychiatry at Emory University. R. 2177, ll. 11-12

Following Dr. Sachy's in camera testimony defense counsel asked the judge to conclude the defense had made out a *prima facie* showing that appellant was insane. The trial judge ruled appellant could pursue his insanity defense assuming Dr. Sachy's testimony was consistent before the jury, which as seen infra it was. R. 1909 l. 1- 1910, l. 4.

Appellant presented an abundance of evidence showing appellant had an abnormal brain, particularly in the frontal lobes which control a person's judgment, his impulses, and his ability to feel empathy for others. Dr. Bernard Albiniak had a Master's of Science in Physiological and Developmental Psychology. R. 1913, ll. 3-4. He was a professor of psychology at Coastal Carolina University, and he specialized in physiological and developmental psychology. Dr. Albiniak testified that physiological psychology was a study of relating "brain function and brain structure to human behavior." R. 1912 l. 12- 1913 l. 9.

Dr. Albiniak attributed appellant's brain problems to several sources. One was that his mother had a complicated pregnancy when appellant was born in Guantanamo Bay, Cuba. The physicians were concerned about the reduced oxygen supply to appellant's brain during "the birthing process, and feared for his survival, the way I read the record." Dr. Albiniak also testified:

> The second incident occurred when he was about sixteen years old. He got hit in the back of the head with a beer bottle, the rear of the head, and the bad part about that is, the brain floats in the skull. It's not solid. It floats in your skull. If you get hit in the rear of the head it drives the brain forward, and it hits his frontal bone, and that would mean the damage won't necessarily be at the rear—the skull will be—but the damage will be on the frontal lobes of the brain, when it drives forward, and he lost consciousness during that episode, which is never a good thing.

R. 1951 l. 10- 1952 l. 1

Dr. Albiniak explained that appellant's abnormal brain in the frontal lobes could not repair itself: "Its simply lost, and that's lost forever." R. 1943 ll. 13-24. Dr. Albiniak explained that where the frontal lobe was missing tissue "there is some loss of function in the frontal lobes, and primarily impulse control, decision-making, those important functions..." Dr. Albiniak testified that if there was a real or perceived provocation: "[T]his individual is more likely to act out than you or I would be." R. 1943 l. 23- 1944, l. 1. Dr. Albiniak's findings were based on P.E.T. scan done by Dr. Joseph Chon-Sang Wu, who would later testify as a defense witness. R. 1944 ll. 3-6; R. 1954 l. 21- 1956 l. 13.

The jury had earlier heard testimony from Brent Turvey, an expert in crime scene analysis and reconstruction, that appellant's relationship was the decedent was a "complete fraud." R. 1872, l. 19 – 1873, l. 22. Turvey said that appellant did not go to the decedent's

house with the intention of killing him. R. 1860, ll. 9-20. Turvey also related that the decedent's girlfriend received a telephone call from the decedent shortly after appellant arrived telling her appellant was there, and appellant was telling him about his allegedly dead father. They talked about it all night. R. 1860, 21 – 1861, l. 4.

Turvey opined that the decedent was an alcoholic, and a photograph of the crime scene, his house, showed a Yuenaling beer was on the table along with two cigarette butts in an ashtray. R. 1589, ll. 2-23; R. 1860, ll. 13-16. The decedent's son had already seen the news about appellant and the murder of his girlfriend on the 11:00 news. R. 1534, l. 9 – 1535, l. 23. Dr. Albiniak testified "all kinds of things" could have been perceived as a threat to appellant when he shot the decedent. R. 1955, l. 5 – 1957, l. 2. Dr. Albiniak told the solicitor on recross-examination that it was "unlikely, but its possible" that the "stimulus" that caused appellant to shoot the decedent may not have been the decedent himself. R. 1956, l. 24 – 1957, l. 2.

Dr. Ruben Gur is a psychiatrist with secondary "appointments in Neurology and in Radiology, and I also work at the Philadelphia V.A. Hospital in the Behavioral Services section. I direct the Brain Behavior laboratory at the University of Pennsylvania, and head the Center for Neuroimaging in Psychiatry." R. 2012 ll. 17-22. Dr. Gur had a degree from the Hebrew University of Jerusalem in Israel and he did his post-doctoral fellowships at Stanford University and the University of Pennsylvania. R. 2012 l. 23- 2013 l. 11.

Dr. Gur concluded appellant had two types of problems, "the frontal lobe problem, and the medial gray matter, limbic system problem." R. 2061 ll. 5-9. Dr. Gur said "the damage in the medial gray matter, and especially at four standard deviations below normal, we don't see it in normal people. It just doesn't happen ... its extreme." R. 2061 l. 24- 2062

l. 9. Regarding appellant's frontal lobes Dr. Gur stated that "[L]ess than one percent, or maybe a quarter of a percent of healthy people may have those kind of values." R. 2062 ll. 10-15.

Defense counsel asked Dr. Gur:

> Q. Based on your results, with the results that you found in Defendant Stanko's brain, do you think the – is it consistent to say, or can you say that you think that it would be natural that he would pre-plan things, or be very active?
>
> A. It's a difficult question to answer. *The reduced volume in the amygdala will increase his vulnerability to react to a perceived threat.* The frontal lobe reduction will reduce his ability to control it, but there are – most of the damage is in the inferior orbital frontal part, so the more intellectual part of planning is still intact.
>
> Q. Okay. And with the perceived threat, the frontal lobe being more damaged, would that – does that mean that it can't do as good a job to determine whether perceived threat is or is not?
>
> A. Yes. It would—
>
> Q. If it's real or if it's not. That's what I meant to say.
>
> A. Yes. *If the frontal lobe is damaged it will diminish its ability to distinguish real from perceived threat that is really not real.*

R. 2070 l. 9- 2071 l. 3.

Dr. Joseph Chon-Sang Wu was a professor of the Department of Psychiatry and Human Behavior at the University of California at Irvine, College of Medicine. Dr. Wu completed a two-year fellowship in P.E.T. Scan Imaging of the brain and he was the Clinical Director of the University of California at Irvine Brain Imaging Center. R. 2105 l.

15- 2106 l. 13. Dr. Wu explained to the jury on the P.E.T. Scan video that the base of the frontal lobe of appellant's brain was abnormal. R. 2136, l. 11- 2137 l. 19.

Dr. Wu also testified that: "[T]his is the primary lesion or injury that Mr. Stanko's brain shows, the floor of the frontal lobe defect or injury ... this part of the frontal lobe is very important part of the frontal lobe which involves things such as impulse control and judgment." R. 2138 ll. 7-25. Dr. Wu also said an injury to this part of the brain impaired "[a]n individual's ability to exercise judgment, [and] impulse control. " Dr. Wu analogized this type of brain defect to a computer in a Lexus or Toyota going "haywire" where you "[h]ave an out-of-control brain, the way this Lexus went out of control and ended up killing the C.H.P. California Highway Patrol officer and his family." R. 2140 l. 13- 2141 l. 13.

Dr. Wu explained that the inner shell of appellant's brain: "[I]s more than four standard deviations below normal, which is probably less than one in – so that means nine hundred ninety-nine out of a thousand people, maybe even more, would have a brain bigger than Mr. Stanko's in this part of the brain." Dr. Wu repeated that this part of the brain controls "moral judgment, impulsivity, and aggression." R. 2153 l. 15- 2154 l. 8.

Dr. Thomas Sachy, a neuropsychiatrist, then testified consistently with his in camera testimony that appellant was legally insane at the time he committed the crimes. R. 2204 l. 13- 2206 l. 24; R. 2208 l. 6- 2212 l. 5; R. 2219 ll. 6-16; R. 2254 l. 10- 2255 l. 1. Dr. Sachy told the jurors "you don't have any choice on how your brain works." R. 2205 ll. 3-12. "[W]hen someone's brain is damaged, and it effects their behavior or cognition, they have no choice. That's happened to them. Its done, and an act of God has happened." R. 2205 ll. 3-12.

Dr. Pamela Crawford testified for the state that her initial involvement in this case was as a consultant for SLED. R. 2280 l. 14- 2281 l. 12. Dr. Crawford said that appellant had a severe personality disorder with anti-social and narcissistic features. R. 2292 ll. 12-16. The state presented the testimony of Dr. William Brannon. Dr. Brannon disagreed with Dr. Sachy's findings and he opined appellant's MRI was a normal image. R. 2326 l. 25- 2327 l. 9.

Dr. Kenneth Spicer testified as a state's witness and he disputed findings that appellant's PET scans were abnormal. R. 2353 ll. 9-18. Dr. Spicer also questioned the manner in which the PET scanning on appellant was done and he opined that experts had to be careful of "overcalling" their findings. R. 2402 l. 20- 2410 l. 20.

State v. Belcher

During the charge conference defense counsel argued that the court should not instruct the jury that malice can be inferred by the use of a deadly weapon based on this court's opinion in State v. Belcher. The same rationale in this insanity case applied to the reasoning of self-defense in Belcher, and the defense therefore requested that this inference of malice be deleted from the judge's charge. R. 2478 ll. 4-14.

The judge then stated that he had read State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), thoroughly and he disagreed that it was proper to delete the inference of malice charge based on the facts of this case. The judge ruled "the Supreme Court didn't indicate that in the slightest." R. 2478 l. 23- 2479 l. 1

Discussion

In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) this Court held that a jury instruction that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where there is evidence presented that would ***reduce, mitigate, excuse*** or justify the killing. Insanity is a disability that excuses the crime. LaFave, Substantive Criminal Law, §9.1(a)(4) Excuses and other conditions at p. 8 (2d ed. 2003). "**Excusable homicides include** those in which the killing was accidental and in which no one involved was criminally negligent or reckless **and those committed by the criminally insane.**" McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina, Offenses Against the Person, at p. 77 (5th Ed. 2007). (emphasis added). Another jury verdict option, guilty but mentally ill, was a verdict finding that reduces or mitigates the crime.

Further, as seen above, there was an plethora of evidence in this case of appellant's brain abnormalities which prevented him from exercising judgment and controlling his impulses. Thus, for the same reasons that the inference of malice from the use of a deadly weapon had no place where there was evidence of self-defense as in Belcher, the jury instruction that the jury could infer malice from the use of a deadly weapon was erroneous and highly prejudicial in this case also.

That inference of malice from the use of a deadly weapon instruction had to confuse the jury where the jury had before it extensive evidence that appellant was not guilty by reason of insanity -- he did not know the difference between legal right and wrong -- and evidence that because of his brain abnormalities he could not exercise judgment and control his impulses as a normal person would be expected to do.

The trial judge must charge "the current and correct law." S.C. Const. V, §17; State v. Adams, 277 S.C. 115, 120, 283 S.E.2d 582, 585 (1981). The purpose of jury instructions is to enlighten the jury and to aid it at arriving at a correct verdict. State v. Leonard 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Further, "[s]uperimposing a correct state of law over an erroneous charge only fosters confusion and prejudice." State v. Robinson, 306 S.C. 399, 401-402, 412 S.E.2d 411, 413 (1991); State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986). Moreover, trial judge's should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. State v. Leonard, supra.

Belcher controlled in this case and the trial judge respectfully was incorrect in reasoning that a not guilty by reason of insanity defense was not contemplated by Belcher. The jury had to be hopelessly confused with an instructions on not guilty by reason insanity and competing instruction that it could infer malice from the use of a deadly weapon.

As in Belcher the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. There was abundant evidence that appellant had abnormalities in the part of his brain, the frontal lobes, where appellant's judgments and impulses were supposed to be controlled. As in a self-defense case where self-defense excuses the homicide, it is impossible to determine how the jury attempted to reconcile that it could infer malice from appellant's use of a deadly weapon against evidence that he was incapable of distinguishing between moral and legal right and wrong and incapable of controlling his actions because of his brain abnormalities. See, State v. Belcher 385 S.C. 597, 611, 685 S.E.2d 802, 809-810 (2009). Under the judge's charge, the jury had every right to find malice merely from the use of a deadly weapon.

The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See, Rose v. Clark 478 U.S. 570 (1986). It also cannot be correctly held that the erroneous inference of malice instruction could not have contributed to the verdict given its obviously confusing nature in this case. See, Plyler v. State 309 S.C. 408, 424 S.E.2d 477 (1992). Appellant should be granted a new trial.

2.

The court erred by accepting appellant's truncated and inadequate waiver of his attorney's conflict of interest in this case where defense counsel represented appellant in his prior trial at which appellant was sentenced to death, and defense counsel was the subject of a pending accusation of ineffective assistance of counsel in PCR. The court's direction to defense counsel and appellant not to discuss the prior case was impractical and erroneous where the murders were committed closely together, and the insanity defenses at both trials were inextricably entwined.

Relevant Facts

On March 4, 2009 a pre-trial hearing was held. The trial judge stated that he was aware appellant had filed a post-conviction relief action alleging trial counsel Diggs provided ineffective assistance of trial counsel during his first trial.[1] R. 2957, ll. 17-25. The judge noted: "It seems to me, at least questionable, if not inconsistent, that Mr. Diggs remain as trial attorney and in this particular case when a post-conviction relief action has been filed against him by Mr. Stanko." R. 2958, ll. 1-6.

Defense counsel Diggs said he had not seen the post-conviction relief application and he did not have any input into the substance of that application. The judge then levied the following prohibition if Diggs remained appellant's attorney:

> And obviously, you know, *there are boundaries obviously that you cannot communicate with Mr. Stanko about that.* You don't represent him in that particular matter and obviously he's filed a complaint in that matter or at least a PCR application that alleges at least in part of it ineffective assistance of counsel, so you being the – not the responding

[1] This Court noted in its prior opinion that appellant raised an insanity defense during the first trial. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008).

> party, but obviously *there are issues and things that you may not discuss with him*, but you can certainly, I assume, and have – and if you haven't, you certainly need to, communicate with him about your continued representation of him regarding this particular case. Have you done that?

R. 2958, ll. 12-23. (emphasis added).

Defense counsel Diggs responded that he understood appellant wanted him to remain as his attorney. R. 2958, l. 24 - 5, l. 3.

The judge then addressed appellant about "some inconsistency or *if not a downright disqualification of Mr. Diggs in this matter regarding you filing a post-conviction relief application in the previous case* that arose out of Georgetown and his continued representation of this particular matter." R. 2959, l. 8- 2961, l. 10. (emphasis added). Appellant then told the judge that the PCR application was filed by Appellate Defender Kathrine Hudgins "in order to stop the death watch..."[2] Appellant told the judge that he intended to file an amended PCR application. R. 2959, l. 8 - 2961, l. 10.

The judge asked appellant if he intended to adopt the PCR application filed by Appellate Defender Hudgins. Appellant answered vaguely: "Not completely, no, sir. I had requested that issue whenever I spoke with her and [co-appellate counsel] Mr. Savitz that is not the way I had agreed that the immediate application was going to be filed. There is an issue that's still – *and I really can't discuss it right now.*" R. 2960, ll. 2-12. (emphasis added).

Appellant also said until he met with the two attorneys who had been appointed to represent him in his capital PCR case – the Ling murder -- that he could not be sure what

else would be filed on his behalf. Appellant also noted that defense counsel Diggs was going to present a very similar defense in this case as he did in the prior death penalty trial and appellant speculated that if Counsel Diggs made legal errors he would acknowledge that "he should have done something differently during the first trial." R. 2960, l. 15 - 2961, l. 10.

Appellant offered that he had planned to meet with one of his PCR attorneys, Bill Godfrey, on Friday but that meeting had been cancelled. Appellant asked the judge if the only way he could keep defense counsel Diggs as his attorney was to waive an ineffective assistance of counsel claim against him. The judge responded that he was not asking appellant to waive his claims against Diggs. Appellant said he trusted Diggs and co-counsel Brana Williams. R. 2962, l. 19- 2963, l. 10. The judge asked appellant that when he filed an amended PCR application, if he did file an amended application, to inform his attorney who would forward a copy of the amended application to the trial judge for his consideration. R. 2963, ll. 11-20.

Defense counsel Diggs said this was "not an ego thing. I don't have a problem with him making that allegation [of ineffective assistance of trial counsel]." Defense counsel then asked the judge to "monitor" his representation of appellant during the trial: "[I]f you see maybe a conflict in theories, you know, that I may be advancing and you see that I may be undermining, you know, the overall state, I guess, of Mr. Stanko's case against the State of South Carolina, you might want to re-visit that issue, but I personally don't have a problem." R. 2964, ll. 10-21.

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[2] Appellant was apparently referring to the 180 day death penalty statute of limitations in federal habeas if South Carolina becomes an "opt in" state in the future.

The judge ruled that he would allow defense counsel Diggs to continue as appellant's attorney "[w]ith the ability for the Court to re-visit it in the future should there be issues in the amended application that either give the Court any concern or Mr. Stanko, or Mr. Diggs concerns as to Mr. Diggs continued representation in this matter." R. 2964, l. 22-2965, l. 5.

Defense counsel Williams was uneasy with this situation. She asked the judge about the ramifications of defense counsel Diggs being removed in the future as trial counsel. The judge recognized that there was certainly "the potential for that happening." Williams worried that the defense may not be able to adjust "if we continue to proceed with this and all of a sudden Mr. Diggs is yanked out of the case, there is a major hole left in Mr. Stanko's defense." R. 2967, ll. 14-20.

The judge acknowledged the potential for that occurring, but he maintained: "We aren't anywhere close to that. I've not indicated that I would remove Mr. Diggs. I wanted to raise the issue." R. 2967, ll. 3-23. The judge said that he thought there was a good level of interaction and trust between defense counsel Diggs and appellant and that barring something unusual he was not going to conflict defense counsel Diggs off appellant's second death penalty trial. R. 2968, ll. 2-14.

Discussion

As seen, the judge instructed counsel Diggs not to communicate with appellant about the pending ineffectiveness allegations against him in the post-conviction relief case involving the first murder trial where appellant also asserted an insanity defense. The judge initially -- and appellant submits correctly -- observed that it appeared there should be "[a] downright disqualification of Mr. Diggs in this matter..." R. 2959, l. 8- 2961, l. 10.

Appellant indicated that counsel Diggs may have learned from his mistakes during the first insanity defense trial. However, counsel Diggs told the judge the court may want to "revisit" the disqualification issue if "you see maybe a conflict in theories... that I may be advancing and you see that I may be undermining... the overall state... of Mr. Stanko's case against the state of South Carolina..." R. 2964, ll. 10-21.

The truncated waiver in this case was inadequate since appellant was essentially offering the same not guilty by reason of insanity defense he unsuccessfully offered during the Ling death penalty trial, and as seen infra appellant was not warned – **at all** -- of the risks he was raising and the potential PCR issues he effectively was waiving

While there is no case from this state directly on point as to whether an attorney who represented a defendant during a previous capital trial should be allowed to represent the defendant during a second capital trial – where he is offering the same defense that had already failed – and where that attorney is a target of a pending allegation in post-conviction relief that he provided ineffective assistance of counsel during the first capital trial.

It is elementary that a defendant has a right to conflict free counsel. See, SC Code 1976, § 20-7-110(2); See also, Von Moltke v. Gillies, 332 U.S. 708, 725 (1948); U.S. v. Wheat, 813 F.2d 1399 (Cal. 1987). "The effective assistance of counsel is a necessary requisite of due process of law." Rogers v. State, 261 S.C. 288, 290, 199 S.E.2d 761 (1973), citing, State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968).

An attorney should not represent a defendant where counsel's adequacy is in question. See, People v. Norris, 46 Ill.App.3d 536, 541, 361 N.E.2d 105, 110 (Ill. App. 1977).

For example, other courts have held that it is a conflict of interest for counsel to represent a client at a PCR hearing where the claim is against him or another member of counsel's office. Adams v. State, 380 So.2d 421, 422 (Fla. 1980) ("Because of these allegations, the public defender of the Nineteenth Judicial Circuit has a *hopeless conflict of interest* which precludes his representation of James Adams in this proceeding") (emphasis added); at sentencing hearings where there is an potential IAC claim against counsel, People v. Fields, 88 Ill.App.3d 821, 410 N.E.2d 1178 (Ill. App. 1980); Owens v. State, 792 So.2d 650, 654 (Fla. App. 2001) ("In this case, defense counsel could not effectively represent appellant during sentencing as to both cases when he faced a possible ineffectiveness of counsel claim. The more counsel said, the more he put into the record which could later be used against him in the ineffectiveness claim."); at post-trial plea withdrawals where counsel or a member of counsel's office represented defendant at the plea hearing, People v. Norris, 46 Ill.App.3d at 541, 361 N.E.2d at 110 ("Although an attorney should not argue his own inadequacy or that of his office, he is under a duty to withdraw as counsel when the issue arises."); and at trial where defendant is denied his pre-trial motion for new representation and subsequently files a federal action against counsel's office, Odum v. State, 283 Ga.App. 291, 293, 641 S.E.2d 279, 281 (Ga. App. 2007) ("If raised pre-trial, a potential conflict of interest is sufficient to bar that representation.").

The United States Supreme Court has stated that "courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness." United States v. Wheat, 486 U.S. 153, 153 (1988). The body of law surrounding conflict

of interest issues indicates a strong desire to maintain the indicia of fairness and propriety.

To cure a conflict of interest, a defendant can make an informed waiver. Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, (1978). The waiver of a constitutional right, including the right against self-incrimination or the right to jury trial, must be knowingly and intelligently made with a full understanding the breadth of the conflict and potential consequences of continued representation. Brady v. United States, 397 U.S. 742 (1970). In Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990), this Court stated that "the ultimate test" for whether a waiver of right to counsel is effective is the defendant's *understanding* of the risks involved. Id. at 294. (emphasis added).

Here, appellant was not questioned *at all* about any potential risks he faced by having counsel Diggs represent him and essentially offer the same defense that was unsuccessful during the first death penalty trial. Further, counsel Diggs and appellant were advised it would be improper to talk about the PCR claims where here the murders occurred a short time apart and the facts of both murders were inextricably entwined since the state's case was that appellant killed Ling and was using Turner to hide out and plan his next move. Diggs also wanted the judge to advise him if the judge thought his continued representation became problematic during the trial. That placed the trial judge in an untenable situation of "monitoring" the adequacy of defense counsel's representation which was a confusion of his judicial role.

In United States v. Swartz, 975 F.2d 1042 (4th. Cir. 1992), where counsel also represented a co-defendant to Swartz's detriment, the Court articulated the proper line of questioning for an effective conflict waiver:

> "[T]he court must personally address each defendant and inform him of the potential hazards of representation by a single attorney, as well as his right to separate representation. In turn, the defendants are free to ask the court questions about the nature and consequences of the representation:
>
> Most significantly, the court should seek to elicit *a narrative response* from each defendant that he has been advised of his right to effective representation, that he understands *the details of his attorney's possible conflict of interest and the possible perils of such a conflict*, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections."
>
> Id at 1049; citing, U.S. v. Akinseye, 802 F.2d 740, 745 (Md. 1986)

The Court's questioning of appellant here was limited to whether he wanted Mr. Diggs to continue representing him. R. 2961, ll. 16-23. While a defendant's relationship with his appointed counsel should be considered before that attorney is removed, the right to counsel of choice can be overcome by a showing of actual conflict or serious potential conflict. State v. Goldsberry, 419 Md. 100, 118, 18 A.3d 836, 847 (Md. 2011); United States v. Wheat, 486 U.S. at 159 ("the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.").

The law requires that the record reflect a defendant's *full understanding* of any negative consequences arising from the conflict. U.S. v. Swartz, 975 F.2d at 1049.

Because, appellant's previous sentence was the death penalty, anything that affects his appeal process from that case is of extreme importance.

Appellant essentially told the judge that his decision to keep counsel Diggs, even though there were pending allegations of ineffective assistance of counsel against him was because he believed that any other attorney besides Diggs may not believe in his defense – which had failed to first time during the Ling trial. R. 2963, ll. 4-10.

Because both the right to counsel and the right to counsel free from conflicts and "devoted to the interests of his client" are derived from the Sixth Amendment, the standard for determining whether a conflict of interest is effectively waived should be at least as thorough as an effective waiver for a right to counsel. See Von Moltke v. Gillies, 332 U.S. at 725; United States v. Wheat, 813 F.2d. 8, ll. 22-25.

Appellant gave two analogies in order to explain his desire to maintain Diggs that serve to illustrate his misunderstanding of the conflict and potential drawbacks:

(A) There's a Solicitor that was in this case [Fran Humphries] that had been sanctioned for previous misconducts, but he's still a solicitor; and

(B) If you have Derek Jeter – a good baseball player -- and in the ninth inning of the final game of the World Series he commits an error that costs his team the game, that does not mean you do not "want him back starting next season."[3] R. 2962, ll. 9-18.

Neither example evidences an understanding of the consequences of keeping counsel Diggs as appellant's counsel. They both merely assert that appellant understands that being charged with an ineffective assistance of counsel claim does not prevent Mr.

[3] Baseball fans have no right to PCR Jeter by accusing him of professional incompetence and malpractice and forcing a replay of the game lost through his error. The Virginia Supreme Court characterizes a

Diggs from maintaining his position as an attorney or his reputation. This is especially true given the judge's unworkable instruction to appellant and counsel Diggs not to discuss the prior case. The prior case involved a murder committed shortly before the murder in this case where all of this was part and parcel of a continuing chain of events, where the defense in this case was the same as the Ling case. It respectfully appears the unworkable instruction – with a promise to possibly revisit the conflict issue later during the trial -- was unprecedented if not, respectfully, also bizarre.

Given the nature of the trial and the severity of the sentence, the trial court should have thoroughly questioned appellant about the extent of his understanding of the conflict and its potential consequences. The attempted waiver in this case did not do so. Again, this was appellant's second death penalty trial where he offered an insanity defense where the two murders were committed very close together. The brief disjointed conflict waiver colloquy in this case was legally inadequate and appellant should be granted a new trial.

Finally, based on the cases cited above, and what occurred in this case, appellant respectfully submits that this Court should erect a per se bar prohibiting counsel in a death penalty case from representing the same defendant in a subsequent death penalty trial where counsel is the subject of a pending PCR as a result of the first death penalty trial.

3.

The trial court erred in denying appellant's motion to disqualify Juror # 480 because she had knowledge of appellant's prior convictions, including his sentence of death, his

criminal lawyer being held ineffective as "professional disgrace." Mu'Min v. Commonwealth, 239 Va.

present charges, and because she said she would vote for death in every instance if there were an aggravating circumstance.

Relevant Facts

Defense counsel used all ten of his peremptory challenges and, therefore, could not keep Juror # 480 off of the jury. During jury qualification, defense counsel sought to disqualify ten prospective jurors because they had knowledge of appellant's prior case and/or this present case. He eventually struck the first nine during jury selection. These ten prospective jurors were # 612[4] R. 30, l. 4 – R, l. 10, # 281 R. 54, l. 24 – 79, l. 19, # 446 R. 144, l. 11 – 164, l. 25, # 67, R. 229, l. 23 – 246, l. 8, # 298 R. 296, l. 22 – 316, l. 4, # 466 R. 316, l. 11 – 330, l. 13, # 330 R. 454, l. 6 – 480, l. 23, # 510 R. 494, l. 9 – 511, l. 24, # 103 R. 558, l. 4 – 574, l. 3, and # 236 R. 624, l. 24 – 646, l. 13.

Juror # 612 explained during voir dire that she read about Stanko in newspaper reports and on the internet and learned that "he went to trial for the murder of the girlfriend, and that he was convicted and waiting for a date [to be executed]." R. 47, l. 24 – 48, l. 8. She candidly offered: "It's difficult not to have an opinion when somebody has been convicted once" and that when someone is "waiting for the date" it "kind of seems redundant" to spend government funds to try them for a different charge. R. 33, l. 20 – 35, l. 5.

When Juror # 281 was questioned during voir dire regarding her knowledge of Stanko she stated, "I know Mr. Stanko took Henry Turner's life, and then went down to Georgetown, I think to a girlfriend's house, and took either the girlfriend or the

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433, 452, 389 S.E.2d 886, 898 (1990).

[4] Page numbers refer to the jury voir dire transcripts dated November 9-12, 2009.

daughter's life as well, and there was some other foul play involved." R. 59, ll. 4-17. This prospective juror also explained that she worked for five years with Henry Turner's son, Roger, at Dick's Pawn Shop. R. 60, l. 22 – 61, l. 16. When defense counsel questioned her she stated that she knows "he's already been tried and convicted," but she could not recall the sentence Stanko received. R. 71, ll. 11-25.

Juror # 446 testified during voir dire that she heard about Stanko's case on T.V. and read about it in the newspaper and learned "that he killed his girlfriend and he raped her daughter, and he killed Mr. Turner." She stated that she did not know anything "more particular than that." R. 150, ll. 14-24.

Juror # 67 admitted while being questioned by the court that his knowledge of Stanko's conviction for the other crime had led him to believe that Stanko was guilty of the current charges as well. R. 235, ll. 5-22. After further discussion with the court, the prospective juror stated that he could put this opinion aside and decide the case solely on information received in the courtroom. R. 236, ll. 2-7. When asked by defense counsel to elaborate on his knowledge of Stanko, Juror # 67 explained that he knew "that he was charged and found guilty of . . . [the] murder of his girlfriend" and that the sentence Stanko received "was the death penalty." R. 241, ll. 3-14.

Prospective Juror # 298 told the court during voir dire that she remembers the headlines in the news regarding Stanko's previous case and knows Stanko was charged with "the murder of his girlfriend, I guess, and the rape of somebody." R. 301, l. 22 – 302, l. 24.

During voir dire, Juror # 466 likewise testified that she had previous knowledge of Stanko. She stated, "I knew that there was – let me recall – a death of a woman, and

assault on a juvenile, and possibility a subsequent death of another individual." R. 320, l. 17 – 321, l. 2.

When questioned by the court during voir dire, Juror # 330 explained, "I remember the Defendant being accused of taking the lives of two individuals, and I believe he had already been tried for one of those, and that she was a librarian, I believe." R. 458, ll. 1-17. When prodded further by defense counsel, this prospective juror admitted that she knew Stanko "was found guilty" in the first murder trial and that "I believe it was death," referring to the sentence he received. R. 468, ll. 2-16.

Prospective Juror # 510 similarly testified that she remembers hearing about Stanko. She stated, "I know there was another trial . . . I don't know a lot of the facts about it though." When questioned by the court if she remembered the result of that trial, the juror responded, "I think they imposed the death penalty." R. 500, ll. 3-16.

Prospective Juror # 103 also admitted that she had heard about Stanko's previous case. When asked by the court what she remembered, she testified, "Well, that he was convicted for the one in Georgetown, and that, you know, they thought that he killed a man in Horry County." When prodded further by the court regarding whether she remembered the sentence Stanko received in the Georgetown trial, the prospective juror responded, "Death." R. 562, l. 22 – 563, l. 9.

Juror # 480, whom appellant could not strike, said during voir dire that what she remembered about appellant was "that he had murdered his girlfriend, and left the daughter for dead." He "then came into Conway and murdered a man in Conway." R. 630, ll. 12-16. Later, she said she knew appellant had been sentenced to death. R. 635, ll. 14-20.

The prospective juror also said she would be predisposed to vote for the death penalty as opposed to life imprisonment if the State presented evidence of an aggravating circumstance. She said she would do so in every case. After she said this, the trial court was able to get the juror to say she could consider life or the death penalty. R. 639, l. 18 – 681, l. 23.

Defense counsel argued that the juror was not qualified because of her prior knowledge of appellant, his death sentence, and her position on imposing the death penalty. The trial court found her qualified. R. 644, l. 7 – 646, l. 13.

As stated, during jury selection, defense counsel struck all of the above jurors with the exception of Juror # 480 because he had used all ten of his strikes by that time.[5] R. 1296, l. 18 – 1315, l. 11. Before Juror # 480 was seated defense counsel noted on the record that he had exhausted his strikes.[6] R. 1313, ll. 16-21. The jury was empanelled, withdrawn from the courtroom and defense counsel said he had the same objections to the jurors as he previously stated. R. 1322, l. 20 – 1324, l. 10.

After a change of venue motion was heard, defense counsel put on the record that if he had not been out of strikes, he would have used a peremptory strike to excuse Juror # 480. He said she had prior knowledge of the case and she knew of appellant's death

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[5] Juror # 236 was also struck before Juror # 480 to complete defense counsel's ten strikes. R. 1300, ll. 3-15. Juror #236 had heard appellant's name and knew his name was connected to a murder. R. 1413, l. 23 – 1414, l. 12. The juror also named. Solicitor Hembree, went to the same church as the solicitor, and her husband was in Bible study with him. In addition, Juror #236's son had been murdered and she acknowledged it impacted her daily. R. 1408, l. 25 – 1410, l. 5.

[6] Exhausting all ten strikes is necessary for appellate review of juror qualification issues this Court held 3-2 in State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). See, also, State v. Bennett, 301 S.C. 347, 392 S.E.2d 157 (1990).

sentence. R. 1386, l. 6 – 1387, l. 15. Prior knowledge that appellant was under a death sentence would jeopardize the juror's sense of responsibility. R. 1388, ll. 7-24. In addition, knowledge that another jury sentenced appellant to death and of the prior charges put appellant's character into issue. R. 1388, l. 25 – 1389, l. 20. There was no presumption of innocence in appellant's case because he had an imposed death sentence. R. 1412, l. 22 – 1413, l. 20.

The juror's prior knowledge disqualified her

The trial court's decision not to disqualify juror #480 was in error. In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) this Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984). State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983). State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987).

In State v. Ross, 272 S.C. 56, 59, 249 S.E.2d 159, 161 (1978), this Court noted that "[c]haracter evidence is so highly prejudicial that it is usually excluded under hard and fast rules." In Mitchell v. State, supra, defense counsel was held ineffective for failing to object to improper character evidence. In State v. Gamble,[7] supra, a conviction in a death penalty case was reversed because the defendant's character was put into issue when other crimes were brought into evidence which were not related to the crime for which the defendant was being tried.

In State v. Johnson, supra, another death penalty case, the defendant's conviction for murder was reversed because excessive evidence of a prior murder was introduced into evidence. As this Court held in State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984), when the prior bad act is strikingly similar to the one for which the defendant is being tried the danger of prejudice is enhanced. The "inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the juror." State v. Lyle, 125 S.C. 406, 412, 118 S.E. 803, 807 (1923).

The prejudice of the juror's prior knowledge of appellant's other case and this case was again raised by defense counsel after the jury returned their guilty verdict. He noted the jury only deliberated for thirty (30) minutes and *that Juror #480 probably told the eleven other jurors of appellant's death sentence in the other case.* (R. 2487, l. 17 – 2488, l. 11). The trial court never instructed the juror not to tell the other jurors of appellant's prior death sentence. And these jurors were never qualified in respect to whether they could set aside knowledge of appellant's death sentence.

The Supreme Court of Illinois, People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982), dealt with the issue of the jury's knowledge of a prior death sentence as follows:

> The State argues that evidence of defendant's prior death sentence was properly before the jury since, in a capital case, the focus should be on both the character and record of the accused. (Lockett v. Ohio 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Ill. Rev. Stat. 1979, ch. 38, par 9-1(c).) This argument ignores the significant fact that the evidence in question was introduced

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[7] Gamble was reversed on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

> during the first phase of the sentencing hearing. At this time the question for the jury to determine is whether, on the basis of a statutory aggravating factory, defendant is eligible to receive the death sentence; not whether, in light of his character or record, he should receive this penalty. That defendant received the death sentence for a prior murder has absolutely no relevance to the issue of whether he is eligible to receive that penalty for the instant offense.
>
> More importantly, as noted by defendant, introduction of this evidence may well have improperly influenced the jury's decision in two respects. In determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant. If a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that 12 other people determined he was could have swayed the juror's verdict in favor of death.
>
> Further, the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would.
>
> In a capital case, a "high standard of procedural accuracy" is required in determining whether or not [the death] penalty will be imposed."

People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982).

The possibility that the jury may have found defendant eligible for this penalty on the basis of an irrelevant and prejudicial non-statutory aggravating factor should not be tolerated. People v. Davis, 97 Ill. 2d 1, 26-27, 452 N.E.2d 525, 537, 72 Ill. Dec. 272, 284 (1983).

In West v. State of Mississippi, 463 S.E.2d 1048, 1052-1053 (1985) the state supreme court held that it was reversible error for the solicitor to bring up during the guilt phase of the defendant's trial evidence of other murders which were not related to the murder for which the defendant was on trial. If the solicitor in the present case brought up

evidence of appellant's prior crimes and death sentence or during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature.

Juror # 480's knowledge of appellant's character evidence and prior bad acts along with his sentence of death was compounded by her willingness to sentence a defendant to death in every instance of an aggravating circumstance being presented. Due process under the Fourteenth Amendment and the Sixth Amendment to the United States Constitution demands that a defendant be given a fair trial by a panel of impartial, indifferent jurors. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985); Ross v. Oklahoma, 487 U.S. 81 (1988). It only takes one juror who believes a death sentence should be imposed in every instance to invalidate a death sentence. Ross v. Oklahoma, supra.

The juror's unequivocal response that she would vote for death in every case when an aggravating circumstance was coupled with murder disqualified her. In such an instance, the prospective juror may be challenged for cause. Morgan v. Illinois, 504 U.S. 719 (1992); State v. Bennett, 328 S.C. 251, 493 S.E.2d. 845 (1997). In Bennett, this Court remanded the case for resentencing when a juror said he would have to go with the majority. Critically, this Court noted language in Morgan that general questions of fairness and impartiality were insufficient to detect unqualified jurors. The trial court's attempt to rehabilitate Juror # 480's statement about imposing death was insufficient to cure the juror's unequivocal response. She was told she could only impose death if she found an aggravating

circumstance and that she could impose a life sentence. But she was not questioned or told of the role of mitigating circumstances- a necessary requirement of a capital sentencing system.

> "Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death sentence" Morgan v. Illinois, 504 U.S. at 738, 112 S.Ct. at 2234.

Jurek v. Texas, 428 U.S. 262, 271 (1976); Mills v. Maryland, 486 U.S. 367 (1988).

In Witherspoon v. Illinois, 391 U.S. 510 (1968) the United States Supreme Court held that prospective jurors could not be excused from jury service if they were opposed to the death penalty unless those jurors make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision to the defendant's guilt." 391 U.S. at 522-23 n. 21 (emphasis in original). Later, in Wainwright v. Witt, 469 U.S. 412 (1985) the Court held that the test for excluding a prospective juror is whether that juror's attitude concerning capital punishment would "substantially impair" his or her ability to render a fair and impartial verdict.

In State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007) this Court upheld the trial judge's decision to exclude a juror because the juror gave "equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death..." 372 S.C. at 193, 642 S.E.2d at 561.

In appellant's case, Juror # 480 was unequivocal in stating she would impose death in every instance when an aggravating circumstance was present. The fact that the trial judge got her to say she would consider either a life sentence or death sentence does not mean she would impose a life sentence. She just turned out to be as equivocal as the juror in State v. Lindsey but in direction of favoring death instead of life. Her ability to render a fair and impartial verdict was substantially impaired. She should have been excluded as a juror based upon her knowledge of applicant's prior crimes and sentence of death and her views in favor of the death penalty. Seating this juror called into question the reliability of a sentence of death under the Sixth and Eight Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment.

Finally to the extent the state may rely on State v. Atkins, 303 S.C. 214, 222, 399 S.E.2d 760, 764-765 (1990) and State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), for the proposition the judge did not abuse his discretion by seating Juror 480 where she knew of appellant's prior murder conviction and death sentence, appellant submits after Morgan v. Illinois, 504 U.S. 719 (1992) such a practice can no longer be permitted. The issue was only summarily addressed in passing in State v. Atkins, 303 S.C. 214, 222, 399 S.E.2d 760, 764-765 (1990) and State v. Bell, 302 S.C. 18, 23, 393 S.E.2d 364, 367 (1990) but it is now apparent following Morgan that appellant's right to an impartial jury includes the right to identify and have removed death prone jurors such as Juror # 480. Appellant's death sentence must be vacated.

4.

The Court abused its discretion by refusing to grant a change of venue where appellant's prior death penalty trial in Georgetown County, and the present murder, were the subject of very wide-spread publicity, since appellant was entitled to a fair trial by a jury that was not contaminated.

Relevant Facts

Before the instant (Turner) trial, appellant was tried, convicted, and sentenced to death for the Ling murder in Georgetown County in 2005. Prior to his arrest for the Ling and Turner murders, appellant was the subject of a nationwide manhunt and featured on Americas Most Wanted and countless other TV programs and newspaper articles. R. 1383, ll. 1-3; R. 468, ll. 5-16.[8]

During voir dire, the trial court judge asked each potential juror if they had been exposed to any pretrial publicity. Out of the 112 potential jurors questioned by the court, 56 knew about appellant through pretrial publicity.[9] Of the 45 qualified jurors, 27 knew

[8] All page numbers under this issue refer to the transcript dated November 13, 2009.

[9] R. 1308, l. 1; R. 1333, ll. 14-17; R. 1358, ll. 22-25; R. 1393, ll. 16-20; R. 1414, ll. 9-12; R. 1424, ll. 21-24; R. 1457, ll. 18-21; R. 1479, ll. 17-19; R. 1488, ll. 14-17; R. 1515, ll. 14-16; R. 1552, ll. 9-10; R. 1565, ll. 14-16; R. 1576, ll. 6-24; R. 1594, l. 25 - 1595, l. 2; R. 1608, ll. 3-10; R. 1629, ll. 17-18; R. 1656, ll. 6-10; R. 452, ll. 6-8; R. 468, ll. 5-16; R. 485, ll. 14-18; R. 500, ll. 10-16; R. 527, ll. 6-14; R. 551, ll. 12-19; R. 563, ll. 4-9; R. 586, ll. 9-18; R. 598, ll. 4-8; R. 615, ll. 13-16; R. 630, ll. 7-16; R. 651, l. 15 - 652, l. 5; R. 661, ll. 2-13; R. 702, l. 23 - 703, l. 4; R. 755, ll. 20-25; R. 775, ll. 2-11; R. 788, ll. 15-21; R. 801, l. 25 - 802, l. 5; R. 845, ll. 9-12; R. 854, ll. 10-14; R. 872, ll. 13-22; R. 880, ll. 1-6; R. 899, l. 25 - 900, l. 1; R. 920, ll. 5-10; R. 935, l. 23 - 936, l. 6; R. 963, ll. 4-6; R. 971, ll. 3-25; R. 1003, l. 17 - 1004, l. 12; R. 1027, ll. 22-23; R. 1036, ll. 17-24; R. 1048, ll. 17-25; R. 1062, l. 15 - 1063, l. 11; R. 1103, ll. 14-19; R. 1134, ll. 11-13; R. 1143, ll. 1-11; R. 1159, ll. 1-3; R. 1166, ll. 4-12; R. 1205, ll. 17-24; R. 1212, ll. 4-6.

about appellant's previous trial, conviction and death sentence.[10] Of the seated jurors, at least eight knew the appellant by name and one, Juror #480, as seen above, knew of appellant's previous murder conviction and sentence.[11]

In support of its change in venue motion at trial, defense counsel requested that the judge discharge the current panel and bring in jurors from another county or area "where they're not going to be so highly exposed to the newspaper articles and that kind of thing that the jurors in this area were exposed to." R. 1386, ll. 1-5. See S.C. Code §17-21-85; State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). The defense explained that if "you run Mr. Stanko's name through search engines . . . there are hundreds, literally hundreds, of hits that come up and articles that have been written and published about this particular prosecution – this particular Defendant." R. 1382, ll. 17-24.

Additionally, defense counsel argued that it is very rare that a nationwide manhunt would involve a defendant from Horry County and Georgetown County, but that occurred in this case. R. 1383, ll. 1-5. "[T]here were television news reports nationwide about . . . the ability of law enforcement and the efforts that were being undertaken at the time to capture him." R. 1383, ll. 6-9. "[T]here were considerable publicity outlets at the initial trial down in Georgetown, all of which covered not only the Georgetown incident, but also the Horry County incident." R. 1383, ll. 10-14.

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[10] R. 1308, l. 1; R. 1333, ll. 14-17; R. 1358, ll. 22-25; R. 1414, ll. 9-12; R. 1424, ll. 21-24; R. 1457, ll. 18-21; R. 1515, ll. 14-16; R. 1552, ll. 9-10; R. 1576, ll. 6-24; R. 1594, l. 25- 1595, l. 2; R. 458, ll. 12-16; R. 500, ll. 10-16; R. 527, ll. 6-14; R. 563, ll. 4-9; R. 630, ll. 7-16; R. 755, ll. 20-25; R. 788, ll. 15-21; R. 801, L. 25 - 802, l. 5; R. 872, ll. 13-22; R. 880, ll. 1-6; R. 899, l. 25 - 900, l. 1; R. 935, ll. 23-25; R. 935, l. 23 - 936, l. 6; R. 1003, l. 17 - 1004, l. 12; R. 1103, ll. 14-19; R. 1143, ll. 1-11; R. 1166, ll. 4-12; R. 1212, ll. 4-6.

[11] R. 84, ll. 22-25; R. 102, l. 21; R. 168, l. 22; R. 264, ll. 11-15; R. 278, ll. 9-10; R. 402, l. 17- 403, l. 5; R. 437, l. 21- 438, l. 5; R. 635, ll. 16-20; R. 708, ll. 13-19.

Further, "given the number of people that actually showed up here – the number of people who demonstrated some knowledge – not only about the case, but about the death sentence that has been imposed, and that's still in effect against Mr. Stanko – I would submit, it's just not possible to me that [the] reliability requirement [mandated for death penalty cases] under the Eight Amendment [can been met] in this particular setting." R. 1384, ll. 12-19.

Defense counsel noted that he was forced to use all of his ten peremptory strikes to keep individuals off the jury who had prior knowledge of appellant and his previous conviction and sentence and, therefore, could not strike Juror # 480. Defense counsel explained that they would have also struck Juror 480 "because she has prior knowledge of the case and she did know about Mr. Stanko's death sentence." R. 1386, l. 6 – 1387, l. 15. "Someone who knows that this defendant is under a death sentence, they're just not going to be able to take as seriously the responsibilities in this case." R. 1388, ll. 7-10.

Defense counsel also reminded the judge that one of the prospective jurors who knew of Stanko's previous death sentence stated that she did not understand why this second trial was "not a waste of time." R. 1388, ll. 11-15. She did not understand why the court did not "go ahead and carry out the sentence that's been imposed." R. 1388, ll. 16-18.

Defense counsel argued this prospective juror demonstrated the lack of responsibility jurors who had prior knowledge of Stanko's previous death sentence would feel in this case. It's just "human nature." R. 1388, ll. 19-20. "Mr. Stanko's character is already at issue." R. 1389, l. 4.

Appellant also argued that the sheer number of potential jurors qualified by the court with specific knowledge of the prior case compelled appellant to use all of his preemptory challenges for reason alone. R. 1386, ll. 6-7; 1393, ll. 3-23; 1248, ll. 11-17. The defense was forced to strike individuals who were not death prone because of their prior knowledge of appellant's criminal history. "We had to actually strike jurors that we otherwise would've wanted to have on this jury because of their softness, so to speak, on the issue of the death penalty. But, we had felt like we had to strike them because of the prior knowledge of the case." R. 1393, ll. 3-23.

Defense counsel stated that the defense did not have the ability to exercise appellant's peremptory challenges in the manner that it normally would because of the widespread knowledge of appellant's prior murder in the venire. R. 1414, ll. 14-18. Appellant argued that this is "an infringement of his Sixth Amendment right to counsel and the right to be [able] to develop a strategy that's designed to defend someone in a capital setting." R. 1415, ll. 8-11.

Counsel further noted the defense was forced to seat a juror who was a victim of an armed robbery because the available peremptory challenges *had to be used* to remove jurors who had knowledge of appellant's crime spree. R. 1391, ll. 15-18. That prior knowledge of appellant's conviction or criminal history is the "[t]ype of knowledge that puts this defendant's character at issue to the point that there is nothing that could be done to rehabilitate him and to show that he's innocent. There's no presumption of innocence here, or any presumption with respect to his character." R. 1413, ll. 14-20.

In denying appellant's motion, the trial judge ruled that the voir dire was adequate and each potential juror had been thoroughly questioned by the court, the state, and the defense and said that they could be both fair and impartial. R. 1421, l. 18 – 1423, l. 14.

Discussion

A criminal defendant is entitled to an impartial jury, "free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the trial judge's duty to ensure that the jury is fair and unbiased. State v. Gaskins, supra. The failure to ensure juror impartiality "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

The denial of a motion to change venue based on pretrial publicity may violate due process. Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723 (1963). To establish such a violation, the defendant must either demonstrate "identifiable prejudice" or circumstances that involved "such a probability that prejudice will result that that [the trial] is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-543 (1965); Rideau, supra.

A motion to change venue is within the sound discretion of the trial court. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). There is no error if the jurors "had the ability to set aside any impressions or opinions" created by the publicity and to make their decision based on the evidence presented at trial. Sheppard; Manning. However, the jurors' own assurances that they are "equal to the task cannot be dispositive of the accused's rights." Murphy v.

Florida, supra, 421 U.S. at 800. In certain cases, exposure to inflammatory pretrial publicity creates such a presumption of prejudice "the jurors' claims that they can be impartial should not be believed." Patton v. Yount, supra, 476 U.S. at 1031

This Court has held that when jurors have been exposed to pretrial publicity, the trial court's denial of a change of venue is not reversible absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); Sheppard, supra; Manning, supra. Appellant's case is extraordinary because of the volume and saturation of the news coverage. Nearly one-half of the perspective jurors questioned by the court and the resulting petit jury had heard about the case through regular coverage, from every local news outlet, spanning years between the incident date until the morning of trial. The sheer pervasiveness of the coverage, is sufficient, in this case, to create a presumption of prejudice. See Irvin v. Dowd; Rideau v. Louisiana; Patton v. Yount, all supra.

This case was the most infamous and widely publicized case in Horry County that appellant is aware of, and if ever a case called for a change of venue it was this case. See, State v. Davis, 138 S.C. 532, 137 S.E.2d 139 (1927) (murder conviction reversed because of intense feelings against Davis following the murder in Fairfield County). As defense counsel argued he was forced to seat a juror who was a victim of an armed robbery because the available peremptory challenges *had to be used* to remove jurors who had knowledge of appellant's crime spree. R. 117, ll. 15-18. That prior knowledge of appellant's conviction or criminal history is the "[t]ype of knowledge that puts this defendant's character at issue to the point that there is nothing that could be done to rehabilitate him and to show that he's innocent. There's no presumption of innocence

here, or any presumption with respect to his character." R. 139, ll. 14-20. Appellant used all ten of his peremptory challenges to remove jurors who knew of the prior crime and even then had a juror deciding his fate that knew he had already been convicted of another murder and sentenced to death.

While appellant cannot pierce the privacy of the jury room, the juror was never instructed not to talk to other jurors about her knowledge of the prior trial. Further, as seen above, appellant had to accept jurors he otherwise would have struck because he had to remove potential jurors who were keenly aware of the prior murder. Appellant should now receive a new trial before an impartial tribunal.

5.

The trial court erred in excusing 85 perspective jurors during roll call because they were sixty-five or older given that such excusals violated the fair cross-section requirement of the Sixth Amendment by allowing the arbitrary removal of jurors on a basis unrelated to their ability to serve.

Relevant Facts

When the court and the state at trial sought to excuse a juror during roll call because she was sixty-five years of age or older the defense strongly objected:

> The Court: Norma Allen is over sixty-five. All right, 14-7-840, exemption from jury service, "No person is exempt from service as a juror in any court of the State except men and women sixty-five years of age or over." All right, what is in this affidavit, there's a statement that Ms. Allen is seventy years old. She suffered a stroke in June 2004, unable to drive. What is the State's position?
>
> Mr. Hembree: No objection to her being excused, Your Honor.
>
> The Court: The Defense position?
>
> Mr. Diggs: You Honor, with all due respect, we understand the juror's situation and are sympathetic to it, but our position has to be that, you know, sixty-five is not what sixty-five used to be, and we lose a lot of wisdom and experience in this situation, and we object to excusing anybody pursuant to that statute simply because it denies –
>
> The Court: So you're saying that 14-7-840 is unconstitutional?
>
> Mr. Diggs: Well, it is unconstitutional and it's just bad policy as well.

The Court: All right. I would respectfully decline to grant your motion to state that 14-7-840 is unconstitutional. 14-7-840 says, "No person is exempt from service as a juror in any court of this state except for men and women sixty-five years of age or over." The wording of that states that, therefore, if you read it, men and women over the age of sixty-five—I'm sorry—men and women sixty-five of age or over are exempt. It is clear, explicit. It is not—and I would respectfully decline to grant your motion to declare it unconstitutional. That person is excused.

Mr. Diggs: Your Honor, could—and, *of course, we based it on the fact that the segment—that segment of the population right now is growing, is significant in size more so than it was when that statute was written. Also, I'm asking for permission to apply that to every person so I don't—I mean every person over sixty-five so I don't have to make a motion every time that—*

The Court: If you have—no sir. If you have an objection to that particular person, you're going to need to raise it.

Mr. Diggs: All right, even if it's the same—

The Court: This person is—the date of birth, so it's clear, is January 25, 1939, age seventy, and further regarding this particular juror, there is information that the juror suffered a stroke in June of 2004.

Mr. Diggs: Well, and I understand that, and it may be that that might be a different ground for excusing her, but she didn't say in there that she was incapacitated because of the stroke. My wife has had a stroke, but she could certainly serve on a jury.

The Court: Very good. That juror is excused. Thank you very much.

Mr. Hembree: Your Honor, I think Mr. Diggs is trying to argue diminished age. I'm concerned about that.

The Court: All right. I do find 14-7-840 to be constitutional.

R. 38, l. 20 – 41, l. 7.

After this first excusal of a perspective juror because of her age, the court excused eighty-four other prospective jurors because they were sixty-five or older over the defense's objections.[12] The defense did not object to the excusal of other prospective jurors who were age sixty-five or older if they had a legitimate reason for seeking to be excused such as a medical condition, a previously planned trip, involvement in law

[12] Juror 14, R. 3170, l. 11 – 3171, l. 1; Juror 25, R. 3174, ll. 8-18; Juror 29, R. 3175, ll. 7-25; Juror 39, R. 3176, l. 25 – 3177, l. 11; Juror 52, R. 3180, l. 23 – 3181, l. 7; Juror 58, R. 3184, l. 18 – 3185, l. 3; Juror 62, R. 3185, l. 12 – 3186, l. 1; Juror 63, R. 3186, ll. 2-13; Juror 66, R. 3186, ll. 16-25; Juror 71, R. 3187, ll. 6-13; Juror 74, R. 3187, l. 20 – 3188, l. 2; Juror 82, R. 3189, l. 19 – 3190, l. 2; Juror 88, R. 3190, ll. 6-14; Juror 96, R. 3192, ll. 13-21; Juror 97, R. 3192, l. 22 – 3193, l. 6; Juror 141, R. 3202, ll. 3-11; Juror 147, R. 3203, ll. 9-14; Juror 152, R. 3204, ll. 6-13; Juror 160, R. 3204, l. 24 – 3205, l. 6; Juror 161; R. 3205, ll. 7-14; Juror 168, R. 3206, l. 15 – 3207, l. 1; Juror 169, R. 3207, ll. 2-11; Juror 173, R. 3208, ll. 2-9; Juror 178, R. 3210, ll. 9-15; Juror 194, R. 3211, ll. 14-21; Juror 196, R. 3211, l. 23 – 3211, l. 5; Juror 205, R. 3212, ll. 19-25; Juror 206, R. 3213, ll. 1-7; Juror 211, R. 3213, ll. 15-21; Juror 214, R. 3214, ll. 3-8; Juror 182, R. 3214, R. 3214, l. 21 – 3215, l. 1; Juror 189, R. 3215, ll. 14-21; Juror 225, R. 3217, ll. 14-19; Juror 232, R. 3218, ll. 9-19; Juror 235, R. 3219, ll. 12-17; Juror 244, R. 3222, l. 19 – 3223, l. 1; Juror 273, R. 3229, ll. 1-7; Juror 283, R. 3230, ll. 2-9; Juror 285, R. 3230, l. 22- 3231, l. 5; Juror 296, R. 3230, ll. 9-15; Juror 301, R. 3234, l. 22 – 3235, l. 4; Juror 306, R. 3235, l. 20 – 3236, l. 3; Juror 312, R. 3236, ll. 9-15; Juror 336, R. 3238, ll. 12-18; Juror 353, R. 3241, l. 24 – 3242, l. 5; Juror 355, R. 3242, ll. 15-22; Juror 356, R. 3242, ll. 15-22; Juror 365, R. 3244, l. 24 – 3245, l. 5; Juror 367, R. 3245, ll. 7-13; Juror 371, R. 3245, l. 24 – 3246, l. 5; Juror 395, R. 3250, ll. 4-11; Juror 404, R. 3252, ll. 5-12; Juror 434, R. 3257, ll. 7-14; Juror 435, R. 3257, ll. 15-23; Juror 447, R. 3260, ll. 16-24; Juror 465, R. 3263, ll. 17-23; Juror 476, R. 3268, l. 18 – 3269, l. 2; Juror 483, R. 3269, l. 21 – 3270, l. 3; Juror 520, R. 3274, ll. 12-19; Juror 525, R. 3275, ll. 17-23; Juror 526, R. 3275, l. 24 – 3276, l. 5; Juror 556, R. 3281, ll. 13-20; Juror 560, R. 3281, l. 22 – 3282, l. 4; Juror 591, R. 3286, l. 22 – 3287, l. 11; Juror 599, R. 3287, l. 21 – 3288, l. 2; Juror 623, R. 3291, l. 22 – 3292, l. 3; Juror 663, R. 3296, l. 20 – 3297, l. 2; Juror 665, R. 3298, ll. 4-10; Juror 666, R. 3297, ll. 11-18; Juror 674, R. 3298, ll. 7-17; Juror 675, R. 3298, ll. 15-22; Juror 681, R. 3300, ll. 3-9. Juror 7, R. 3309, ll. 13-23; Juror 61, R. 3311, l. 24 – 3312, l. 5; Juror 304, R. 3324, l. 24 – 3325, l. 5; Juror 436, R. 3333, ll. 2-9; Juror 551, R. 3340, ll. 4-11; Juror 584, R. 3342, ll. 16-24; Juror 697, R. 3352, ll. 12-19. Juror 49, R. 3389, ll. 10-20; Juror 50, R. 3389, l. 21 – 3390, l. 7; Juror 151, R. 3391, ll. 13-22; Juror 532, R. 3402, l. 18 – 3403, l. 2; Juror 697, R. 3411, ll. 12-19.

enforcement, being unable to fill out the questionnaire, or having to care for a family member.[13] There were a total of eighteen of these prospective jurors.

Only two prospective jurors, #38 and #510, waived their right to be exempted from serving on the jury because of their age. R. 531, l. 16 – 532, l. 4; R. 494, l. 17 – 495, l. 5. However, prospective Juror #38 was found not qualified to serve by the court for other reasons. R. 535, ll. 13-20.

While Juror #510 was found qualified by the court, she was later struck by defense counsel during jury selection because of her knowledge about Stanko's previous murder trial. R. 511, ll. 12-24. Another prospective juror over sixty-five, Juror #90, came in for jury qualification but requested to be exempted from service because the trial was close to the Thanksgiving holiday, not because of her age. R. 556, ll. 1-24. This perspective juror asked to be called at a later date recognizing her ability to serve on a jury. R. 557, ll. 5-6.

South Carolina Code Section 14-7-840

The above code section reads:

> No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section *may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate*. The jury commissioners shall not excuse or

[13] Juror 174, R. 3208, ll. 10-17; Juror 394, R. 3249, l. 20 – 3250, l. 3; Juror 445, R. 3260, ll. 7-14; Juror 175, R. 3268, ll. 10-17; Juror 523, R. 3275, ll. 7-15; Juror 527, R. 3276, ll. 6-16; Juror 541, R. 3279, ll. 8-15; Juror 569, R. 3282, l. 22 – 3283, l. 5; Juror 605, R. 3288, ll. 16-23; Juror 613, R. 3289, l. 17 – 3290, l. 2; Juror 614, R. 3290, ll. 3-11; Juror 630, R. 3292, l. 23 – 3293, l. 9; Juror 646, R. 3294, l. 21 – 3295, l. 3; Juror 653, R. 3296, ll. 7-14; Juror 678, R. 3299, ll. 3-11; Juror 679, R. 3299, ll. 12-19; Juror 680, R. 3299, l. 20 – 3300, l. 2; Juror 687, R. 3300, ll. 12-23.

> disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

(emphasis added). It is clear that under this section a prospective juror age sixty-five or older may, when summoned, request an exemption. The section does not automatically disqualify such jurors, and if they do not seek an exemption, the court may later find them qualified to serve on a jury. Therefore, the basis of the exemption of such citizens as jurors is arbitrary and unrelated to their ability to serve. Their age alone is the only requirement that needs to be satisfied in order for them to be exempted as jurors in this state.

Discussion

The United States Supreme Court long ago recognized that "[it] is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (1975), citing Smith v. Texas, 311 U.S. 128, 130 (1940). The Court has further stated that "The selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. at 528.

The Court noted, however, that "The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." Taylor v. Louisiana, 419 U.S. at 534 *citing* Rawlins v. Georgia, 201 U.S. 638 (1906). Such exemptions, the Court stated, do not pose substantial threats that the remaining pool of jurors will not be representative of the community. Id. This is

something defense counsel acknowledged at trial when it declined to object to perspective jurors sixty-five or older who had a legitimate reason for seeking an excusal.

In order to establish a prima facie violation of the fair-cross-section requirement, the appellant must show (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979).

Citizens sixty-five or older do make up a distinctive group in the community. The most compelling fact is that clearly a community made up of entirely of citizens under the age of sixty-five would be significantly different than a community comprised of all citizens. People sixty-five or older frequently share the same generational values and experiences. They have been alive through the same major world and national events and cultural changes. They are often more involved in their community and bring invaluable insight and wisdom to the jury simply based on their maturity. In addition, older citizens are often more rational and sensible as a result of their age. Therefore, such exemption dilutes the quality of community judgment represented by the jury in criminal trials. See Taylor v. Louisiana, 419 U.S. at 535.

The representation of citizens sixty-five or older in the venire from which the jury was selected in this case was not fair and reasonable in relation to the number of such persons in the community. This Court can take judicial notice that, according to the U.S. Census Bureau, the population of citizens sixty-five or older in Horry County in 2009, the year the trial took place, was 18.0 percent. U.S. Census Bureau, State and County

QuickFacts, http://quickfacts.census.gov/qfd/states/45/45051.html (Last visited July 26, 2011). This is a significant portion of the county's population. However, *only one of the qualified jurors was sixty-five or older*, almost completely eliminating the representation of 18.0 percent of the community's population in the venire from which the jury was ultimately selected.

This elimination of such a significant portion of the county's population is both unfair and unreasonable. It is untenable to advocate, as defense counsel argued, that in this day and age with the improvements in the fields of health and medical care, that all citizens age sixty-five and older can be automatically exempt over the telephone because of the fact that are simply sixty-five years old or older.

A large majority of sixty-five year old seniors today are healthy both physically and mentally and have the capacity to competently serve on a jury. Therefore, it is unreasonable to systematically exempt such citizens.

This argument is analogous to Taylor v. Louisiana. 419 U.S. at 534 where the Court held that: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties." Just as a change in societal views of the role of women and their occupations made the exclusion of women from jury service unreasonable in the 1970s, the improvement of medical care and the overall health of our nation's seniors has made the exclusion of citizen's sixty-five or older unreasonable today. A significant amount of such citizens are wholly qualified to serve on a jury.

The third element is easily satisfied in this case. It is clear that the underrepresentation of citizens sixty-five or older in the venire from which the jury was

ultimately selected is from their systematic exemption during roll call. The percentage of the original 700 prospective jurors who were identified by the court as age sixty-five or older was approximately 15 percent, a percentage that better reflects the percentage of such citizens in Horry County in 2009.

When excluding only the prospective jurors sixty-five or older who had a valid reason for excusal, the percentage merely drops to 12.5 percent, a percentage that is still clearly more reflective of the 18.0 percent found in the community than 0.02 percent, the percentage of citizens sixty-five or older that was ultimately in the qualified venire from which the jury was selected.

State v. Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002) involved a similar challenge but on an equal protection basis. As the North Carolina Supreme Court previously noted, "The adverse effects of growing old do not strike all equally or at the same time, and it is only sensible to allow trial judges to consider the individual when a prospective juror seeks to be excused because of his or her age." Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002). Because Section 14-7-840 allows for the arbitrary excusal of perspective jurors sixty-five or older when requested without first considering the individual's justifiable reasons for seeking to be exempt, such as a medical condition, it fails to satisfy the rational basis test. As previously noted, a significant number of prospective jurors sixty-five and older are wholly qualified and both physically and mentally competent to serve on a jury. Today, with the advancement of medical care and the overall health of U.S. citizens, it should be expected that such prospective jurors serve unless other grounds for an exemption or disqualification is provided. Therefore, it is irrational to automatically exempt perspective jurors sixty-five or older upon request.

Our Supreme Court should follow the North Carolina Supreme Court in its ruling that the excusal of "prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion." Rogers, 355 N.C. at 448, 562 S.E.2d at 877.

Based on these arguments, the trial court erred in its systematic exclusion of perspective jurors sixty-five or older in violation of the Sixth and Fourteenth Amendments, and appellant should, therefore, be granted a new trial.

6.

The court erred by ruling that appellant's execution as a brain damaged and mentally ill man would not violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should now shield an appellant with significant diminished capacity, as well as the mentally retarded from the death penalty.

Mental illness has long been statutorily recognized as a mitigating circumstance, just as mental retardation was prior to Atkins v. Virginia, 536 U.S. 304 (2002). See S.C. Code §16-3—20(C)(b)(2)(6) & (7). Likewise, the youth of the offender was similarly a statutory mitigating circumstance. See S.C. Code §16-3—20(C)(b) (7).

Mental illness or brain damage that causes a defendant to be unable to exercise judgment and control his impulses would surely also be a non-statutory mitigating circumstance. However, just as the mentally retarded and minors who commit murder can no longer be executed under the Eighth Amendments "evolving standards of decency," the same conclusion should be reached for a brain damaged defendant such as appellant whose brain damage or brain defects severely lessen his ability to control his impulses. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, supra.

At the October 8, 2009 at a pre-trial hearing defense counsel moved to declare S.C. Code §16-3-20 unconstitutional as it applied to appellant who had a structural and functional brain defects. "We've got experts in this case both who will testify one as to the structure and one as to the function. It's been measured scientifically." R. 3082, ll. 7-19.

Defense counsel told the judge that the defense would offer scientific evidence comparing appellant's brain to:

> [P]eople with good mental health, a big database which has been put together to show . . . the healthy brain . . . the mentally healthy individual should look like in terms of structure and how it should function under certain situations. What this case is going to show is that Mr. Stanko has this condition of hypofrontality. Its not something he chooses to have. Its something that he just has. We can speculate a little bit about how it got there and what causes it, and there will be evidence about that, but the fact of the matter is its something that exists in this case, again just like a missing limb might be existing from someone born with an obvious physical defect. We can see that. We are learning how to see those types of defects when they exist inside the brain, and that's what we've got in this case.

R. 3082, l. 16- 60, l. 11.

Defense counsel noted that the current status of the law was that appellant could be executed notwithstanding his brain defects. Counsel reminded the judge that in the United States we no longer execute the mentally retarded or minors: "We don't execute them because we know through maybe more obvious observable evidence that there's a problem with these people; their brains aren't working properly, and so we're going to cut them some slack and we, as an evolving society, we don't execute these people, because the Eighth Amendment would protect them. We are better than that." R. 3083, ll. 12-23.

Defense counsel argued that, when it came to a bar on the death penalty, that appellant's brain defects should not be treated any differently than mental retardation or young people whose brains had not yet fully developed: "If someone's brain is not

functioning properly because of their young age or because of mental retardation, then it's a proper thing that we do not execute, my argument is that in this case the same rationale should apply. We shouldn't execute people who have brain defects and that's what we have in this case..." R. 3084, ll. 4-24.

Solicitor Hembree argued: "This is not a condition that has been recognized by our Supreme Court like mental retardation or like that of a juvenile." The solicitor said that if there was evidence appellant had the requisite brain defects "the appropriate place and time for that issue to be argued and determined would be at the appellate level and we'd request that this issue—I mean excuse me, this motion be denied at this time." R. 3086, l. 5- 3087, l. 4. The judge denied the motion. R. 3087, ll. 5-23.

Discussion

In Winick, The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, 50 B.C. L. Rev. 785, 785 (May 2009), Professor Bruce Winick wrote:

> The U.S. Supreme Court's recent death penalty jurisprudence displays the Court's willingness to invalidate the death penalty for certain offenses or classes of offenders, including those with mental retardation and those who were under eighteen at the time of the offense. The Court has noted that the death penalty in these cases constitutes a disproportionate punishment because it fails to adequately serve the two primary goals of the Cruel and Unusual Punishments Clause: retribution and deterrence. Because the cognitive and volitional impairments caused by severe mental illness result in a parallel diminution in culpability and deferability, severe mental illness is an appropriate next frontier at which to apply the Court's emerging concept of proportionality. Social attitudes have only recently begun to shift toward opposing the death penalty for those with severe mental illness at the time of the offense. Nonetheless, the Court's recent death penalty

> cases teach that the Court may independently determine that execution of these offenders is a disproportionate punishment if it concludes that executing such offenders does not adequately serve the goals of retribution and deterrence.

In Roper v. Simmons, supra the Court concluded the death penalty is a disproportionate punishment for juveniles, and hence cruel and unusual punishment. The Court noted that juveniles are more susceptible to immature and irresponsible behavior, so their conduct is not as morally reprehensible as that of adults because they are still developing mentally and as human beings. Second, juveniles are more vulnerable to the influence of others and lack control over their immediate surroundings. Finally, since a juvenile's personality and sense of identity are still developing, it makes even the commission of a heinous crime insufficient evidence of an "irretrievably depraved behavior" or person.

Mentally retarded individuals also lack the capacity to appreciate the full consequences of their behavior. In Atkins v. Virginia, the Court therefore found a "per se" finding of diminished responsibility that exempts mentally retarded individuals from the death penalty.

Defense counsel here correctly argued that appellant's brain defects, which were discussed at length above in issue one, exempted him from the death penalty under the Eighth Amendment's "evolving sense of decency" standard. As seen, appellant's brain defects were attributed to his mother's complicated pregnancy when appellant was born in Guantanamo Bay, Cuba and he received reduced oxygen to his brain. There was also evidence that appellant was hit in the back of the head when he was about sixteen-years-

old with a beer bottle which damaged his frontal lobes. There was testimony appellant's frontal lobes could not repair themselves. R. 1543, l. 10- 1544, l. 1.

Dr. Ruben Gur also testified that appellant's damaged frontal lobes diminished his ability to distinguish between real and perceived threats. Dr. Gur also opined that appellant's brain abnormalities were extreme. R. 1653, l. 6- 1663, l. 3. Dr. Wu analogized appellant's brain defects to a computer in a Lexus or Toyota going "haywire" where you have "an out of control brain..." R. 1732, l. 13- 1733, l. 13.

In Gregg v. Georgia, 428 U.S. 153, 173 (1976), the plurality of the Court fashioned a three pronged analysis for determining whether a punishment constitutes cruel and unusual punishment under the Eighth Amendment. The first question is whether the punishment conforms to contemporary standards of decency. The second is whether the punishment is disproportionate to the offense, and the third is whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective.

As stated, our state's death penalty statute considers mental or emotional distress, capacity to appreciate, and age and mentality of the defendant as mitigating circumstances. We are not a weighing state and our legislature has deemed that any one juror can prevent a defendant from being sentenced to death. It is elementary that a jury may sentence a defendant to life imprisonment for "any reason or no reason at all, simply as an act of mercy." Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009).

South Carolina juries, obviously depending somewhat on geography, do not often return death sentences for defendants where there is strong evidence they are severely mentally ill. Further, such death sentences are not likely to be carried out: *e.g.* Fred

Singleton, Donney Council, Jamie Wilson. Moreover, often such mental illness are not wholly appreciated until the post-conviction relief stage. There is reason to believe that South Carolinians do not favor the execution of the mentally ill or those who are brain damaged for circumstances beyond their control because such punishment for conduct beyond their control is considered disproportionate.

As to penological objectives -- retribution and deterrence – the execution of the brain damaged and the severely mentally ill does not contribute to either goal. People who commit crimes because they are brain damaged or severely mentally ill are not going to be deterred by the fear of execution since they are unable to control their impulses in the manner a normal person is able to do so. Further, to execute the brain damaged and severely mentally ill therefore also constitutes the unnecessary infliction of pain and suffering that goes beyond any legitimate consideration of retribution.

Executing this brain damaged appellant, where there is strong evidence his brain defects prevented him from controlling his impulses would violate our contemporary standards of decency and therefore the Eighth Amendment to the United States Constitution.

Other jurisdictions

While Florida's proportionality analysis differs from this Court's in some respects, Florida has held that evidence of the respective defendant's severe mental illness made the death sentence a disproportionate punishment. See Offord v. State, 959 So.2d 187 (Fla. 2007), Crook v. State, 908 So.2d 350 (Fla. 2005), Green v. State, 975 So.2d 1081 (Fla. 2008).

In State v. Nelson, 173 N.J. 417, 483, 803 A.2d 1, 41 (2002) where the defendant's sentence was vacated on other grounds, the concurring Justice Zazzali, joined by Justice Long wrote that there were additional and compelling justifications for not executing the defendant: "I agree with defendant that her execution for crimes that are inextricably bound to her mental illness violates our State Constitution. The State's legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person. In defendant's case, it is constitutionally inadequate for a jury to consider her severe mental illness as merely a mitigating factor to be weighed among other aggravating and mitigating factors."

In Corcoran v. State, 774 N.E.2d 495, 502-03 (Ind. 2002), Justice Rucker wrote in dissent:

"[I] do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are 'cruel and unusual punishments' prohibited by the Eighth Amendment of the United States Constitution. Atkins v. Virginia, 536 U.S. 304 (2002). There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency. In that regard I associate myself with the dissenting opinion of Justice Pfeifer of the Ohio Supreme Court who noted:

> "Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of

> the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.... I believe that executing a convict with a severe mental illness is a cruel and unusual punishment."

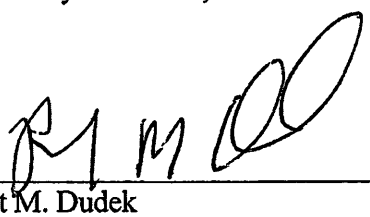
Ohio v. Scott, 92 Ohio St.3d 1, 748 N.E.2d 11, 20 (2001) (Pfeifer, J., dissenting).

Appellant strongly and respectfully submits that just as mentally retarded people and juveniles can no suffer the death penalty for the crime of murder, so to appellant, with his extreme brain defects should not, under our "evolving sense of decency," be eligible for execution under the Eighth Amendment to the United States Constitution.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,

BY: 

Robert M. Dudek
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This 22nd day of May, 2012

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 22nd, 2012

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 22nd day of May, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of May, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Steven H. John, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Appellant,

v.

STEPHEN CHRISTOPHER STANKO,

Respondent

Appellate Case No. 2010-154746

FINAL BRIEF OF RESPONDENT

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I. Judge John did not err in charging the jury on the permissive inference of malice from the use of a deadly weapon where Stanko offered an insanity defense, and even assuming *arguendo* error in charging this permissive inference, the error was harmless beyond a reasonable doubt where the jury found the State disproved the defense of insanity beyond a reasonable doubt, and there was overwhelming evidence of malice 7

II. Stanko's 2nd appellate ground is not preserved for appellate review and was waived and abandoned where Stanko requested the appointment of attorney Diggs as his counsel in this capital case and interposed no objection to Diggs appointment; furthermore, Stanko has shown no actual conflict of interest regarding Diggs' representation of him in the Horry County/Turner murder nor how any potential conflict affected Diggs' representation of him in the Horry County/Turner murder 17

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where appellant raised the defense of insanity which constitutes an excusable homicide and puts the existence of malice in issue factually, and the instruction in this case was in direct violation of the reasoning and logic of State v. Belcher?

2.

Whether the court erred by accepting a truncated and inadequate waiver of his attorney's conflict of interest in this case where defense counsel represented appellant in his prior trial at which appellant was sentenced to death and defense counsel was the subject of a pending accusation of ineffective assistance of counsel and the court's direction to defense counsel and appellant not to discuss the prior case was impractical and erroneous where the murders were committed closely together, and the insanity defenses at both were inextricably entwined?

3.

Whether the court erred by refusing to disqualify Juror #480 where she acknowledged she knew appellant had killed two people and received the death penalty for the prior murder, since the juror's knowledge appellant was under a death sentence jeopardized her sense of responsibility?

4.

Whether the court abused its discretion by refusing to grant a change of venue where Appellant's prior death penalty trial in Georgetown County, and the present murder, were the subject of very widespread publicity, since appellant was entitled to a fair trial by a jury that was not contaminated?

5.

Whether the court erred by allowing all jurors over 65 simply to opt out of jury service over appellant's objection that this denied him the wisdom and experience of that cross-section of the county, since this systematic exclusion of these jurors denied appellant a fair trial?

6.

Whether the court erred by ruling that appellant's execution as a brain damaged and mentally ill man did not violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should now shield an appellant with significant diminished capacity, as well as the mentally retarded from the death penalty?

STATEMENT OF THE CASE

On April 8, 2005, Appellant Stephen C. Stanko ("Stanko") murdered Charles Henry Turner in Conway, S.C. and stole his keys and pick-up truck. Stanko was arrested on a fugitive from justice warrant in Augusta, Georgia on April 12, 2005 and returned to South Carolina. Stanko was subsequently indicted by the Horry County grand jury in a two (2) count indictment for the murder and armed robbery of Turner (2005-GS-26-2927). (R. 3507, 2482, 1670-77, Tr. pp. 2074, 397-403)

The State sought the death penalty for Turner's murder. This Court appointed the Honorable Michael Baxley, Circuit Court Judge, to preside over this capital trial. William "Bill" Diggs and Brana J. Williams, Esquires were appointed to represent Stanko. The Honorable Steven H. John, Circuit Court Judge, was subsequently appointed by this Court to replace Judge Baxley as the presiding judge over this capital case.[1] (R. 2909, 3508, 3533, 1, Tr. Nov. 15, 2006, 1, Tr. p. 1).

Stanko proceeded to trial on November 14, 2009. At the conclusion of the guilt phase, the jury found Stanko guilty of murder and armed robbery. (R. 2482, Tr. p. 2074, ll. 2-25). At the conclusion of the penalty phase, the jury unanimously found the following aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed during the commission of an armed robbery; (2) the murder was committed for the purpose of monetary gain. The jury also unanimously recommended a sentence of death. (R. 2896, Tr. p. 2486, ll. 14-23). Judge John, following the jury's recommendation, sentenced Stanko to death for Turner's murder and thirty (30) years for armed robbery. (R. 2905-2906, Tr. p. 2495, l. 12 - p. 2496, l. 19). This appeal followed.

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[1]On information and belief, Judge Baxley removed himself from this capital case because he was assigned to the Georgetown capital PCR filed by Stanko arising out of his convictions and sentences there for a separate murder.

RESPONDENT'S STATEMENT OF FACTS

On April 8, 2005, around 4:00 a.m., Stephen Stanko ("Stanko") drove from Murrell's Inlet to Conway to the residence of Henry Turner, a friend. Stanko was driving a red Ford Mustang convertible, which belonged to his girlfriend. Prior to driving to Turner's residence, Stanko had called Turner and informed him that his, Stanko's, father had died. Turner, who was seventy-four (74) years old, told Stanko to come over to his residence, and he would console him. When Stanko arrived at Turner's residence, he parked the red Mustang in front of Turner's home. (R. 1472-1478, 1495-1502, 1857-1861, 1872-1874, 1880, 2706, 2710-11, Tr. pp. 198-204, 221-228, 1449-1453, 1464-1467, 1472, 2296, 2300-2301).

Stanko and Turner sat in the living room of Turner's home discussing Stanko's loss, i.e. the death of his father. During the conversation, Turner called his girlfriend in Charlotte, N.C. and informed her Stanko was there at the house and he, Turner, was trying to help Stanko deal with his father's death. Stanko and Turner talked most of the remaining night. (R. 1857-1861, 1868, 2706, 2710-11, Tr. pp. 1449-53, 1460, 2296, 2300-2301).

That same morning, after daylight, Turner drove his gray Mazda pick-up truck to a nearby McDonald's restaurant and got breakfast. He returned to his residence shortly thereafter. A neighbor spoke with Turner in the yard and noticed Stanko's red Mustang was parked at Turner's residence.[2] (R. 1503-1511, 1517-1531. 1587-1588, Tr. p. 229-237, 243-257, 313-314).

After returning to the residence with breakfast, Turner was shaving with an electric razor in front of his bathroom mirror. Unknown to Turner, Stanko's father had not died. Unknown to

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[2]The neighbor had seen Stanko driving the red Mustang before and assumed it belonged to Stanko. The car actually belonged to Stanko's girlfriend Laura Ling.

Turner, Stanko had murdered his girlfriend Laura Ling in Georgetown County, raped her daughter, cut the daughter's throat, and left her for dead. Stanko had also stolen Laura Lings' car, the red Mustang, and driven to Ling's bank and withdrawn several hundred dollars in cash before coming to Turner's residence.[3] (R. 1479-1494, 1472-1478, 1587-1588, 1590, 319-20, 1593-1594,1830-1851, 1857-1862, 1880, 2315, Tr. pp. 205-220, 198-204, 313-314, 316, 319-320, 1422-1443, 1449-54, 1472, 1907).

Either while Turner was at McDonald's getting breakfast, or while Turner was shaving, Stanko retrieved a .357 revolver loaded with .38 caliber bullets. While Turner was shaving, Stanko approached Turner from behind, and while placing a pillow over the gun to silence the weapon, shot Turner in the back. Turner turned around and walked a few steps to the doorway of the bathroom. Stanko struck Turner in the head with his hand or possibly the gun. Turner dropped to his knees. Stanko then shot Turner again, this time in the chest. Turner then collapsed on the floor dead. (R. 1599-1572, 1575-1597, 1598-1603, 1730-1745, 1746-1750, 1751-1757, 1830-1846, 1862-1863,1876-1877, 1884, Tr. pp. 285-298, 301-323, 324-329, 1322-1337, 1338-1342, 1343-1349, 1422-1438, 1454-1455, 1468-1469, 1476).

Stanko then removed items from Turner's pockets including the keys to his truck. Stanko then stole Turner's gray truck, leaving Ling's red Mustang convertible at Turner's residence. Stanko fled the coastal area of South Carolina in Turner's truck. (R.1532-1548, 1590, 1592, 1604-1677,1508-1509,1529-1531, 1830-1846, 1865-1867, 2239-2241, Tr. pp. 258-274, 316, 318, 330-403,

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[3]Stanko was previously convicted of Ling's murder, the attempted murder of her daughter (ABWIK), the kidnapping of Laura Ling, the kidnapping of the daughter, and the sexual assault (CSC 1st) of the daughter. Stanko was also sentenced to death by a Georgetown jury for the murder of Laura Ling. His convictions and death sentence were affirmed by this Court. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)

234-235, 255-257, 1422-1438, 1457-1459, 1831-1833).

Police were called to Turner's residence that same evening when Turner's son became worried about his father when he saw news reports that Stanko was wanted for the Ling murder. When police arrived at the residence, they found Ling's Mustang still parked in front of Turner's residence. Inside the residence, police found Turner's body face down on the floor with Turner's electric shaver next to his body. Police also found the pillow Stanko had used in an attempt to muffle the first shot fired into Turner's back and two (2) fired shell casings on the dresser.[4] Also found was a business card of Stanko. (R. 1532-1548, 1549-1557, 1559-1572, 1575-1597, 1598-1603, Tr. pp. 258-274, 275-283, 285-298, 301-323, 324-329).

Stanko appeared that same evening in the Congaree Vista area of Columbia, S.C. Stanko was seen partying at various restaurants or night clubs representing himself to be a successful businessman. Stanko was carrying a large amount of cash. Stanko bought drinks for most of the people he came into contact with that night. Witnesses noticed Stanko had an injury to his hand that was bandaged. Stanko told various stories regarding how he injured the hand. Stanko told one individual he hurt the hand while changing a tire on his vehicle. Stanko told another individual he had fallen while jogging in Charleston, S.C. earlier in the week. (R. 1604-1633, Tr. pp. 330-359).

Stanko appeared the following Monday in Augusta, Georgia where *The Masters* golf tournament was taking place. At this time, Stanko was again seen at a bar, and struck up a romantic relationship with another young lady, Dana Putnam. Stanko at this time represented himself to be the owner of several "Hooters" restaurants in the southeastern United States. Stanko's new girlfriend

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[4]The gun Stanko used to murder Turner was a revolver. (R. 1755-1756, Tr. pp. 1347-1348).

also noticed he had an injury to his hand. She also testified Stanko was spending a lot of cash. She also testified the entire time she was with Stanko he was driving a Mazda pick-up truck. Stanko told her the truck belonged to his mechanic, and his Jaguar was being repaired. After several days of being in Stanko's company, Ms. Putnam saw Stanko's picture in a local newspaper indicating he was wanted for the coastal South Carolina murders. She notified police. (R. 1634-1688, Tr. pp. 360-394).

A United States Marshall's task force located Stanko at a strip mall in Augusta, Georgia where Stanko was arrested. He waived extradition to South Carolina. (R. 1670-1677, Tr. pp. 396-403).

At the time of his arrest, Stanko was still in possession of Turner's Mazda pick-up truck. Found inside the truck were items linked directly to Stanko, including his business card, and a receipt for flowers he had bought his new girlfriend in Augusta. Also found in the truck was a .357 revolver fully loaded with .38 caliber ammunition. Police also found in the truck the key fob to a Ford Mustang automobile, and a notebook with Laura Ling's name on it. (R. 1670-1677, 1707-1724, 1867-1868, 1886 , Tr. pp. 396-403, 1299-1316, 1459-1460, 1478).

At Henry Turner's autopsy, the pathologist removed two fired .38 caliber bullets from Turner's body. A forensic firearms examiner later concluded the two .38 caliber bullets taken from Turner's body were fired by the .357 revolver recovered from Turner's truck, which was in Stanko's possession. (R. 1730-1757, 1867-1868, Tr. pp. 1322-1349, 1459-1460).

At trial, Stanko called a series of experts who opined that Stanko was insane and had, based on brain scans, a malformed frontal lobe of the brain. (R. 1811-1889, 1913-2009, 2012-2220, 2229-2250, 2254-2257, Tr. pp. 1403-1481,1505-1601, 1604-1812, 1821-1842, 1846-1849). The State

called several experts who established Stanko was not insane and that the frontal lobe of Stanko's brain was not malformed. (R. 2278-2319, 2320-2346, 2346-2410 , Tr. pp. 1870-1911, 1912-1938, 1938-2002). At the conclusion of the case, the jury was given four (4) different verdict forms for each crime charged: (1) Not guilty; (2) Not guilty by reason of insanity; (3) Guilty but mentally ill; and (4) Guilty. (R. 2413-2427, 2475-2476, Tr. p. 2005, ln. 22 - p, 2019, ln.11, p. 2067, ln. 19 - p. 2068, ln. 7). The jury found Stanko guilty of murder and guilty of armed robbery. (R. 2481-2485, Tr. pp. 2073-2077).

The Penalty Phase

In the penalty phase, the State established Stanko's bad character and future dangerousness. Stanko was on community supervision at the time he murdered Turner. Stanko had previously been convicted in Charleston, S.C. of kidnapping, obtaining goods by false pretenses, and multiple counts of breach of trust. Stanko served eight (8) and a half (½) years in prison for these offenses. After being released from prison, and while on community supervision, Stanko was representing himself to be an attorney, paralegal, or attorney's investigator and had defrauded several individuals of large amounts of money through his fraudulent cons and schemes. (R. 2504-2594, Tr. pp. 2094-2184).

In the penalty phase, the jury also heard the facts and circumstances surrounding Stanko's murder of Laura Ling, and the kidnapping, rape, and attempted murder of Ling's minor daughter. Stanko bound Laura Ling and strangled her to death. (R. 2603-2616, 2631-2676, 2681-2696, Tr. pp. 2193-2206, 2221-2266, 2271-2286). Stanko had also beaten, bound, and brutally raped her fifteen (15) year old daughter. After murdering Laura and raping her daughter, Stanko cut the daughter's throat and left her believing she was dead. Stanko then stole Ling's Ford Mustang, drove to Ling's bank, and withdrew the cash from an ATM machine. The following morning, Stanko called Ling's

employer, the Socastee Library, and informed them that Ling would not be coming to work because she was ill from food poisoning. (R. 2594-2601 , Tr. pp. 2184-2191). At the time Stanko made this call, the Socastee Library staff already knew police had discovered someone dead in the Ling home; however, Stanko was not aware Ling's body and that of her living daughter had been discovered in the early morning hours after he left the Ling residence. Ling's daughter had survived the brutal assault and called 911 using a cell-phone. Police were already looking for Stanko for the Ling murder when he made the call to the Socastee Library and when he murdered Turner and stole his truck. (R. 2603-2616, Tr. pp. 2193-2206)

ARGUMENT I.

Judge John did not err in charging the jury on the permissive inference of malice from the use of a deadly weapon where Stanko offered an insanity defense, and even assuming *arguendo* error in charging this permissive inference, the error was harmless beyond a reasonable doubt where the jury found the State disproved the defense of insanity beyond a reasonable doubt, and there was overwhelming evidence of malice.

What Occurred Below

At the charge conference below, Judge John indicated he would charge insanity and guilty but mentally ill. He also indicated he would charge murder and armed robbery and other legal concepts, such as malice, as is typically done. Stanko did not inquire how Judge John was going to instruct malice and raised no objection prior to the jury charge that the permissive inference of malice from the use of a deadly weapon should not be charged because he was raising the defense of insanity. (R. 2419-2428, Tr. pp. 2011-2020).

During the charge to the jury, Judge John instructed the jury on express malice and implied malice. Judge John instructed the jury express malice is shown when a defendant expresses his

intent to harm the victim prior to the homicide or makes plans or preparations for the resulting act. (R. 2472, Tr. p. 2064). With regard to implied malice, Judge John charged the jury on the permissive *inferences* of malice that may arise (1) from conduct showing a total disregard for human life, (2) the use of a deadly weapon, or (3) when one intentionally kills another during the commission of a felony. (R. 2472, Tr. p. 2064). Judge John also instructed the jury as part of his instruction on insanity that criminal intent is required to prove a defendant guilty of the crime charged, and a person who is insane cannot have criminal intent, and therefore cannot be found guilty of a crime. (R. 2470, ll. 12-16, Tr. p. 2062, ll. 12-16).

After the jury was charged, Judge John inquired if there were any exceptions, additions, or deletions to the charge. Stanko objected to the charge of the permissive inference of malice arising only from the use of a deadly weapon comparing his insanity plea/defense to self-defense as in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). (R. 2477-2478, Tr. pp. 2069-2070). Judge John indicated he had read Belcher thoroughly. (R. 2478-2479, Tr. p. 2070-2071). He disagreed with Stanko that pursuant to Belcher it was proper to delete the permissive inference of malice based on the facts of this case. (R. 2478-2479, Tr. pp. 2070, ln. 23 - 2071, ln. 1). Stanko did not object to the Court's charging the jury on the permissive inference of malice that arises from conduct indicating a total disregard for human life or the permissive inference of malice that arises from an intentional killing during the commission of a felony. (R. 2477-2480, Tr. pp. 2069-2072).

The Issue Raised on Appeal

On appeal, Stanko argues Judge John erred in charging the permissive inference of malice that arises from the use of a deadly weapon where he offered the defense of insanity. Stanko argues this Court should extend its holding in Belcher to cases where an insanity defense is offered.

The Lack of Merit of this Issue

Judge John was correct, and Stanko's reasoning is flawed. The purpose of this Court's holding in Belcher, was to prevent a false or misleading charge where a defendant acting in the heat of passion upon adequate legal provocation, in self-defense, or with criminal negligence killed someone with a firearm. Belcher, *supra*. The rationale for the decision in Belcher is not applicable in this case.

Stanko offered the defense of insanity. The jury first had to determine whether Stanko met his burden of proof to prove insanity by a preponderance of the evidence and then, if he did so, whether the State disproved Stanko's insanity, or stated another way, proved his sanity.[5] It is clear the jury found either Stanko did not meet his initial burden or the State had met its burden to disprove insanity beyond a reasonable doubt, because it rejected the verdict of Not Guilty by Reason of Insanity and the verdict of Guilty But Mentally Ill.[6] As a result, the inference of malice which arises from the use of a deadly weapon would still arise, and there could be no danger that the jury was laboring under a false or misleading charge, because Stanko presented no evidence of legal

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[5]Under South Carolina law, a criminal defendant is presumed to be sane. State v. Smith, 298 S.C. 205, 209, 379 S.E.2d 287, 288 (1989). Consequently, the State need not establish sanity in every case. The defendant has the initial burden of proving insanity by a preponderance of the evidence. S.C. Code Ann. Section 17-24-10(B) (2003). When a defendant presents evidence of insanity, however, the presumption disappears and the State must present evidence of the defendant's sanity. State v. Rimert, 315 S.C. 527, 446 S.E.2d 400 (1994), *cert denied* 513 U.S. 1080 (1995); State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993); State v. Milian-Hernandez, 287 S.C. 183, 185-86, 336 S.E.2d 476, 477 (1985). *Accord* State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989).

[6]Stanko did not assert or argue he was guilty but mentally ill but this verdict form was submitted to the jury as required by statute and by the decisions of this Court. S.C. Code Ann. Section 17-24-30; State v. Rimert, 315 S.C. 527, 446 S.E.2d 400 (1994); State v. Campen, 321 S.C. 505, 469 S.E.2d 619 (Ct. App. 1996).

provocation or heat of passion, self-defense, or criminal negligence/recklessness. Belcher, *supra*.

Further, the facts surrounding the killing of Henry Turner were not contested, even by Stanko's own crime-scene reconstruction expert. (R. 1830-1846, Tr. pp. 1422-1438). Stanko shot Turner in the back while Turner was shaving at a bathroom mirror. Stanko intentionally shot Turner in the back while using a pillow as a silencer. When Turner turned around, Stanko struck Turner in the face knocking Turner to his knees. Stanko then shot Turner again in the chest killing him. Stanko then went through Turner's pockets stealing Turner's keys and then stole his pick-up truck and fled the coastal area of South Carolina in Turner's truck. There was no evidence presented to the jury that Stanko was acting in self-defense. There was no evidence presented Stanko was acting in the heat of passion upon adequate legal provocation. There was no evidence presented Stanko was handling the firearm in a reckless or criminally negligent manner. The rationale for Belcher is not applicable here.

Additionally, malice and the defense of insanity do not intersect. South Carolina does not recognize the defense of diminished capacity, i.e. that because of mental disease or defect the defendant could not form the specific intent necessary to commit the crime. Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001); State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006)(relying on Gill). The defense of insanity deals with whether a defendant can recognize moral or legal right from moral or legal wrong or can recognize the act charged as morally or legally wrong. S.C. Code Ann. Section 17-24-10 (2003); State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997)("[The key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong'."), *quoting* State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992); State v. Senter, 396 S.C. 547, 722 S.E.2d 233 (Ct. App.

2011)(same). "The crux of the defense is the inability to distinguish right from wrong or to recognize the act charged as wrong." *McAnich, et. al, The Criminal Law of South Carolina, Fifth Ed.,* p. 567, S.C. Bar 2007. Additionally, a person is guilty but mentally ill if at the time of the offense he had the capacity to distinguish right from wrong *or* to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. S.C. Code Ann. Section 17-24-20(A)(2003)(emphasis added). The defense of insanity is not that the defendant could not form malice. Gill; Santiago. Malice and the defense of insanity simply do not intersect, therefore the permissive inference of malice from the use of a deadly weapon is not inappropriate where the defendant offers the defense of insanity. This appellate ground has no merit.

Regardless, the confusion this Court was concerned about in Belcher could not have occurred in this case based on the trial court's instruction to the jury regarding insanity and criminal intent. (R. 2464-2480, Tr. pp. 2056-2072). In charging the jury in this case, Judge John instructed the jury that a basic principle of law is that "criminal intent is required to prove the defendant is guilty of the crime charged. A person who is insane cannot have criminal intent, and therefore cannot be found guilty of a crime." (R. 2470, ll. 12-16, Tr. p. 2062, ll. 12-16).

The trial court also explained malice in detail, both express malice and inferred malice. The Court instructed the jury that express malice is shown when a person speaks words which express hatred or ill-will for another, "or when the person prepared beforehand to do the act which was later accomplished." (R. 2472, ll. 12-16, Tr. p. 2064, ll. 12-16). In this case there was extensive evidence Stanko prepared beforehand to do the act which was later accomplished by arming himself with a loaded firearm, approaching the victim from behind while he was shaving, and picking up a pillow

and placing it over the gun and using the same as a silencer. Stanko did not challenge this jury instruction below and is not challenging it now.

Additionally, Judge John instructed the jury on implied malice. The Court explained other inferences of malice beside the permissive inference of malice from the use of a deadly weapon. (R. 2472-2473, Tr. pp. 2064-2065). The Court instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life." (R. 2472, ll. 16-17, Tr. p. 2064, ll. 16-17). The Court also instructed the jury that malice may be inferred if one intentionally kills another during the commission of a felony. (R. 2472, ll. 23-24, Tr. p. 2064, ll. 23-24). Appellant did not object to these charges below and has not objected to them on appeal. (See BOA). And, this Court did not obviate any of these charges in its decision in Belcher. The State established implied malice at trial. The State established Stanko's conduct showed a complete disregard for human life, and the State proved Stanko intentionally killed Henry Turner in the commission of an armed robbery. The jury could not have been confused by the court's charge as in Belcher. This ground of Stanko's appeal must be dismissed.

Harmless Error

Even assuming *arguendo* that the defense of insanity and malice do intersect, and Judge John erred in charging the permissive inference of malice from the use of a deadly weapon, the error was harmless beyond a reasonable doubt where there was overwhelming evidence of malice. Belcher, 385 S.C. at 611. Errors, including erroneous jury instructions, are subject to harmless error analysis. *See* Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008).

As this Court noted in Belcher, "[i]n many murder prosecutions, as Belcher concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon." Belcher, 385 S.C.

at 611. As this Court noted in the footnote immediately following the just quoted passage, even Belcher conceded that: "In many, if not most murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption ... Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." Id., n. 8, *quoting* BOA, Belcher, p. 9. Likewise, the evidence of malice in this case was overwhelming justifying a finding of harmless error. Belcher.

Stanko surreptitiously gained entry into the victim's home by telling the victim that his father had just died, when in fact Stanko's father had not died, but Stanko had murdered his girlfriend, raped her daughter, cut the daughter's throat, stolen his girlfriend's car, and withdrawn money from his girlfriend's bank account using an ATM machine. Stanko continued this deception by fraudulently leading the victim to believe that he was grieving for his deceased father. The victim sat up with Stanko in the victim's home for several hours talking and attempting to console Stanko over the death of his father until daybreak. Either when the victim left to get breakfast or while the victim was shaving, Stanko obtained a .357 caliber handgun. Stanko either loaded the handgun with .38 caliber bullets or knew the weapon was already loaded when he retrieved it. Stanko approached the victim from behind while the victim was distracted shaving. Stanko inserted the pistol into a pillow in an attempt to silence the weapon before he shot the victim in the back. Stanko shot the victim in the back while the victim was defenseless using the pillow as a silencer. When the victim turned after being shot, Stanko struck the victim knocking him to the floor. Stanko then shot the victim again in the chest while the victim was on his knees. Stanko rendered the victim helpless by killing him.

After killing the victim, Stanko then emptied the victim's pockets. Stanko then took the

victim's car keys and stole the victim's gray pick-up truck. Stanko left Laura Ling's stolen red Ford Mustang in the victim's driveway. Stanko then fled the coastal area of South Carolina in Turner's gray pick-up truck. Stanko was arrested in Augusta, Georgia still in possession of Turner's truck and in possession of the murder weapon. However, Stanko had reloaded the weapon after murdering Turner.

Stanko's own crime-scene reconstruction expert agreed to the basic facts set forth above. (R. 1830-1846, Tr. pp. 1422-1438). And, the State's evidence established the same. There was no evidence presented to the jury that Stanko and the victim quarreled. There was no evidence presented Stanko was acting in self-defense. There was no evidence presented the victim did anything to provoke his murder. There was no evidence before the jury that Stanko handled the weapon with criminal negligence which would authorize a charge on involuntary manslaughter. Instead, there was overwhelming evidence of malice.

"Under South Carolina law, '[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.'" Belcher, 385 S.C. at 609, n. 5, 685 S.E.2d at , n. 5; State v. Fennell, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); *see also* State v. McDaniel, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904)(same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." Id.; Arnold v. State, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); *see also* Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984)(same); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct. App. 2007)(same).

Furthermore, malice is said to be expressed where there is manifested a violent, deliberate,

intention unlawfully to take away the life of another human being. Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984). And, "[m]alice has been defined as the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480 (1987). Finally, malice can be supplied or inferred by the commission of a felony dangerous to human life, such as armed robbery. Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (19730, *cert. denied* 416 U.S. 968; State v. Norris, 285 S.C. 86, 91-92, 328 S.E.2d 339, 342 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956).

Stanko's actions in murdering the victim to steal the victim's car and escape the coastal area of South Carolina show a formed purpose and design to do a wrongful act under circumstances that exclude any legal right to do so. Belcher; Fennell; McDaniel. The evidence in this case demonstrated wickedness, depravity, and a heart devoid of social duty and fatally bent on mischief. Belcher; Arnold; Singletary. The evidence showed Stanko intended to injure the victim so he could steal his vehicle. The evidence showed Stanko intended to kill the victim. The evidence established Stanko killed the victim in the commission of an armed robbery. Any error in charging the jury on the permissive inference of malice from the use of a deadly weapon, was harmless given the overwhelming evidence of malice in this case.[7] Id. This ground of this appeal must be dismissed with prejudice.

Further, Stanko presented expert testimony, if believed, that he was insane when he murdered

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[7]The facts of this case are similar to those facts set forth in Belcher's brief in which he conceded the evidence of malice would be overwhelming and there would be no prejudice to the defendant from the challenged charge even if charged as a presumption. Id. at 611, n. 8. Stanko's father was not dead. Stanko deceptively gained entry into the victim's home. Stanko shot the victim to steal his truck and escape the coastal area of South Carolina.

Henry Turner. The State produced evidence and expert witnesses that disproved that Stanko was insane when he murdered Henry Turner. At the close of the guilt phase, the jury was appropriately instructed that where the Defendant appropriately raises insanity as a defense, the State must prove the Defendant's sanity beyond a reasonable doubt. The jury returned a verdict of guilty of murder and armed robbery. The jury necessarily found either Stanko did not prove insanity by a preponderance of the evidence or the State had proved Stanko's sanity and disproved insanity beyond a reasonable doubt. The jury also rejected a verdict of guilty but mentally ill. Therefore, since the jury found Stanko was sane and not mentally ill, any finding of malice based on the charge of the permissive inference of malice arising from the use of a deadly weapon was appropriate and could not be prejudicial to Stanko. This appellate ground has no merit and must be dismissed.

Additionally, any error in charging the permissive inference of malice from the use of a deadly weapon would be harmless in this case where the Court charged the jury on express malice and instructed the jury that express malice is shown where the defendant prepared beforehand to do the act which was later accomplished. (R. 2472, ll. 12-16, Tr. p. 2064, ll. 12-16). And, the evidence in this case showed Stanko did exactly that: armed himself with a loaded pistol, approached the victim from behind while he was occupied shaving, and shot the victim in the back while using a pillow as a silencer.

Additionally, any error in charging the permissive inference of malice from the use of a deadly weapon would be harmless in this case where the Court charged other permissive inferences of malice to which Stanko did not object and those permissive inferences of malice are applicable in this case. The jury was instructed that malice may be inferred where the defendant's conduct indicates a total disregard for human life. The jury was also instructed malice may be inferred where

the defendant intentionally kills another during the commission of a felony. Both of these facts were established by the evidence in this case. The evidence showed Stanko acted with complete and total disregard for human life, and he killed Henry Turner in the commission of an armed robbery. As a result, this appellate ground has no merit.

ARGUMENT II.

Stanko's 2nd appellate ground is not preserved for appellate review and was waived and abandoned where Stanko requested the appointment of attorney Diggs as his counsel in this capital case and interposed no objection to Diggs appointment; furthermore, Stanko has shown no actual conflict of interest regarding Diggs' representation of him in the Horry County/Turner murder nor how any potential conflict affected Diggs' representation of him in the Horry County/Turner murder.

This ground is not preserved for appellate review. At several hearings before Judge Baxley and Judge John, Stanko specifically requested that William "Bill" Diggs be appointed to represent him in his 2nd death penalty trial (the Turner murder case) or that Diggs remain as his attorney in his 2nd death penalty trial (the Turner murder case). Diggs had previously represented Stanko in his first capital murder trial (the Ling murder case) in Georgetown County.

The State expressed its concern in Diggs' representation because Stanko had filed a post-conviction relief (PCR) application against Diggs in regards to his representation of Stanko in the Ling case in Georgetown County. Stanko insisted that Diggs represent him in the Turner murder. Stanko explained that while Diggs made some mistakes in his first capital trial, Diggs would not make the same mistakes in his second trial. Stanko further explained that his defense to Turner's murder was the same, and Diggs was thoroughly familiar with the defense he was going to present and the facts and evidence in the case. Following Stanko's wishes, Diggs was appointed to

represent Stanko in the Turner murder case and Diggs was not removed from the case when this issue was raised several times by *the Court* or by *the State*. Stanko did not object to the appointment of Diggs, and in fact acquiesced to this ruling since this is exactly what he wanted and requested several times. Stanko never raised this issue to the trial court. Stanko now alleges on appeal that Judges Baxley and John erred, in appointing Diggs to represent him in the Turner murder case and not removing Diggs, even though that is exactly what he, Stanko, asked for repeatedly and received.

This appellate ground must be dismissed because it is not preserved for appellate review. Stanko made no objection to the appointment of Diggs as counsel in this case, and in fact requested that Diggs be his attorney and requested several times that he not be removed. He cannot now argue the lower court erred where Judge Baxley and Judge John gave him exactly what he wanted and repeatedly insisted on. *See* State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008)(*Stanko I.*), *citing* State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996)(no issue is preserved for appellate review if the objecting party accepts the trial court's ruling and does not contemporaneously make an additional objection); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998)(issue is not preserved where appellant acquiesced in court's ruling thereby waiving issue below); Ex Parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995)(a party cannot acquiesce to an issue at trial and then complain on appeal). Furthermore, an unchallenged ruling, right or wrong, is the law of the case. S.C. Coastal Conservation League v. S.C. Dep't of Health & Evnt'l Constol, 363 S.C. 67, 610 S.E.2d 482 (2005); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). Stanko cannot complain of an error he brought about himself. An appellant may not claim that the trial strategy he opted for warrants a new trial. State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007); State v. Babb, 299 S.C. 451, 455, 385 S.E.2d, 827, 829 (1989) ("[A] party cannot complain of an error which his own

conduct has induced."). This ground must be dismissed with prejudice.

The Lack of Merit of this Ground

Stanko also claims any waiver was truncated and not sufficient. The record demonstrates the opposite.

The Initial Appointment of Counsel Hearing

After the State served Stanko with its Notice of Intent to Seek the Death Penalty for the Turner murder, the Honorable Michael Baxley, Circuit Court Judge, was appointed by this Court to preside over this capital trial (the Horry County capital case/the Turner murder). On November 15, 2006, Judge Baxley held an appointment of counsel hearing with Stanko, William "Bill" Diggs, and the Solicitor with regard to this death penalty case (the Turner/Horry County murder).[8] At the November 15, 2006 hearing, Stanko requested that Diggs be appointed to represent him in the Horry County capital case.[9] Stanko specifically asked Judge Baxley *not* to appoint *Gerald Kelly*. Stanko indicated he had problems with Kelly's performance in the Georgetown County death penalty case. However, Stanko indicated to the Court that he had no problem with Diggs' representation in the Georgetown capital case. Stanko asked the court to appoint someone other than Gerald Kelly to be 2nd chair capital counsel. (R. 2909-2928, Tr. November 15, 2006, pp. 1-19).

Diggs also informed the Court that he saw no conflict in representing Stanko in the Horry County capital trial. Diggs indicated the defense in this capital case was going to be the same as the

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[8]Diggs along with Gerald Kelly had represented Stanko in the Georgetown capital case (the Ling murder). The Georgetown capital case was on direct appeal at the time the appointment of counsel hearing took place in this case. Gerald Kelly was not present at this appointment of counsel hearing.

[9]Stanko was questioned under oath in an *ex parte* hearing and expressed his desire that Diggs be appointed to represent him.

Georgetown capital trial;[10] it was a credible defense; he was thoroughly familiar with the case, and significant savings in time and resources would be saved if he represented Stanko again, i.e. another attorney would not have to get up to speed on the facts and defense. Diggs informed the Court that some continuity needed to be maintained with the previous defense team, and it only made sense that he be appointed since he was in charge of the medical testimony previously presented. Diggs informed the Court he had a good relationship with Stanko. (R. 2909-2928, Tr. November 15, 2006, pp. 1-19).

After hearing from Stanko and Diggs, Judge Baxley appointed Diggs as 1st chair capital counsel in this capital case. (R. 2909-2928, 3508, 3532, Tr. November 15, 2006, pp. 1-19 & Order Appointing Counsel). Judge Baxley also subsequently appointed Brana J. Williams, Esquire, as 2nd chair capital counsel on February 23, 2007, *not* Gerald Kelly, after hearing from Stanko and Diggs regarding their input for 2nd chair counsel. (R. 2909-2928, 3533, Tr. November 15, 2006, pp. 1-19 & Order Appointing Counsel, February 23, 2007).

The PCR Appointment of Counsel Hearing before Judge Baxley

Subsequently, Stanko, through appellate counsel Joseph Savitz and Katherine Hudgins, filed a PCR Application in the Georgetown capital case (the Ling murder). Judge Baxley was also assigned by this Court to that capital PCR matter. On December 8, 2008, Judge Baxley held an appointment of counsel hearing in the Georgetown capital PCR case. (R. 2929-2954, Tr. December 8, 2008, pp. 1-26). At that hearing, Stanko expressed his desire to have Diggs represent him in the Horry County capital case [Turner murder] even though he had filed a PCR application in

[10]As previously set forth in the statement of facts, Turner's murder occurred just a few hours after the murder of Ling and the attempted murder of her daughter.

Georgetown County regarding his conviction and death sentence for the Ling murder. Stanko informed Judge Baxley that he still desired to have Diggs represent him in the Horry County case/the Turner murder. Stanko explained to Judge Baxley that while Mr. Diggs may have made some mistakes in the Georgetown capital case, he would not make the same mistakes again, and Stanko still desired Diggs to represent him in the Horry County (Turner) capital case. Stanko further explained that the defense in this case was going to be the same, and Diggs was thoroughly familiar with the defense. Stanko also explained to Judge Baxley that he did not want to lose Diggs as his attorney in the Horry County (Turner) case because he filed a PCR action against Diggs in a separate case in Georgetown County. (R. 2947-2948, Tr. December 8, 2008, pp. 19-20).

Subsequently, Judge Baxley was removed as the trial judge for the Horry County (Turner) capital case. Judge Baxley remains the judge on the Georgetown capital PCR case. The Honorable Stephen H. John, Circuit Court Judge, was appointed by this Court to replace Judge Baxley and preside over this case (the Horry County capital case/the Turner murder).

The March 4, 2009 Hearing before Judge John

Judge John raised the issue of the viability of Diggs' continued representation of Stanko in light of the Georgetown PCR application at a March 4, 2009 hearing. Diggs informed Judge John that he had conferred with Stanko regarding any potential conflict, and Stanko still wished for Diggs to represent him in the Horry County death penalty case/the Turner murder. Judge John then questioned Stanko under oath. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Stanko explained his PCR application was filed with the assistance of Katherine Hudgins of the Office of Appellate Defense to stop his death sentence. Stanko explained to Judge John that he did not agree with the allegations of the PCR application against Mr. Diggs, only those against Mr.

Kelly. Stanko also explained that any allegations he raised against Diggs in the future would not affect Diggs' representation in this case. Stanko further explained that he wanted Diggs to represent him in this case, the Horry County case, because Diggs was familiar with the defense, which was the same as that offered in the Georgetown case, and Diggs believed in his case. Stanko stated that he knew of no other attorneys who believed in his case more than Diggs and Brana Williams. Stanko insisted that Diggs be his attorney in the Horry County case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Judge John engaged in a detailed colloquy with Stanko regarding his desire to have Diggs represent him in his Horry County capital murder trial. Judge John specifically questioned Stanko regarding the potential conflict of interest with regard to the PCR application against Diggs in the Georgetown capital murder case. Stanko informed the Court that he wanted Diggs to remain on the Horry County case. Stanko informed the Court that he did not wish to waive any claims of ineffective assistance against Diggs in the Georgtown County case, but if that is what he would have to do to retain Diggs on the Horry County case, then he might just have to do that. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

Judge John also engaged in a detailed colloquy with Diggs regarding his representation of Stanko in the Horry County [Turner murder] case. Diggs assured the Court he had no problem with Stanko filing a PCR Application against him regarding the Georgetown County case, and he was ready and able to represent Stanko in the Horry County case. Diggs assured the Court the fact that Stanko had filed a PCR Application in Georgetown County would have no effect on his ability to represent Stanko in the Horry County case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

After hearing from both Stanko and Diggs, Judge John allowed Diggs to remain as counsel

in the Horry County case because of Stanko's expressed desire, after careful thought, that Diggs remain on the case. (R. 2955-2970, March 4, 2009, Tr. pp. 1-16).

The June 5, 2009 Hearing before Judge John

On April 28, 2009, the State filed a motion entitled "Motion and to Notice of Motion to Review Status of Counsel for Defendant in Light of Post-Conviction Relief Action in Companion Case." (See Motion). A hearing was convened into the State's Motion on June 5, 2009, where the issue of Diggs continued representation of Stanko in light of the Georgetown PCR application was again addressed by the Court, Mr. Diggs, and Stanko. (R. 2971-2990, Tr. June 5, 2009, pp. 1-20).

At the hearing, the Solicitor informed the Court that Stanko's filing of the PCR Application in Georgetown County had waived the attorney-client privilege necessary to defend those allegations. The Solicitor informed the Court that it would not seek in any way to call Mr. Diggs as a witness in the Horry County case or to take advantage of any waiver of the attorney-client privilege in the Georgetown County PCR case in the Horry County capital trial. The State asked the Court to explore with Mr. Diggs and Stanko whether this caused any conflict that would necessitate the removal of Mr. Diggs in the Horry County capital trial.

Judge John conducted a detailed colloquy with Mr. Diggs. Diggs informed the Court again that Stanko wanted Diggs to remain on the Horry County case as his attorney. Diggs assured the Court that the filing of the Georgetown PCR case had no impact on his relationship with Stanko and did not affect his ability to represent him in the current action. Diggs also assured the Court that the filing of the PCR application had no impact or interfered with his representation of Stanko in the Horry County case. Diggs also assured the Court that the filing of the PCR application itself caused him no problems with his client, as he was an experienced attorney, and he would do his utmost to

represent Stanko in this case.

Judge John also noted on the record that this was the 3rd time this issue had been discussed. Judge John noted that Judge Baxley conducted an extensive hearing of record where Mr. Stanko was questioned about Mr. Diggs representation because Judge Baxley was aware of the filing of the PCR Application. Judge John noted that Judge Baxley found at that time that Diggs continued representation of Stanko was proper. Judge John noted that he had also conducted a hearing in which he questioned Mr. Stanko about all of these matters and the Court found at that point in time, based on what Mr. Stanko had told him and his knowledge of his rights under the Sixth Amendment to the U.S. Constitution and the numerous U.S. Supreme Court cases and South Carolina cases like State v. Sanders, that Stanko was aware of the issue, and he wanted Mr. Diggs to continue his representation of him. (R. 2978-2979, June 5, 2009 Tr. pp. 8-9).

Ms. Williams also informed the Court that she had discussed with Stanko his meeting with his PCR attorneys in the Georgetown County case, and the allegations that would be asserted against Mr. Diggs in the Georgetown PCR were regarding failure to object to certain evidence or failure to cross-examine further or more of a trial technique, and she saw nothing that she was aware of that would be waiving any privilege with regard to their [her and Diggs'] current defense of Stanko in the Horry County case.

Judge John questioned Stanko under oath again. Stanko informed the Court that he had met with his PCR attorneys in the Georgetown County case and nothing had changed since the last time he spoke with Judge John. Stanko informed the Court that he continued to want Diggs to represent him in the Horry County/Turner death penalty case. Stanko informed Judge John that there was free and open communication between he and Mr. Diggs despite the fact that Stanko had filed a PCR

action against Diggs in the Georgetown County case. Stanko informed the Court that he and Mr. Diggs were able to fully discuss all issues that he [Stanko] deemed necessary. Stanko informed the Court Diggs was not unresponsive or harboring any ill feelings against Stanko because of the filing of the Georgetown County PCR action. Stanko also informed the Court that he did not anticipate any problems in the future. Stanko informed the Court that the issues he was going to be raising in his PCR that had anything to do with Mr. Diggs had nothing to do with any issues that would create a conflict or cause any communication problems between Mr. Diggs and himself. Stanko further clarified that he was not waiving any issues he raised in the Georgtown PCR, but that did not mean he did not have 100% trust in Mr. Diggs in the upcoming Horry County trial. And, Stanko informed Judge John that he trusted Mr. Diggs "one hundred percent" in his ability to properly represent him in this Horry County action. And, he continued to want Diggs to represent him in this case. (R. 2979-2982, June 5, 2009 Tr. pp. 9-12).

At the conclusion of the hearing, Judge John found that Stanko had expressed on more than one occasion his full and complete confidence in the abilities of Mr. Diggs to represent him in the Horry County capital case. There was free and open communication between the defendant and Mr. Diggs. Mr. Stanko had raised no issue that would impact Mr. Diggs ability to properly represent Mr. Stanko in the upcoming trial, and therefore, the Court found that Mr. Diggs could continue to represent Mr. Stanko in the trial in November of 2009. (R. 2984-2985, June 5, 2009, Tr. pp. 14-15).

The August 24, 2009 Hearing before Judge John

The issue was addressed again at the August 24th hearing before Judge John. The Solicitor marked as an exhibit a "Statement of the Attorney General" setting forth that the Attorney General's Office would have no contact with Mr. Diggs regarding the Georgetown County PCR case while

Diggs was preparing for and trying the Horry County death penalty case. (Court's Ex. 1, "Statement of the Attorney General"). Judge John indicated again on the record that Mr. Stanko had clearly expressed his desire that Mr. Diggs represent him in this case. Mr. Diggs informed the Court that Stanko's desire had not changed. Stanko also indicated to the Court there was no change in his position that Mr. Diggs continue to represent him in the Horry County death penalty case. Judge John noted on the record that this issue had been addressed by Judge Baxley and by himself twice, and Mr. Stanko remained steadfast in his desire that Mr. Diggs represent him in this case, and both Diggs and Stanko had expressed the complete ability to cooperate and to properly present the defense of Mr. Stanko in this matter. The Court also noted that it considered the issue resolved unless and until Mr. Diggs or Mr. Stanko raised the issue to the Court. (R. 3015-3020, Tr. August 24, 2009, pp. 5-10).

The issue was never again raised to the Court by Stanko, Diggs, or Brana Williams. The Horry County capital case proceeded to trial in November of 2009. The Georgetown capital PCR case is still pending and has not gone to trial.

There simply is no merit to this ground. First, Stanko waived and abandoned any issue regarding any conflict or potential conflict of interest by his own conduct and insistence that Diggs represent him in the Horry County case.

Further, neither Diggs nor Brana Williams raised any objection to Diggs appointment to represent Stanko in the Horry County case at any time from their appointment through the trial of the case. This issue was waived and abandoned at the trial level.

While Stanko's appellate counsel argues that he could not have waived any conflict because he is insane, the jury rejected this contention, and the record shows Stanko did not contend he was

insane during any pre-trial proceedings or during the trial, only at the time of the Turner murder. In fact, Stanko was examined and found competent to stand trial and to assist his attorneys in his defense in this case. (R. 3365-3378, Tr. Nov. 4, 2009, pp. 1-14). And, Stanko was found competent to stand trial at his previous trial in Georgetown County by both the State's examining psychiatrist and his own expert. (R. 3365-3378, Tr. Nov. 4, 2009, pp. 1-14). The record also shows Stanko was completely coherent, articulate, intelligent, and sane at all hearings regarding this issue. (R. 1-3507, See all Transcripts). This argument has no merit.

Stanko also argues the waiver was not proper because Judge John instructed Stanko and Diggs not to discuss the prior case. This is incorrect and is not supported by the record.

Judge John instructed Diggs that he was not to discuss the pending *PCR action* in Georgetown County with Stanko because Stanko *was represented by counsel* in that action. Judge John did not instruct Diggs and Stanko that they could not discuss the prior Georgetown County death penalty case. In fact, the record shows Stanko and Diggs indicated to Judge John that the pending PCR action had not prevented them from discussing all matters that they needed to discuss to prepare Stanko's defense, which necessarily included the prior criminal case in Georgetown County. There is a difference between not discussing the PCR case, on which Stanko was represented by collateral counsel, and discussing the prior criminal case. This argument has no merit.

Finally, on this record, Stanko has failed to establish an actual conflict in Diggs representing him in the Horry County/Turner death penalty case. Stanko has pointed to nothing in the transcript that indicates Diggs did not properly represent him in the Horry County/Turner murder case. Stanko has pointed to nothing in the record that would indicate the filing or pendency of the PCR action in

Georgetown County had any effect on Diggs' representation of Stanko in this present case. As a result, this appellate ground has no merit and must be denied.

ARGUMENT III.

The trial court did not err in denying Stanko's motion to disqualify Juror #480 where the juror indicated under oath she would decide the case based solely on the evidence produced in the courtroom during the trial and not on any outside information, and she clarified under oath that where an aggravating circumstance was proved she could consider *and* impose either a life sentence or death sentence depending on the circumstances.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010), *cert. denied*; State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)(*citations omitted*). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id.; Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

In a capital case, a defendant has no right to a trial by any particular jury, only a right to a trial by a competent and impartial jury. State v. Caldwell, 300 S.C. 494, 338 S.E.2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the duty of the trial judge to see that a jury of unbiased, fair, and impartial jurors are impaneled. State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (1986).

The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the

evidence. State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2009) *citing* State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert denied* 498 U.S. 881 (1990); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Green; State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987).

A juror must be excused from service if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985)(*quoting* Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521 (1980). *See also* Green, 301 S.C. at 354, 392 S.E.2d at 160.

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do...If even one such juror is empaneled and the the death sentence imposed, the state is disentitled to execute the sentence.

Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). General protestations that the juror will follow the law, without the opportunity for further inquiry by the defendant, are not sufficient for "[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so." Id. at 734-36, 112 S.Ct. 2222. *See also* State v. Bennett, 328 S.C. 251, 257-58, 493 S.E.2d 845, 848 (1997)(holding juror's general statements he could be fair and impartial and follow the law were not sufficient in light of his later, unequivocal statement that he would just "go with the majority.").

As this Court recently held in State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011):

> This inquiry, however, "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Wainwright, 469 U.S. at 424, 105 S.Ct. 844. Thus, the record may not be entirely clear to the point of "unmistakable clarity" as to the juror's views, and situations will arise

> where a circuit court simply is left with a "definite impression" of a juror's qualifications following voir dire. Id. at 425-26, 105 S.Ct. 844. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." Id. at 426, 105 S.Ct. 844. Therefore, determinations of whether a juror is qualified to serve on a panel are left to the sound discretion of the circuit court. Green, 301 S.C. at 354, 392 S.E.2d at 160. In reviewing the circuit court's decision, we must examine the juror's responses in light of the entire voir dire and will not reverse the court's decision unless it is wholly unsupported by the evidence. Id. at 354, 392 S.E.2d at 160-61

Id. This Court's holding in Dickerson is controlling on this issue. The entire voir dire of Juror 480 shows she misunderstood the question or the law in responding to counsel's initial questioning regarding aggravating circumstances. (R. 624-646, Nov. 9-12 Tr. pp. 624-646). Upon further questioning by the trial judge, her responses to the Court's questions demonstrate she was Witherspoon[11] qualified. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).**

The record of the voir dire of Juror #480 shows that while she was familiar with Stanko's prior murder conviction and sentence, she testified she could disregard anything she knew about the case and decide this case based solely on the facts and evidence presented in the courtroom. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).** She was properly qualified in this regard. State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128 (2009)(critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial); State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied*, 128 S.Ct. 662 (2007)(same); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(similar); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(similar).

Additionally, while she initially testified on examination by Stanko's attorney that she would be inclined to impose death where an aggravating circumstance were found, the record shows she

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[11] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

was confused, as was Judge John by Stanko's attorney's questions in this regard. **(R. 624-646, Nov. 9-12 Tr. pp. 624-646).** When the law was explained to the Juror by Judge John, and she understood that a juror is never required to sentence someone to death, even when there is an aggravating circumstance proven, the Juror testified she could consider either a life or death sentence if an aggravating circumstance was proven, *and* she could impose either a life or death sentence if an aggravating circumstance was proven. **(R. 640-646, Nov. 9-12 Tr. pp. 640-646).**[12] The juror also indicated in her questionnaire that she was a Type III juror, that she could impose either a life or death sentence depending on the evidence presented in the case. **(R. 640-646, Nov. 9-12 Tr. pp. 624-646).** This appellate ground has no merit and must be dismissed with prejudice. State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011)(although juror unquestionably displayed equivocation on how he might vote should the State prove an aggravating circumstance, the State's rehabilitation revealed this was more the result of a misunderstanding of the trial process than any firmly held belief that he would automatically vote for the death penalty).[13] There is no merit to this appellate ground. Id.

Stanko also argues that it was error for Judge John to qualify this juror because she had heard or read that Stanko had been convicted of another murder and sentenced to death. This same argument has been previously raised to this Court and rejected several times. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(no error committed where trial judge qualified two jurors to serve,

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[12]Stanko argues in his brief that Judge John only asked the juror whether she could *consider* a life sentence if an aggravating circumstance were proven, and this was not sufficient to qualify her. (See IBOA, p.38, ll. 9-11). However, the record shows Judge John not only asked the juror whether she could consider a life sentence if an aggravating circumstance were proven, but also if she could *impose* a life sentence if an aggravating circumstance were proven. She testified she could do both. **(R. 641-643, Nov. 9-12 Tr. pp. 641-643).** The juror was properly qualified. Dickerson.

[13]Dickerson was decided after Stanko filed his Initial Brief in this appeal.

who admitted to reading a newspaper article revealing defendant's prior death sentence, where each juror when questioned, stated they could put aside their prior knowledge, and follow the law); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)(nine jurors who knew that defendant had been convicted in a separate capital case and received the death penalty, were properly qualified). *See also* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(trial judge did not err qualifying seven jurors that knew something about the case, including some who knew of the defendant's prior conviction and death sentence for the same murder, where each juror stated that they would set aside such knowledge and base their verdict on evidence presented). There is no merit to this argument. This ground of Stanko's appeal must be dismissed.

ARGUMENT IV.

Judge John did not err in denying Stanko's motion for a change of venue, and even assuming error Stanko cannot show any prejudice on this record.

Stanko alleges Judge John should have granted a change of venue because he had been convicted and sentenced to death in neighboring Georgetown County and there was widespread publicity. Judge John did not err in denying the motion to change venue, and Stanko cannot demonstrate prejudice on this record.

"When a trial judge grants or denies a motion for a change of venue after adequate *voir dire* of prospective jurors, the decision will not be overturned absent extraordinary circumstances." State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128 (2009); State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied*, 128 S.Ct. 662 (2007). "The moving party has the burden of demonstrating actual juror prejudice." Woods, 373 S.C. at 157; State v.Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

"When jurors have been exposed to pretrial publicity, a denial of a change of venue is not

error where 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." Evins, 373 S.C. at 412; State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). Therefore, the mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Id.

While there was certainly publicity surrounding these crimes, as in any capital case, the jurors were each questioned individually regarding what they had heard about the case. Each juror who was qualified and selected to serve in this case, if they had heard, read, or seen anything about the case, testified under oath that they could set aside what they knew or had heard and decide the case based solely on the evidence they heard in the courtroom. **(R. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916).** Stanko has presented no reason to question the sworn testimony of these jurors. Additionally, Stanko has pointed to no juror, of those qualified and not selected as petit jurors, who testified they could not set aside what they had read or heard about the case or any preformed opinion and decide the case solely on the facts and evidence presented in the courtroom. (See IBOA, p. 41, n. 9).

This Court has clearly held that the safest guarantee of a fair and impartial jury is voir dire. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007). Evins was a capital murder case that involved extensive pre-trial publicity including the fact that Evins had previously been convicted of sexual assaults and had been charged with another brutal murder in addition to the murder for which he was on trial. Even though some of the jurors in Evins had read about the other crimes, this Court held

that the trial judge did not err in refusing to change venue, finding the court's instructions and the jurors' answers under oath sufficient to insure a fair and impartial jury. Id. Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath that they would disregard anything they had read, heard, or seen about the case, and decide the case solely on the evidence presented at trial, Stanko has failed to show error or prejudice. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(when jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where 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. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing trial court's grant of a change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, the better practice is to try and seat a jury prior to ruling on a change of venue motion); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, not pre voir dire public opinion surveys); *See also* State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(change of venue not required where jurors are found to be able to lay aside exposure and base verdict on evidence at trial); State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998)(relevant inquiry is whether jurors have such fixed opinions that they cannot judge evidence impartially, and credibility of juror responses is for trial court). Given the jurors' responses under oath that they would decide the case based solely on the evidence introduced at trial, and this state's legal precedential standard for a change of venue, Judge John did not err in denying the motion for a change venue. State v. Kelsey, 331 S.C. 50, 68, 502 S.E.2d 63, 72 (1998)(finding no error by denying change of venue when nine of twelve seated jurors had heard some coverage of the case but told judge they could set aside what they heard and decide case on evidence presented);

see State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)(no abuse of discretion to deny venue change when eleven seated jurors and two alternates acknowledged exposure to media coverage but said they could be impartial and decide case on evidence presented). *See also* State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins.").

The issue is not whether the jurors had heard something about the case or whether there was publicity about the crimes prior to trial. Evins; Tucker; Manning. The critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial. Evins, 373 S.C. at 412, 645 S.E.2d. at 908. This ground of Stanko's appeal has no merit and must be dismissed.

Lack of Prejudice

Additionally, Stanko has failed to demonstrate prejudice. Stanko was tried by a fair and impartial jury. **(R. 1407-1412, 1418-1423, Nov. 13 Tr. pp. 133-138, 144-149).**

A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985) *overruled on other grounds* Torrence, *supra*; State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Stanko has shown none.

The record shows that of Stanko's petit jury panel only (2) jurors had heard or read about Stanko's prior crimes in Georgetown County and heard or read something about the Horry County case. Both testified they had not formed an opinion about the case, and could set aside whatever they

had read or heard and decide the case based solely on the evidence presented in the courtroom. **(R. 81-97, 624-646, Nov. 9-12 Tr. pp. 624-646).** The remainder of the ten (10) petit jury panel members, and the four (4) alternates, either knew nothing about the case or only had heard the name of the defendant. **(See R. 1418-1421, Nov. 13 Tr. pp. 144-147).**[14]

Each juror who was seated on the petit jury panel, if they knew anything about the case, testified they 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. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916).** Stanko has not shown any of the jurors in this case violated their oath or sworn testimony to disregard anything they heard or saw in the press and decide the case solely on the evidence produced in the courtroom.

Furthermore, the fact that Stanko committed the Georgetown murder and attempted murder could not have prejudiced the jury's ultimate determination of sentence. The jury was fully aware Stanko had murdered his girlfriend Laura Ling, and kidnapped, raped her daughter, and tried to murder her through the testimony elicited during the Horry County trial. **(R. 2603-2696, Tr. pp. 2193-2286).** The jury was also aware Stanko had stolen Ling's car and gone to her bank and

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[14]This paragraph was corrected from the Initial Brief of Respondent with the consent of opposing counsel because of a factual error. Judge John's summary of the jurors selected on R. 1418-19, Tr. pp. 144-145 that only one (1) juror knew about the case is incorrect. Judge John was relying on his notes. Two jurors actually had heard about the case. Both testified they could set this aside and decide the case solely on the facts and evidence presented in the courtroom.

withdrawn money from her bank account before going to Turner's residence. **(R. 1473-1531, 1533-1547, 1549-1557, 1559-1571, 1575-1602, 1634-1668, 1670-1676, 1857, 2594-2606, 2608-2616, 2631-2675, 2677-2696, Tr. pp. 199-257, 259-273, 275-283, 285-297, 301-328, 360-394, 396-402, 1449, 2184-2196, 2198-2206, 2221-2265, 2267-2286).** These facts were properly before the jury, therefore Stanko cannot show prejudice in the penalty phase. Evins, 373 S.C. at 414. Additionally, the fact that Stanko had previously been sentenced to death for the Ling murder was elicited *by Appellant Stanko* from one of his mitigation witnesses in the penalty phase; therefore, any prejudice in this regard was brought about by Stanko. **(R. 2768-2769, Tr. p. 2358, ll. 1-9, p. 2359, ln. 15-16).**

Accordingly, Stanko's complaint regarding prejudice is necessarily limited to the guilt phase. Id., at 414. Given the overwhelming evidence presented during that phase of his trial, Stanko cannot show prejudice. The guilt phase jury knew Stanko had taken Ling's car, driven to her bank and withdrawn money, and then driven all the way to Conway from Murrell's Inlet. The jury also knew Stanko had deceived the victim into admitting him into his home, waited until the victim was distracted before attempting to murder him, approached the victim surreptitiously from behind and shot the victim in the back using a pillow as a silencer, shot the victim again in the chest while he was on his knees, removed items from the victim's pocket after he rendered him helpless, stole the victim's truck leaving Ling's red Mustang behind, and fled the coastal area of South Carolina. Considering this evidence along with the State's medical expert testimony that Stanko was not insane and did not have any brain abnormality, Stanko cannot show he suffered any prejudice. Id., at 414.

Inasmuch as the trial court was able to select an unbiased jury pursuant to this Court's mandate in Manning; Evins, and Woods, there was no error in failing to grant a change of venue. **(R.**

1418-1421, Nov. 13 Tr. p. 144, ln. 15 - p. 149, ln. 14). *See* Woods, 382 S.C. at 158. *Accord* State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007)(grant or denial of change of venue after adequate *voir dire* of prospective jurors will not be overturned except in extra-ordinary circumstances). This appellate ground has no merit and must be dismissed.

ARGUMENT V.

Judge John did not err by allowing jurors over sixty-five 65 years of age to be excused from jury service pursuant to S.C. Code Ann. Section 14-7-840.

Stanko alleges Judge John erred by excusing those jurors who were sixty-five (65) years or older who requested that they be excused, because *allegedly* this constituted the systematic exclusion of a fair cross-section of the community. Stanko is wrong.

South Carolina recognizes a difference between "exemptions" and "disqualifications" from jury service. An exemption from jury duty does not disqualify a person from jury service, but rather, it is a personal privilege that the juror may claim or waive, and if he does not claim his privilege the parties have no right to object to him on this account. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001), *affirmed as modified on writ of cert.*, 353 S.C. 539, 579 S.E.2d 318 (2003); State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Graham, 79 S.C. 116, 60 S.E.431 (1908); State v. Toland, 36 S.C. 515, 15 S.E. 599 (1892); State v. Merriman, 34 S.C. 16, 12 S.E. 619 (1891). Conversely, a disqualification prohibits a juror from serving, regardless of whether or not the person desires to serve as a juror. Hughey, *supra*..

Pursuant to S.C. Code Ann. Section 14-7-840, men and women sixty-five (65) years of age

or over are *exempt* from jury service if *they* so *choose*. Hughey. They are not disqualified.[15]

Under the Sixth Amendment to the Constitution of the United States, a person charged with a crime has a right to a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 697 (1975). To establish his claim, Stanko must show there has been a systematic exclusion of a distinctive group in the community. Lockhart v. McCree, 476 U.S. 162, 174, 106 S.Ct. 1758, 1765 (1986). To show a prima facie violation of a defendant's federal constitutional Sixth Amendment right to a jury selected from a fair cross-section of the community the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664 (1979). To be "distinctive," a group must: (1) show a quality or attribute that defines or limits membership in the group; (2) possess a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) share a community of interest that may not be represented in other segments of the population. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (2002); State v. Price, 301 N.C. 437, 445-46, 272 S.E.2d 103, 109 (1980); Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73, 75 (1996). Once the defendant makes out a prima facie case, the State may rebut it if "a significant [S]tate interest" is "manifestly and primarily advanced by those aspects of the jury-selection process

[15]Under the former provisions of Article V, Section 22 of the 1895 Constitution of the State of South Carolina, each juror had to be a qualified elector, and between the ages of twenty-one and sixty-five years; and therefore jurors sixty-five and older were disqualified. State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958); State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912). That is no longer the case. *See* current S.C. Constitution, Article V., Section 22.

...that result in the disproportionate exclusion of a distinctive group." Duren, 339 U.S. at 367-368, 99 S.Ct. at 670.

The objective to be furthered by the fair cross-section requirement is the "assurance of a diffused impartiality." Commonwealth v. Soares, 377 Mass 461, 480, 387 N.E.2d 499 (1979). A jury need not mirror the population statistically to effectuate this goal. *See* Taylor v. Louisianna, 419 U.S. at 538, 95 S.Ct. at 701. States retain "broad discretion" and "remain free to prescribe relevant qualifications for their jurors and provide reasonable exemptions." Taylor, 419 U.S. at 538, 95 S.Ct. at 701. "Because a true cross section is practically unobtainable, courts have tended to allow a fair degree of leeway in designating jurors so long as the [S]tate or community does not *actively* prevent people from serving or actively discriminate, and so long as the system is reasonably open to all"(emphasis in original). Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985), *cert. denied* 475 U.S. 1050, 106 S.Ct. 1272 (1986).

Stanko's claim fails for several reasons. First, while age is a clearly identifiable factor, courts have recognized that age by itself does not generate similarity in attitudes and ideas, or demonstrate a commonality of interests that cannot be represented by citizens of a different age. Courts across the country that have considered a fair-cross section Sixth Amendment challenge to the type of age-based jury exemption provision presented here have rejected the same. *See* Stewart v. Carroll, 214 Ariz. 480, 154 P.3d 382 (Ct. App. Div. 1 2007)(finding statutory provision allowing jurors 75 years of age and older to opt out of jury service did not violate Arizona's constitutional rights to due process and a fair jury trial because under Arizona law these rights are identical to the federal rights and defendant failed to show those over 75 years of age and older constituted a distinctive group); Brewer v. Nix, 963 F.2d 1111 (8th Cir. 1992)(Iowa law exempting those over 65 from jury service

did not violate fair cross-section requirement because the group was not a distinctive group under Duren standards)[16]; Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73 (1996)(no violation of fair cross-section requirement in permitting senior citizens to be excused from jury duty at age 70 if they so choose); State v. Rodgers, 355 N.C. 420, 562 S.E.2d 859 (2002)(holding citizens over age of 65 do not make up a "distinctive group" for the purposes of determining whether defendant was denied his right to have a jury selected from a fair cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution or N.C. state constitution); Sellers v. State, 809 P.2d 676 (Okla. Crim. App. 1991); State v. Blunt, 708 S.W.2d 415 (Tenn. Crim. App. 1985)(refusing to hold, as the defendant alleged, that those 65 years of age and older are a distinctive group under a Sixth Amendment analysis); Weaver v. State, 823 S.W.2d 371 (Tex. Ct. App. 1992)(finding persons over the age of sixty-five (65) years of age did not constitute a "distinctive" group for Duren purposes); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990)(exemption of persons over 70 did not violate fair cross section because persons over the age of seventy did not constitute a "distinctive group" for purposes of the Sixth Amendment). *See also* Commonwealth v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980)(jury under-representation of 18 to 34 year olds not violative of Sixth Amendment as age not identifiable group and no intentional discrimination).

Furthermore, in the present case, the jurors Stanko objects to being excused from jury service were not systematically excluded as Stanko alleges. The jurors could have served if they wanted to. They were not disqualified. The jurors exercised their personal right to be exempted from jury service. S.C. Code Ann. Section 14-7-840; Hughey.

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[16]For example, the Court in Brewer noted that they saw no reason to believe that the qualities brought to a jury by people over sixty-five (65) could not be adequately represented by sixty (60) or fifty-five (55) year old jurors.

The Court did not disqualify or exclude them from jury service. Each juror exercised their personal right to be exempted. Stanko cannot show a certain portion of the community was systematically excluded from jury service where each individual juror made an *individual* decision to exercise their right to the exemption and not serve. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000)(an exemption from jury service is not a disqualification, but rather a personal privilege of the prospective juror, which the juror may claim or waive when deciding to serve on jury duty), *overruled on other grounds,* Rosemond v. Catoe. *See also* State v. Blunt, 708 S.W.2d 415 (Tenn. Crim. App. 1986)(finding defendant failed to prove systematic exclusion of a group where exemption of jurors over sixty-five (65) years of age was personal to each juror and jurors were summoned for jury service).

Furthermore, the record shows two (2) jurors over the age of sixty-five (65) chose to waive their personal exemption and serve. One juror was disqualified for a totally unrelated reason. The other juror was qualified and struck by Stanko. **(R. 531-532, 535, 494-495 511, 1311, Nov. 9-12 Tr. pp. 531-532, 535, 494-495, 511, Nov. 13 Tr. p. 37).** This ground has no merit and must be dismissed because jurors composing a certain portion of the community were not systematically excluded from jury service, but each individual juror sixty-five (65) years or older made his or her own personal choice to serve or not serve during that term of court. This appellate ground has no merit and must be dismissed.

Even if Stanko could make out a prima facie case, his claim would have to be rejected. Stanko has failed to show that this historically common exemption deprived him of a fair and impartial jury or otherwise frustrated the purposes of the Sixth Amendment's fair cross-section requirement. Brewer v. Nix, 963 F.2d 1111 (8th Cir. 1992); Silagy v. Peters, 905 F.2d 986,1011 (7th

Cir. 1990)(ultimate concern of the fair cross-section requirement is to ensure that each criminal defendant be afforded his constitutional right to an "impartial jury."). Accordingly, Stanko has failed to prove a Sixth Amendment violation. Id.

Furthermore, the exemption attacked by Stanko is a reasonable exemption. *See* Commonwealth v. Manning, 41 Mass. App. Ct. 696, 673 N.E.2d 73 (Mass App. 1996)(holding it was not unreasonable for legislature to have determined that, after persons had been subject for fifty-two years to compulsory service on juries, their civic duty on that score had been discharged); Sellers v. State, 809 P.2d 676 (Okla. Ct. Crim. App. 1991)(finding age exemption for jurors reasonable given the higher rate of infirmities suffered by the elderly and the likelihood of substantial hardship if they are compelled to travel and serve lengthy jury terms justified exemption); Weaver v. Texas, 823 S.W.2d 371 (1992)(age based exemption bore a fair and substantial relation to the objects that the legislation was designed to accomplish); State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (2002)(rational basis of allowing trial judges to excuse jurors based on advanced age is readily apparent).

As a result of all of the foregoing, this appellate ground has no merit. It must be denied.

ARGUMENT VI.

Judge John did not err in ruling that appellant's death sentence was not a violation of the Eighth Amendment to the United States Constitution.

In this appellate ground, Stanko alleges Judge John erred in not vacating his death sentence because he is a mentally infirm person. This ground has no merit for several reasons.

First, Stanko does not fall under any classification that has been recognized that would exempt him from application of the death penalty. Stanko is not mentally retarded; he has an I.Q.

of 143. (R. 2233, Tr. p. 1825). *See* Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002)(Eighth Amendment prohibits the execution of mentally retarded); State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003)(defining mental retardation). Stanko was forty-seven (47) years old at the time of the murder of Henry Turner. *See* Roper v. Simmons, 543 U.S. 551,125 S.Ct. 1183 (2005)(Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime). Furthermore, the State proved Stanko's sanity beyond a reasonable doubt. (R. 1707-1724, 1730-1746, 2278--2410, Tr. pp. 1299-1316, 1322-1338, 1870--2002). The jury rejected the verdict of insanity. (R. 2474-2476, 2482-2485, Tr. pp. 2066-2068, 2074-2077). Therefore, Stanko does not fall under this exemption. *See* Ford v. Wainwright, 477 U.S. 399 (1986)(Eighth Amendment precludes the execution of one who is insane).

Second, to date, Respondent is unaware of **any** majority decision by any state or federal court in the United States that would support such a classification as Stanko is suggesting. *See e.g.* State v. Irick, 320 S.W.3d 284, 297-98 (Tenn. 2010); Mays v. State, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); Johnston v. State, 27 So.3d 11, 26-27 (Fla. 2010); Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59 (2008). *See also, e.g.* ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007); In re Neville, 440 F.3d 220, 221 (5th Cir. 2006)(*citing* In re Woods, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir., Nov. 17, 2005)(unpublished); State v. Ketterer, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006); Matheney v. State, 833 N.E.2d 454 (Ind. 2005); Hall v. Brannan, 284 Ga. 716, 670 S.E.2d 87 (2008); Coleman v. State, No. W2007-0267-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App., Jan 13, 2010)(unpublished), *reversed on other grounds* 341 SW3d 221 (Tenn. 2011). In fact, this Court has rejected a similar argument and held that a defendant found guilty but mentally ill or who pleads guilty but mentally ill may be sentenced to death. State v. Weik, 356 S.C. 76, 587

S.E.2d 683 (2002), *cert. denied June 16, 2003*; State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

Further, Stanko cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. Mays, 318 S.W.3d at 379 & n. 25; Irick, *supra*; Johnston, 27 So.3d at 26-27.[17] Finally, Stanko has failed to show that whatever mental impairment he may have had at the time of the murder, if any, was so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled.[18] Mays, *supra*. Thus he cannot show error or prejudice. This appellate ground has no merit and must be dismissed.

Fourth, the jury rejected verdicts of both insanity and guilty but mentally ill. (R. 2482-2485, Tr. pp. 2074-2077). The jury determined Stanko was not mentally infirm.

As a result of all of the above, this ground has no merit. This ground of Stanko's appeal must be denied.

Proportionality Review

Respondent respectfully submits that pursuant to S.C. Code Ann. Section 16-3-25(c), the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(death sentence warranted where defendant convicted of murder

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[17]The Court in Irick pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders, who at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

[18] The jury rejected verdicts of not guilty by reason of insanity and guilty but mentally ill. **(R. 2474-2476, 2482-2485 Tr. pp. 2066-2068, 2074-2077).**

and armed robbery and jury found aggravating circumstances of murder in commission of robbery with a deadly weapon and murder during commission of a larceny with a deadly weapon, and defendant confessed to separate murder prior to present trial); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996)(murder of store owner in commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)(murder of convenience store owner during commission of an armed robbery); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981); State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996); State v. Damon; 285 S.C. 125, 328 S.E.2d 628 (1985).

CONCLUSION

For the above stated reasons, Stanko's convictions for murder and armed robbery and his sentences should be affirmed.

Respectfully submitted,

J. ANTHONY MABRY
Assistant Attorney General

By: _____
J. Anthony Mabry

ATTORNEY FOR RESPONDENT
P.O. Box 11549
Columbia, SC 29211

July 23, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Steven H. John, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Appellant,

v.

STEPHEN CHRISTOPHER STANKO,

Respondent

Appellate Case No. 2010-154746

CERTIFICATE OF COMPLIANCE

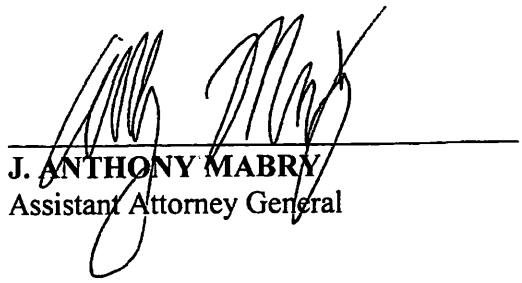
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

J. ANTHONY MABRY
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P.O. Box 11549
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July 23, 2012

CERTIFICATE OF SERVICE

I, J. Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 23rd day of July, 2012.



J. ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 23 2012
S.C. Supreme Court

July 23, 2012

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

Re: The State v. Stephen Christopher Stanko
Appellate Case No. 2010-154746

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the ***Final Brief of Respondent*** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
J. Gregory Hembree, Solicitor
Sandi Wofford, Victims Assistance

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COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
MAY 22 2012
S.C. Supreme Court

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

MAY 22 2012
SC OFFICE OF
APPELLATE DEFENSE

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEYS FOR APPELLANT

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State v. Binney, 384 S.C. 539, 683 S.E.2d 478 (2009) 6

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ARGUMENT IN REPLY

2.

The state's argument that the issue of the inadequate, impractical, erroneous waiver of defense counsel Diggs being appointed to represent appellant again during his second capital trial, while a PCR alleging Diggs was ineffective, a professional disgrace, in appellant's first capital trial was pending is procedurally barred because appellant wanted Diggs to represent him, and Diggs wanted to remain on the case, misses the entire point of the legal issue.

Appellant argued in his brief that the trial court, Judge John, erred by accepting a truncated and inadequate waiver of his attorney's [Bill Diggs] conflict of interest in this case where defense counsel represented appellant in his prior trial at which appellant was sentenced to death, and where defense counsel was the subject of a pending accusation of ineffective assistance of counsel from that first trial at the time of appellant's second death penalty trial. Appellant argued the court's direction to defense counsel and appellant not to discuss the prior death penalty case was impractical and erroneous where the murders were committed closely together, and the insanity defenses were identical at both trials and they were therefore inextricably entwined. Appellant's Brief at 20-29.

The state argues "Stanko made no objection to the appointment of Diggs as counsel in this case, and in fact requested that Diggs be his attorney and requested several times that he not be removed. He cannot now argue the lower court erred where Judge Baxley and Judge John gave him exactly what he wanted and insisted on." The State's Brief at 18.

The state further argues that: "Diggs also informed the Court that he saw no conflict in representing Stanko in the Horry County capital trial. Diggs indicated the defense in this

capital case was *going to be the same* as the Georgetown capital trial; it was a credible defense; he was thoroughly familiar with the case, and significant savings in time and resources would be saved if he represented Stanko again, i.e. another attorney would not have to get up to speed on the facts and the defense. Diggs informed the Court that some continuity needed to be maintained with the previous defense team, and it only made sense that he be appointed since he was in the charge of the medical testimony previously presented. Diggs informed the Court he had a good relationship with Stanko." Respondent's brief at 19-20.

The defense in fact sank like a stone and the jury convicted Stanko of murder in thirty minutes after hearing eight defense witnesses and four hundred forty-eight transcript pages of the defense case. R. 2481, l. 6 – 2482, l. 25. Further, defense counsel was paid by the state for his representation.

This issue is not procedurally barred. In short the fact counsel Diggs wanted to stay on the case and that appellant asked that Diggs represent him is inconsequential to any analysis of this issue. As argued in appellant's brief the trial judge at the March 4, 2009 pre-trial hearing, sua sponte, noted he was aware appellant had filed a post-conviction action alleging trial counsel Diggs provided ineffective assistance of counsel during the first trial. R. 2957, ll. 17-25. This Court will recall, the judge unprompted stated it appeared at "least questionable, if not inconsistent, that Mr. Diggs remain as trial counsel in this particular case when a post-conviction relief has been filed against him by Mr. Stanko." R. 2958, ll. 1-6; Appellant's Brief at 20.

While Diggs, as noted in the state's brief, pushed the "continuity" of the prior death penalty trial with appellant, the judge here ultimately told him "there are boundaries

obviously that you cannot communicate with Mr. Stanko about that . . . . there are issues and things you may not discuss with him." R. 2958, ll. 1-6; Appellant's brief at 20. This is hardly the basis for an attorney-client relationship in the defense of capital murder, where the cases were, as noted, inextricably entwined, in particular as to Stanko's mental state. Where the defense was again insanity and it had already failed one time in a death penalty case that is hardly a moving argument in support of the status quo. See, SC Code 1976, § 20-7-110(2); See also, Von Moltke v. Gillies, 332 U.S. 708, 725 (1948); U.S. v. Wheat, 813 F.2d 1399 (Cal. 1987). "The effective assistance of counsel is a necessary requisite of due process of law." Rogers v. State, 261 S.C. 288, 290, 199 S.E.2d 761 (1973), citing, State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968). Further, an attorney should not represent a defendant where counsel's adequacy is in question. See, People v. Norris, 46 Ill.App.3d 536, 541, 361 N.E.2d 105, 110 (Ill. App. 1977).

Regardless of Diggs wanting to remain as counsel on the second trial, and the state's position that appellant wanted Diggs to remain as counsel, the issue before this Court is the inadequate, impractical and erroneous waiver in understanding appellant's right to conflict free counsel under the boundaries the judge set forth in this case. See Brief of Appellant at 24-29.

As stated in appellant's brief the appellant here essentially told the judge he wanted to keep Diggs, despite the PCR allegations against him, because he believed any other attorney besides Diggs may not believe in his defense – which had failed the first time during the Ling trial. R. 2963, ll. 4-10. The state's allegation that this issue is procedurally barred misses the entire thrust of the issue.

Further, the state writes that: "Stanko further clarified that he was not waiving any issues he raised in the Georgetown PCR, but that did not mean he did not have one hundred percent trust in the upcoming Horry County trial. The state also argued that the solicitor offered an exhibit stating that the Attorney General's office would have no contact with Mr. Diggs regarding the Georgetown County PCR case while Diggs was preparing for and trying the Horry County death penalty case." Respondent's brief at 25. Thus, the state's apparent position is the fact that the state *would later in fact, when the time came, defend Diggs* against PCR claims where he offered the same losing defense during both trials made whatever happened during this second trial alright. Merely deferring this huge conflict does not resolve it. The state concludes: "There is a difference between not discussing the PCR case, in which Stanko was represented by collateral counsel, and discussing the prior criminal trial." Respondent's brief at 25; p. 27.

It is important to note that in State v. Binney, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009), this Court held that the language of S.C. Code §17-27-130 (1996) was plain and unambiguous and that the "waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of counsel . . ." As to Stanko wanting Diggs, it is elementary that neither Stanko nor any other indigent criminal defendant is entitled to appointed counsel of his choice. That is particularly true given the highly unusual facts of this cases. Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

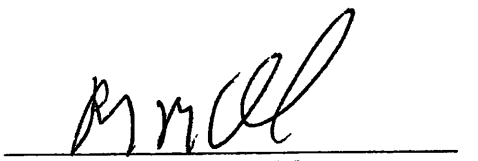
The state simply does not seem to grasp the fact that the defense - - insanity - - was the same as both the Ling and Turner murders, and appellant and Diggs were ordered by the trial court not to discuss the inadequacies they both may have perceived from the trial of the first death penalty case.

The truncated waiver here was inadequate to inform and protect appellant from the judge's unworkable instruction to appellant and counsel Diggs not to discuss the prior death penalty case. Not only was this was an unworkable instruction, but the promise to possibly revisit the issue later, as appellant has argued, was unprecedented if not also, respectfully, bizarre. Appellant's Brief at 29.

CONCLUSION

By reason of the foregoing argument and all of the arguments contained in appellant's initial brief, appellant's convictions and death sentence should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



BY: Robert M. Dudek
Chief Appellate Defender

Robert M. Pachak
Appellate Defender

ATTORNEYS FOR APPELLANT.

This 22nd day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of May, 2012.

BY: Robert M. Dudek
Chief Appellate Defender

Robert M. Pachak
Appellate Defender

ATTORNEYS FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 22nd day of May, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27224
Heard October 4, 2012 – Filed February 27, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender Robert M. Pachak, both of Columbia, SC for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, all of Columbia, SC, and Solicitor John Gregory Hembree of Conway, SC for Respondent.

CHIEF JUSTICE TOAL: Stephen Christopher Stanko (Appellant), appeals his conviction and death sentence for murder and armed robbery. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On April 8, 2005, at approximately 3:30 a.m., Appellant called his friend, seventy-four year old Henry Turner (the Victim), and falsely informed him that Appellant's father had died. Appellant arrived at the Victim's residence around 4:00 a.m. Later that morning, the Victim drove to a nearby McDonald's restaurant for breakfast. After returning with breakfast, sometime later that morning, the Victim was shaving in front of his bathroom mirror. Appellant approached the Victim from behind with a gun and a pillow as a silencer, and shot him in the back. Appellant then struck the Victim in the head, and fatally shot him in the chest.

Appellant stole the Victim's gray Mazda truck and fled the scene. On the evening of April 8, Appellant visited Columbia's Vista district. Appellant held himself out as a resident of New York City, visiting South Carolina to close a "big deal." Appellant proceeded to spend large amounts of cash and buy drinks for several people he met that night.

On April 9, Appellant travelled to Augusta, Georgia and visited Surrey Tavern. There, Appellant met a woman, and convinced her that he was a businessman in town for The Master's Golf Tournament. Appellant and the woman spent the next several days together, and Appellant stayed at her apartment. The two attended church services together on Sunday, April 10, and she introduced Appellant to her co-workers on Monday, April 11. Appellant left the woman's apartment at approximately 1:00 a.m. on Tuesday, April 12. Later that day, the woman recognized Appellant's picture in the newspaper with a headline alerting her to his alleged involvement in the Victim's murder. She notified police and assisted in Appellant's arrest. Appellant possessed the Victim's vehicle at the time of his arrest. Police searched the vehicle and recovered a bag containing a .357 Magnum caliber double-action revolver, .38 caliber bullets, and a checkbook belonging to the Victim. Testing later revealed that the .357 Magnum fired the bullets recovered from the Victim's body.

On August 25, 2005, the Horry County Grand Jury indicted Appellant for the Victim's murder and armed robbery. The case proceeded to trial, and Appellant relied on an insanity defense. Specifically, Appellant averred that he suffered from central nervous system dysfunction, and at the time of the Victim's murder he did not understand "legal right from wrong." On November 16, 2009, a jury found Appellant guilty of murder and armed robbery. Three days later, following the conclusion of the trial's penalty phase, the jury found beyond a reasonable doubt

the existence of the requisite statutory aggravating circumstance and recommended the trial court sentence Appellant to death. Consequently, the trial court sentenced Appellant to the maximum twenty years' imprisonment for armed robbery and to death by lethal injection for the Victim's murder.

ISSUES PRESENTED

I. Whether the trial court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where Appellant presented an insanity defense.

II. Whether the trial court erred in accepting Appellant's waiver of his trial counsel's conflict of interest where that counsel was subject to a pending accusation of ineffective assistance of counsel for his representation of Appellant in a prior capital murder case.

III. Whether the trial court erred in refusing to disqualify a juror who acknowledged she knew that Appellant received the death penalty for a prior capital murder, and stated unequivocally that she would vote to impose death in every instance where the State proved an aggravating circumstance beyond a reasonable doubt.

IV. Whether the trial court abused its discretion by refusing to grant a change of venue.

V. Whether the trial court erred by allowing all jurors over sixty-five to opt out of jury service.

VI. Whether the trial court erred by ruling that Appellant's execution did not violate the Eighth Amendment to the United States Constitution.

LAW/ANALYSIS

I. Jury Instruction on Inferred Malice

Appellant argues that the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon where Appellant presented an insanity defense. We agree.

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009). In *Belcher*, the jury convicted the defendant of murder and possession of a firearm during the commission of a violent crime. *Id.* at 600, 685 S.E.2d at 803. During a gathering of family and friends, the victim and another man began arguing. The defendant intervened, and later shot and killed the victim. *Id.* at 601, 685 S.E.2d at 805.

Testimony at trial demonstrated conflicting versions of the event. *Id.* The State's evidence tended to show that after the defendant confronted the victim, the defendant retrieved a gun and without justification, fatally shot the victim. *Id.* The defendant presented evidence that the victim confronted him without provocation, and with a gun, following the apparent resolution of the argument. *Id.* The defendant claimed he subsequently retrieved a gun and fired on the victim as he approached. *Id.* In accordance with long-standing practice, the trial court instructed the jury that "malice may be inferred by the use of a deadly weapon," and the jury convicted the defendant of murder. *Id.*

This Court reversed, and rejected the traditional jury instruction as inconsistent with our policy-making role in the common law:

> The use of the term "intentional" is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise."

Id. at 610, 685 S.E.2d at 809 (citing *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 809 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991)). The Court also held that the error in *Belcher* could not be considered harmless:

> Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was [the defendant]'s use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

Id. at 611–12, 685 S.E.2d at 809–10 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alterations in original)).

In the instant case, Appellant presented evidence he had a brain abnormality. A psychiatric expert testified that he performed a psychiatric evaluation and neurological exam on Appellant, and that Appellant demonstrated mild signs consistent with brain dysfunction, including central nervous system dysfunction. According to this expert, Appellant also demonstrated the typical signs of anti-social personality disorder or psychopathy, and at the time of the crime, "you could argue" Appellant did not understand moral or legal right from wrong, as his brain could not process the events. In other words:

> Based on the interview, the review of the records, the neurological evaluation, the brain-imaging evaluation, and the fact that he has received diagnoses of anti-social personality disorder . . . and the—limitations or impairments that anti-socials or psychopaths have, one of the major ones they have is an appreciation for the wrongfulness, or the moral wrongfulness and legal wrongfulness of their actions at the time.

An expert in physiological psychology testified that Appellant suffered damage to the frontal lobe of his brain from two separate incidents. The first incident occurred during Appellant's birth when his brain received a reduced oxygen supply. The second incident occurred during Appellant's teen-age years when he received a blow to the back of his head from a beer bottle, driving his brain forward. Appellant presented psychiatric testimony that he had diminished or lowered function of his brain in the frontal lobe areas, and that there "could" be a causal connection between diminished function in the frontal lobe and mental illness. An expert in neuropsychology and neuroimaging testified that scans of the right hemisphere of Appellant's brain exhibited damage. According to this expert, the damage occurred in the medial gray matter of Appellant's brain at four standard deviations below normal, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy. A medical doctor with expertise in Positron Imaging Tomography (P.E.T.) scans and neuropsychiatric disorder testified regarding the actual injury to Appellant's frontal lobe. This expert testified that the damaged lobe of Appellant's brain played an important role in impulse control, judgment, and empathy. In fact, he stated, "This abnormally low

function or abnormality or injury would significantly compromise and impair an individual's ability to exercise judgment, impulse control, control of aggression."

The trial court in this case issued a jury instruction regarding both express and implied malice:

> Malice aforethought could either be express or implied. Express malice is shown when a person speaks words which express hatred or ill-will for another, or when the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from a conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

Appellant's trial counsel took exception to the trial court's instruction, and argued that *Belcher* prevented an inferred malice charge, "[W]e would assert that, in this case, that insanity too is a self-defense, and we would think that the same rationale would apply to this case, and we would ask that charge be deleted, and they be so instructed, and that portion of that be deleted." The trial court overruled trial counsel's objection, and decided to include the objected-to portion of the charge:

> I have read thoroughly *State [v.] Belcher*, [385 S.C. 597, 685 S.E.2d 802 (2009)] decided by the South Carolina Supreme Court in October—on October 12, 2009. I find nothing, absolutely nothing in the Supreme Court opinion that would so indicate—certainly doesn't direct, but even indicate, in any way, that it would be proper under these circumstances for the [c]ourt to charge—or delete that as far as the inference of malice. The Supreme Court didn't indicate that in the slightest. Now—so I respectfully decline to do that.

It is unclear what this Court could have included in *Belcher* to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon in this case. Appellant certainly presented evidence which could have reduced, mitigated, or excused the Victim's murder. The language of *Belcher* is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper. *See Belcher*, 385 S.C. at 612 n.10, 685 S.E.2d at 810 n.10 ("We overrule all cases involving a homicide or charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused, or justified the homicide or the charged

[assault and battery with intent to kill.]") Thus, the trial court erred. However, we must determine whether that error requires reversal.

Harmless Error

Errors, including erroneous jury instructions, are subject to a harmless error analysis. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

In *Belcher*, we observed that often in murder cases there will be overwhelming evidence of malice, apart from the use of a deadly weapon. *Id.* at n.8 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alteration in original)). The instant case is similar.

The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Additionally, we must consider the jury instruction as a whole, and if as a whole the instruction is free from error, any isolated portions which may be misleading do not constitute reversible error. *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. This Court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

In the instant case, the trial court issued a jury instruction consistent with evidence presented by both the State and Appellant. The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Therefore, if the jury believed that Appellant could not distinguish moral or legal right from wrong, they could have found him

not guilty by reason of insanity. In addition, the jury could have found that Appellant's mental disease or defect prevented him from conforming his conduct to the requirements of the law, regardless of whether he could make the necessary moral or legal distinctions. Nothing in the trial court's inferred malice charge would have prevented the jury from reaching either of these conclusions.

The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." The trial court also stated that malice "can be inferred from conduct showing total disregard for human life." Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, the jury could also find that Appellant's conduct showed a total disregard for human life. Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Therefore, although the trial court's charge in this case failed to comply with *Belcher*, this does not constitute reversible error.

II. Trial Counsel's Conflict of Interest

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.

The trial court next conducted a hearing on March 4, 2009, to discuss the potential 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 (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 (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.

III. Juror Disqualification

Appellant argues that the trial court erred in refusing to disqualify a juror with prior knowledge of Appellant's unrelated crimes who stated unequivocally that she would vote to impose the death penalty in every instance in which the State proved an aggravating circumstance beyond a reasonable doubt. We disagree.

A prospective juror may be excluded for cause when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath. *State v. Sapp*, 366 S.C. 283, 290–91, 621 S.E.2d 883, 886 (2005). When reviewing the trial court's qualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* at 291, 621 S.E.2d at 886. The determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have

concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.* at 291, 621 S.E.2d at 887.

A. Prior knowledge

Juror #480 stated during voir dire that she remembered that Appellant "murdered his girlfriend, and left the daughter for dead." She also stated she heard that following these crimes, Appellant "murdered a man in Conway." The trial court then asked Juror #480 if she could leave her prior knowledge "outside the courtroom," and Juror #480 indicated that she could:

> The Court: You are coming into the courtroom, you listen to all of the facts and evidence presented in this case, make your decision based on the facts and evidence in this case, the law the Court would give to you, and don't let anything that you think you might know about it in the past affect your decision in any way. You understand that?
>
> Juror #480: Yes sir.
>
> The Court: Can you do that?
>
> Juror #480: Yes sir.
>
> The Court: All right, Ma'am. Can you follow the law that the Court would give to you? Even if for some reason you didn't agree with it could you follow the law that the Court would give to you in this case?
>
> Juror #480: Yes sir.
>
> The Court: All right, Ma'am. When you heard about this matter in the past do you remember forming any kind of opinion or belief at that point in time when you heard about it in the past?
>
> Juror #480: No sir. I really don't remember much about it, and just kind of wiped it out.

According to Appellant, Juror #480's prior knowledge was the equivalent of placing improper character evidence and evidence of Appellant's prior death sentence before the jury. Appellant asserts, "If the solicitor in the present case brought up evidence of [Appellant's] prior crimes and death sentence [] during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature."

Appellant relies on *People v. Davis*, 452 N.E.2d 525 (Ill. 1983), in support of his argument. However, *Davis* is inapplicable. In that case, an Illinois jury found Davis guilty of murder. *Id.* at 527. In a separate, bifurcated sentencing hearing, the jury unanimously determined that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. *Id.* Davis argued that the trial court erred in allowing the prosecution to inform the jury that he had received the death penalty for an unrelated murder. *Id.* at 536. To establish the aggravating factor that defendant had murdered two or more individuals, the State introduced certified copies of Davis's prior murder convictions. *Id.*

The Illinois Supreme Court reversed Davis's conviction. The court found that introduction of this evidence may have improperly influenced the jury in two respects. *Id.* at 537. First, if a juror had any uncertainty as to whether Davis qualified for the death sentence, the knowledge that twelve other people previously determined that he did could have swayed that decision. *Id.* Second, the jury's awareness of Davis's prior death sentence could diminish its sense of responsibility and mitigate the serious consequences of its decision. *Id.* Put another way, the jurors may have considered their own decision much less significant than they otherwise would. *Id.*

The facts of the instant case are markedly different from those of *Davis*. The State did not present evidence of Appellant's prior death penalty conviction to the jury. Although the juror in this case admitted that she had prior knowledge of the conviction, the court established that Juror #480 could place that prior knowledge aside and decide the case based solely on the evidence presented at trial.

Appellant's trial counsel also questioned Juror #480 concerning her prior knowledge:

Diggs: Okay. And let's assume that's correct for a moment and you are selected to serve on this jury, would having knowledge about a prior death sentence undermine your ability to be responsible in terms of the—filling the juror responsibilities in this case, in other words, would you feel like we are just kind of going through the motions here for no good reason.

Juror #480: No sir, because I think this is, what, an entirely different matter.

Juror #480's unequivocal answers to the trial court's and trial counsel's questions prevent us from finding that the trial court's qualification of the juror was "wholly" unsupported by the evidence. The court in *Davis* reversed over concerns about the impact the introduction of a prior death sentence might have had on the jury. But here, Juror #480's statements show a lack of clarity regarding Appellant's prior crimes, and there is nothing to suggest that knowledge of those crimes would have any bearing on her jury service. Thus, Appellant fails to demonstrate that Juror #480's prior knowledge improperly affected the verdict, or that the trial court erred in concluding that Juror #480 could faithfully discharge her responsibilities as a juror.

B. Predisposition

Appellant argues that the trial court erred in qualifying Juror #480 because of the juror's unequivocal response that she would vote for death in every case where the State proved murder beyond a reasonable doubt, coupled with an aggravating circumstance proved beyond a reasonable doubt. Juror #480's initial statements demonstrate a troubling likelihood that her view on this issue would have substantially impaired her performance as a juror. However, we find that the trial court sufficiently rehabilitated Juror #480.

In *State v. Lindsay*, 372 S.C. 185, 642 S.E.2d 557 (2007), the Court analyzed the trial court's decision to disqualify a juror who expressed an equivocal view regarding the death penalty. In that case, the trial court asked Juror K if he could impose the death penalty. *Id.* at 190, 642 S.E.2d at 560. Juror K responded that he "didn't really know" if he could or not. *Id.* During subsequent voir dire by trial counsel, Juror K stated that he could listen to both sides in the penalty phase and render the most appropriate penalty, be that life imprisonment or death. *Id.* However, when questioned by the State, Juror K equivocated, and admitted that, in his view, life without parole was a more serious punishment than the death penalty.

Id. at 190–91, 642 S.E.2d at 560. Juror K stated that regardless of the facts of a particular case, he would most likely choose life imprisonment as a punishment rather than death. *Id.* at 191, 641 S.E.2d at 560. The trial court found that Juror K's views on the death penalty would substantially impair his ability to follow the law as instructed. *Id.* at 192, 642 S.E.2d at 561 ("He further noted that when asked about giving the death penalty, Juror K 'took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that.'"). This Court found that Juror K's equivocal views and noted hesitation provided a reasonable basis for the trial court's conclusion. *Id.* at 193, 642 S.E.2d at 561 ("Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing the juror.")

In *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990), the defendant argued that two jurors should have been disqualified because their responses during voir dire indicated a predisposition towards the death penalty. This Court held that the "ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as it is explained to him." *Id.* at 354, 392 S.E.2d at 161. Despite one juror's disconcerting responses, the juror indicated she would wait until she had been presented with the "entire picture." *Id.* In addition, the juror expressed a willingness to "follow the law," and a respect for mitigating circumstances. *Id.* Thus, the Court concluded that the trial court did not abuse its discretion in qualifying the juror. *Id.* (finding that the other juror was an alternate and any error in seating that juror would be harmless beyond a reasonable doubt).

Appellant's trial counsel questioned Juror #480 regarding her ability to consider life imprisonment without parole even if the State proved murder and an aggravating circumstance beyond a reasonable doubt:

> Diggs: I want you to tell me, once you are on the jury, and you have concluded that there was guilt beyond a reasonable doubt, and then we move into the sentencing phase, and the State begins to present evidence of an aggravating circumstance, which is what the Judge is going to tell you they are required to do in order to ask for a death sentence, okay, and then we get to the end of that hearing and you believe the State did, indeed, present evidence in this case of an aggravating circumstance, coupled with murder, would you be predisposed in that situation to vote death as opposed to life imprisonment?
>
> Juror #480: Yes sir.

Diggs: Okay. And would you do that—without knowing specific facts would it be fair to say you would be in that position in every case?

Juror #480: Well, that's where you said specific facts.

Diggs: Yes Ma'am. Without any specific facts, just that foundation, that two-tiered foundation, so to speak, murder you found beyond a reasonable doubt, and then on top of that an aggravating circumstance beyond a reasonable doubt, you would—in every case where those two factors were combined, would vote death?

Juror #480: Yes sir.

Following this exchange the trial court questioned Juror #480. The trial court explained to Juror #480 that just because an aggravating circumstance is found, this does not mean that the jury automatically recommends a sentence of death. Juror #480 answered that she could vote to impose life imprisonment or death if the State proved an aggravating circumstance beyond a reasonable doubt. Juror #480 also stated that she understood that the jury could not even consider the death penalty if the State failed to prove an aggravating circumstance. Juror #480 answered affirmatively that she could follow the trial court's instruction and apply the law to facts of the case.

This Court's decisions in *Green* and *Lindsay* lead us to the conclusion that the trial court did not err in this case. During trial counsel's voir dire, Juror #480 stated that she would always vote to impose the death penalty when murder and a statutory aggravating circumstance were proven beyond a reasonable doubt. However, within that same colloquy she stated that she could consider all of the evidence in the case and render any one of the four verdicts she felt was best supported by the evidence. Moreover, Juror #480 responded to the trial court's methodical questioning with an affirmative response that she could in fact consider life imprisonment and the death penalty equally only if the State proved the requisite statutory aggravating circumstance. Ultimately, there is evidence in the Record to support the trial court's decision to qualify Juror #480. Her answers on the whole demonstrate an ability and willingness to be impartial and carry out the law as explained to her. Although Juror #480 gave two contradictory answers

during voir dire, the overall balance of her answers does not demonstrate the type of equivocation evident in *Lindsay*.

IV. 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 Evins's appeal, this Court found the United States Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (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. 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. The failure to change venue in that case compromised the defendant's due process rights. *Id.* at 727.

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.

V. Juror Opt Out

Appellant asserts that the trial court erred in excusing eighty-five perspective jurors pursuant to section 14-7-840 of the South Carolina Code. Section 14-7-840 allows any person age sixty-five or over to avoid jury service. S.C. Code Ann. § 14-7-840 (Supp. 2011). Appellant argues that allowing these individuals an exemption from jury service violates the "fair cross-section" requirement of the Sixth Amendment to the United States Constitution. We disagree.

The Sixth Amendment requires that a person charged with a crime be able to draw from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant must show that (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). A "distinctive" group has been defined as one that: (1) shows a quality or attribute that defines or limits membership in the group; (2) possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) shares a community of interest that may not be represented in other segments of the population. *State v. Price*, 272 S.E.2d 103, 109 (N.C. 1980).

Section 14-7-840 of the South Carolina Code provides:

> No person is exempt from service as a juror in any court of this State **except** men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate. The jury commissioners shall not excuse or disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

S.C. Code Ann. § 14-7-840 (Supp. 2011) (emphasis added).

In the instant case, the trial court excused eighty-five prospective jurors who chose to take advantage of their statutory exemption. Trial counsel objected on the grounds that "sixty-five is not what sixty-five used to be," and that section 14-7-840 was unconstitutional. The trial court rejected trial counsel's argument, and excused the jurors.

In *Duren*, the United States Supreme Court explained the test that must be performed in analyzing an alleged violation of the fair cross-section requirement. In that case, a jury convicted Duren of first degree murder and armed robbery. *Duren*, 439 U.S. at 360. At the time of trial, Missouri law granted women, who so requested, an automatic exemption from jury service. *Id.* (citing M.Rev.Stat. § 494.031(2) (Supp. 1978)). Duren contended that this law violated his right to a trial by a jury chosen from a cross-section of his community. *Id.* The Supreme Court agreed.

First, the Supreme Court held that (1) women were sufficiently numerous and distinct from men, and if they were systematically eliminated from jury panels, the Sixth Amendment's cross-section requirement could not be satisfied. *Id.* at 364 (citing *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975)). Second, the Court noted Duren's statistical evidence that women constituted fifty-four percent of the community, but jury venires contained approximately fifteen percent women. *Id.* at 365–66. The Supreme Court found that these venires were not "reasonably representative" of the community, and such a gross discrepancy between the percentages of women in the community and those participating in jury service mandated the conclusion that women were not fairly represented in the source from which juries were drawn in the community. *Id.* at 366. Finally, Duren demonstrated that this large discrepancy occurred in every weekly venire for nearly

a year. *Id.* The Supreme Court agreed that this indicated that the cause of the underrepresentation was systematic. *Id.* at 367.

Appellant cannot establish a prima facie case under the *Duren* test. There is no evidence before this Court that persons age sixty-five or over are "distinctive." Appellant states that a community of persons aged sixty-five or older are significantly different than a community comprised of all citizens, and that this particular group of citizens holds the same generational values and experiences, and lived through some of the same major world and national events. However, Appellant fails to cite any authority for the proposition that having lived through the same major events would yield monolithic values and experiences. Persons aged sixty-five or older obviously share a quality that limits membership in the group, but Appellant cannot demonstrate that this group as a whole possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes them from the rest of society, or that these persons share a community of interest not represented in other segments of the population. *See Price*, 272 S.E.2d at 109 (outlining the definition of a distinctive group).

Additionally, Appellant fails to present any statistical evidence that the percentage of persons aged sixty-five years or older who participate in jury selection is not a reasonable representation of the community, or that any alleged underrepresentation is due to systematic exclusion of the group in the jury selection process. Thus, there is no basis for a conclusion that the trial court's excusal of potential jurors pursuant to section 14-7-840 of the South Carolina Code violated his constitutional right to a jury constituting a fair cross-section of the community.

In addition, based on the preceding analysis, we take this opportunity to hold that, for the purposes of section 14-7-480, persons age sixty-five or older are not a distinctive group. *See, e.g., Brewer v. Nix*, 963 F.2d 1111, 1112–13 (8th Cir. 1992) ("We conclude that this falls far short of proving the type of distinctive group required for a prima facie case under *Duren*. The age parameters of the group are too arbitrary, and its supposed distinctive characteristics are too general and ill-defined, to satisfy the *Duren* standards.") (holding that Iowa law exempting persons sixty-five or older from jury service did not violate the Sixth Amendment); *Silagy v. Peters*, 905 F.2d 986, 1010–11 (7th Cir. 1990) (holding that persons seventy years of age or older did not constitute a "distinctive" group for purposes of the Sixth Amendment); *United States v. Lynch*, 792 F.2d 269, 271–72 (1st Cir. 1986) ("None of this evidence, however, undercuts our decision in *Barber*, [*Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985)] that persons age 18 to 34 do not sufficiently

blend into one 'cognizable group' so as to permit the making of a prima facie case of juror discrimination simply by showing that the venire underrepresents persons falling within the broad spectrum of those ages."); *State v. Rodgers*, 562 S.E.2d 859, 876–78 (N.C. 2002) (holding that citizens aged sixty-five or over do not constitute a distinctive group for purposes of the Sixth Amendment); *Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 n.10 (Mass. 1980) ("Classifications based on age have been rejected as an 'identifiable group' (for equal protection purposes) or as a 'distinctive' group (for Sixth Amendment purposes) in virtually every Federal case that has dealt with the question.").

VI. Cruel and Unusual Punishment

Appellant argues that the trial court erred in ruling that his execution would not violate the Eighth Amendment to the Constitution. We disagree.

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citation omitted). There are a number of crimes that beyond question are severe, yet the death penalty may not be imposed for their commission. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.") (citation omitted); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the death penalty may not be applied to a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed). The Eighth Amendment's prohibition against cruel and unusual punishment is viewed through the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560–61 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)). These evolving standards prohibit the execution of the juvenile defendants and the intellectually disabled.[1] *See Atkins v.*

[1] *See* Act of October 5, 2010 (Rosa's Law), Pub. L. No. 111-256, 124 Stat 2643 (2010), codified at 20 U.S.C. § 1400 *et seq* ("(1) a reference to 'an intellectual disability' shall mean a condition previously referred to as 'mental retardation,' or a variation of this term, and shall have the same meaning with respect to programs, or qualifications for programs, for individuals with such a condition; and (2) a reference to individuals with intellectual disabilities shall mean individuals who were previously referred to as individuals who are 'individuals with mental retardation' or 'the mentally retarded,' or variations of those terms."); *see also* S.C.

Virginia, 536 U.S. 304, 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a [intellectually disabled] offender."); *Roper*, 543 U.S. at 575 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Section 44-20-30 of the South Carolina Code defines an intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (Supp. 2011). In *Franklin v. Maynard*, 356 S.C. 276, 278–79, 588 S.E.2d 604, 605 (2003), this Court approved this statutory definition as applicable to the death penalty context.

The threshold determination in this analysis is whether Appellant's alleged mental condition places him within the class of offender that may not executed. As discussed in Issue I, *supra*, Appellant presented expert testimony, as part of an insanity defense, that he suffered from central nervous system dysfunction and diminished or lowered function of his brain in the frontal lobe area. In addition, one of Appellant's experts testified that scans of the right hemisphere of Appellant's brain exhibited damage in the medial gray matter of Appellant's brain at four standard deviations below normal. The expert testified that this type of damage is not seen in "normal" people, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy.

However, the State presented compelling counter testimony. An expert in Forensic Psychology testified that she conducted a detailed review of Appellant's personal and criminal history and interviewed Appellant for approximately seventeen hours. The expert diagnosed Appellant as having a severe personality disorder. She pointed out in her testimony that evidence of mental disease or defect manifested only by repeated criminal or other anti-social conduct is not sufficient to establish the defense of insanity. The expert's description of Appellant does not depict an intellectually disabled individual:

Code Ann. § 44-20-30 (Supp. 2011), *amended by* 2011 Act No. 47, § 13 (2011) ("SECTION 13. In Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded.'").

> I think he's a highly narcissistic, entitled person, who really feels special. I think he, throughout his life, has not really wanted to work very hard, so he's done a lot of illegal activities for quick gain. He's a very, very smart person, but I would say that, rather than applying himself . . . he would look for the fast deal . . . . Why he doesn't have a conscience, I don't know. I don't think anybody can tell you why he doesn't have a conscience.

An expert in neurology and neuropsychiatry testified that the white matter damage and prefrontal atrophy claimed by Appellant's experts was simply "not there." Moreover, the expert testified directly to the possible occurrence of brain damage during Appellant's birth. According to that expert's review of Appellant's medical records, Appellant received the maximum ten points in the Apgar test given to newborns almost immediately following birth. A diagnostic imager provided expert testimony that the images of Appellant's brain demonstrated no abnormalities and were "perfectly normal." This expert's testimony regarding Appellant's brain scan is illuminating. The expert explained the usual procedure of a P.E.T. scan, and how Appellant's scan differed from that procedure. According to this expert's testimony, patients are normally placed in a controlled environment for approximately one hour prior to the scan. This sequestration ensures a standard brain scan by preventing, as much as possible, exposure to external stimuli. However, in Appellant's case, his trial counsel altered the standard pre-scan routine. Appellant's trial counsel arranged for a psychologist to administer a computer-generated test to Appellant both before and during the pre-scan routine. This test required Appellant to sit in front of a computer screen and click a mouse in response to "yes" or "no" questions. This caused certain areas of Appellant's brain to appear irregular. However, when the expert accounted for the disruption to the pre-scan routine, Appellant's scan appeared normal.

Appellant has an intelligence quotient of 143, and a history of criminal behavior consistent with that of a confidence man. Moreover, Appellant's trial counsel admitted there was no definitive evidence of an intellectual disability, stating, "Your honor, hypofrontality is what *some* experts say is the condition this defendant has." While expert testimony in this case may demonstrate Appellant's inability to adapt, the Record does not show that he is of significant sub-average intellectual functioning.

However, Appellant's trial counsel argued that preventing the State from executing individuals with Appellant's alleged brain dysfunction simply represented a logical step in Eighth Amendment jurisprudence:

> It should be declared unconstitutional and say, "Look, we've taken the step in terms of [intellectual disability]. We've taken the step in terms of age, recognizing that the brain has got to function properly, and in those two cases, the [intellectual disability] and the young age, it doesn't, so we're not going to execute those people," and we shouldn't.

Appellant renews that argument in asking this Court to expand the United States Supreme Court's rationale in prohibiting execution as a punishment for certain offenders. However, trial counsel's argument oversimplifies the underlying reasoning for the Eighth Amendment prohibition on executing juveniles and the intellectually disabled.

In *Roper*, the Supreme Court articulated three differences between juveniles and adults which demonstrate that juveniles cannot reliably be classified as among the worst offenders. *Id.* at 569. First, scientific and sociological evidence demonstrates that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Id.* (citation omitted). This often results in impetuous and ill-considered actions and decisions. *Id.* ("[A]dolescents are overrepresented statistically in virtually every category of reckless behavior." (citation omitted)). Second, juveniles are more vulnerable to negative influences and outside pressures. *Id.* ("This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." (citation omitted)). Third, the character of a juvenile is not as well informed as that of an adult. *Id.* at 570 ("The personality traits of juveniles are more transitory, less fixed." (citation omitted)). In addition, according to the Supreme Court, the two distinct social purposes served by the death penalty, retribution and deterrence, are not served by a minor's execution. *Id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). The Court also cited the glaring fact that at the time of the decision, the United States stood alone as the only country in the world that continued to officially sanction the juvenile death penalty. *Id.* at 575.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen. *Id.* at 318. Contrary to trial counsel's assertion in the instant case, the Supreme

Court's decision did not rely on a *simple* finding that an intellectually disabled defendant's brain did not function properly. The Supreme Court found that these persons frequently know the difference between right and wrong and are competent to stand trial. *Id.* However, their diminished capacity frustrated the retributive and deterrent goals of capital punishment. *Id.*

Following the resumption of the death penalty, the Supreme Court maintained that the punishment applied only to the most serious crimes. *Id.* at 319. Thus, the Court reasoned that if the "culpability of the average murderer is often insufficient to justify the most extreme sanction available to the State[,] the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." *Id.* ("Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate."). With respect to deterrence, the Court had previously held that capital punishment could only serve as a deterrent when murder "is the result of premeditation and deliberation." *Id.* (citation omitted). The Court held that this sort of calculation stood at the opposite end of the spectrum from the behavior of the intellectually disabled. *Id.* at 319–20. In addition, this disability was also found to increase the risk that the death penalty would be imposed in spite of factors which may call for a less severe penalty. *Id.* at 320. More specifically, these defendants are more susceptible to false confessions, are less able to provide meaningful assistance to their counsel, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. *Id.* at 320–21.

Appellant's alleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans. *See Enmund v. Florida*, 458 U.S. 782, 799 (1982) (holding that capital punishment can only serve as deterrent when murder is the result of premeditation and deliberation). Thus, his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person. *See Atkins*, 536 U.S. at 319–20 (analyzing the mental capabilities of intellectually disabled offenders). There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.[2]

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[2] The decisions by other jurisdictions cited by Appellant are not persuasive. For example, the Florida Supreme Court has reversed death penalty convictions based on mental illnesses whose symptoms do not align closely with our state's definition

The trial court properly denied Appellant's motion pursuant to existing law, and did not err in refusing to find that Appellant's death sentence violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and sentence.

BEATTY, KITTREDGE, and HEARN, JJ., concur. PLEICONES, J. concurs in result only.

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of intellectual disability. However, even those cases involve debilitating mental illnesses of the type inapposite that of Appellant.

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MAR 14 2013
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

Appellate Case No. 2010-154746

Appeal from Horry County

Steven H. John, Circuit Court Judge

MAR 14 2013

Opinion No. 27224

PETITION FOR REHEARING

Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that insanity by its very definition precludes an ability to act with malice aforethought. Further, there is not anyway for this Court, or counsel for that matter, to know what happened during jury deliberations. This court correctly held: "It is unclear what this Court could have included in Belcher to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon in this case. Appellant certainly presented evidence which could have reduced, mitigated, or excused victim's murder. The language of Belcher is clear, that when this type of evidence is submitted, an instruction regarding

inferred malice from the use of a deadly weapon is improper." State v. Stephen Christopher Stanko, Op. No. 27224, Shearouse's Adv. Sh. #9 at p. 84 (filed February 27, 2013).

Appellant respectfully submits that this court should reconsider its harmless error analysis not only because this Court and the parties will never know how jury deliberations in this case proceeded, but also as a matter of logic. There was evidence that appellant shot the decedent with a gun -- a deadly weapon. The Court's jury instruction in this case allowed it to infer malice aforethought from the use of that deadly weapon, without anything further. Once the jury found that appellant acted with malice, any consideration of insanity was not warranted. If appellant acted with malice aforethought, he straightforwardly was not entitled to a verdict of not guilty by reason of insanity. This court wrote:

> In the instant case, the trial court issued a jury instruction consistent with evidence presented by both the State and Appellant. The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Therefore, if the jury believed that Appellant could not distinguish moral or legal right from wrong, they could have found him not guilty by reason of insanity. In addition, the jury could have found that Appellant's mental disease or defect prevented him from conforming his conduct to the requirements of the law, regardless of whether he could make the necessary moral or legal distinctions. Nothing in the trial court's inferred malice charge would have prevented the jury from reaching either of these conclusions.
>
> The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." The trial court also stated that malice "can be inferred from conduct showing total disregard for human life." Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, **which it did**, the jury **could** also find that Appellant's conduct showed a total disregard for human life. **Thus, Appellant could not have** suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.
>
> Therefore, although the trial court's charge in this case failed to comply with Belcher, this does not constitute reversible error."

(emphasis added). Shearouse's Adv. Sh. # 9 at pp. 85-86 (February 27, 2013).

Again, we will never know if the jury reached discussion on an insanity verdict. The jury instruction permitted it, in effect to reject appellant's insanity defense when it inferred malice from his use of a deadly weapon without further deliberation or analysis. Mere speculation that the jury **could have** inferred malice "from conduct showing total disregard for human life," therefore "appellant **could not have** suffered prejudice from any separate inference" simply does not follow, respectfully, as a matter of logic. The jury was out for thirty minutes, R. 2481, ll. 19-22, despite contradictory expert testimony on appellant's mens rea vel non, that was hundreds of pages in the Record. It was free, to reject all of this by a finding of malice from the use of a deadly weapon for as Belcher and the law clearly teach – the mens rea of malice is absent from one who is legally insane.

Furthermore, this Court cites Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000), holding the judge did not abuse its discretion in giving the charge here. This is erroneous as an error of law, as found here, constitutes an abuse of discretion.

Rehearing should be granted.

Conflict issue based on PCR allegations of ineffective assistance of counsel

Appellant also respectfully submits that this court should grant rehearing to reconsider its analysis of the conflict of interest issue involving appellant's allegations of ineffective assistance of counsel against trial counsel Diggs involving the first capital trial where appellant was sentenced to death. These PCR allegations were pending against trial counsel Diggs prior to and during this trial. This Court held that this issue was not preserved for appellate review because neither appellant nor defense counsel Diggs objected. This Court wrote: "Appellant did not object to the appointment of Diggs as counsel, but instead emphatically requested that Diggs continue to represent him ...

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 now argue on direct appeal the trial court erred in acquiescing to his express and informed desire." State v. Stephen Christopher Stanko, Op. No. 27224, Shearouse's Adv. Sh. No. 9, at p. 90 (February 27, 2013).

There are certain conflicts that cannot be waived, even with the consent of the attorney and client, because the interests of the criminal justice system in ensuring a fair result override the wishes of the parties. For example, if a client charged with murder desired to be sentenced to death (which was not the case here), and he wanted an incompetent attorney, who was his friend, to make a considerable fee while not putting any of the State's case to an adversarial setting, appellant is confident this Court would find a trial court could not approve of such an attorney–client relationship proceeding to trial despite the fact that neither party objected. See United States v. Wheat, 486 U.S. 153, 159 (1988) ("the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.").

The same could be true of multiple defendant representation where neither client nor attorney objected, and both defendants enthusiastically embraced the representation of same attorney, despite the fact the interests of one of the defendants had to be compromised for the good of the other.

While a defendant's relationship with his appointed counsel should be considered before that attorney is removed, the right to counsel of choice can be overcome by a showing of actual conflict or serious potential conflict. State v. Goldsberry, 419 Md. 100, 118, 18 A.3d 836, 847 (Md. 2011). Mandating that one of the defendants or the attorney object, or the issue is not

considered preserved for appeal, would preclude the substance of the waiver issue from ever being addressed on direct appeal.

Waiver

This Court should also respectfully reconsider and grant rehearing as to its waiver analysis. This Court wrote that "appellant cannot now complain of an error which is own conduct induced." Shearouse's Adv. Sh. # 9 at p. 91 (February 27, 2013). This Court, under its waiver analysis, essentially continued to find fault with appellant for desiring to want Diggs to represent him, and again raise his failed insanity defense. This Court cited Brady v. United States, 397 U.S. 742, 748 (1970), to support its conclusion that "appellant's extensive endorsement of Diggs's continued representation constituted a valid waiver" finding appellant's waiver was voluntary, knowing and an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Shearouse's Adv. Sh. # 9 at p. 91 (February 27, 2013).

As appellant urged in his brief of appellant, an attorney should not represent a defendant where counsel's adequacy is in question. See, People v. Norris, 46 Ill.App.3d 536, 541, 361 N.E.2d 105, 110 (Ill. App. 1977). It is a conflict of interest for counsel to represent a client at a PCR hearing where the claim is against him or another member of counsel's office. Adams v. State, 380 So.2d 421, 422 (Fla. 1980); People v. Fields, 88 Ill.App.3d 821, 410 N.E.2d 1178 (Ill. App. 1980); Owens v. State, 792 So.2d 650, 654 (Fla. App. 2001) ("In this case, defense counsel could not effectively represent appellant during sentencing as to both cases when he faced a possible ineffectiveness of counsel claim. The more counsel said, the more he put into the record which could later be used against him in the ineffectiveness claim."); at post-trial plea withdrawals where counsel or a member of counsel's office represented defendant at the plea hearing, People v. Norris, 46 Ill.App.3d at 541, 361 N.E.2d at 110 ("Although an attorney should

not argue his own inadequacy or that of his office, he is under a duty to withdraw as counsel when the issue arises."); and at trial where defendant is denied his pre-trial motion for new representation and subsequently files a federal action against counsel's office, Odum v. State, 283 Ga.App. 291, 293, 641 S.E.2d 279, 281 (Ga. App. 2007) ("If raised pre-trial, a potential conflict of interest is sufficient to bar that representation.").

As appellant urged in his brief: "Courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness." United States v. Wheat, 486 U.S. 153, 153 (1988). The body of law surrounding conflict of interest issues indicates a strong desire to maintain the indicia of fairness and propriety. To cure a conflict of interest, a defendant can make an informed waiver. Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, (1978). Appellant cited Brady v. United States, 397 U.S. 742 (1970) on page twenty-six of his brief in support of this proposition.

Respectfully, appellant was not questioned *at all* about any potential risks he faced by having counsel Diggs represent him and essentially offer the same defense that was unsuccessful during the first death penalty trial. Further, counsel Diggs and appellant were advised *it would be improper to talk about the PCR claims where here the murders occurred a short time apart and the facts of both murders were inextricably entwined since the state's case was that appellant killed Ling and was using Turner to hide out and plan his next move.*

Diggs also wanted the judge to advise him if the judge thought his continued representation became problematic during the trial. That placed the trial judge in an untenable situation of "monitoring" the adequacy of defense counsel's representation which was a confusion of his judicial role. The trial court was asked to intervene and take corrective action at some point during the trial, assumingly even order a mistrial if it thought Diggs' representation

had become problematic. This Court respectfully overemphasized appellant's enthusiastic endorsement of Diggs as his attorney where he again was presenting an insanity defense at the same time he was alleging Diggs was ineffective during the first capital trial in a neighboring county post-conviction relief action arising out of a scenario twenty-four hours later. An endorsement of Diggs by appellant where he was offering an insanity defense should have been viewed as extraordinarily suspect by the trial judge – yet it was not.

In United States v. Swartz, 975 F.2d 1042 (4th. Cir. 1992), where counsel also represented a co-defendant to Swartz's detriment, the Court articulated the proper line of questioning for an effective conflict waiver:

> [T]he court should seek to elicit *a narrative response* from each defendant that he has been advised of his right to effective representation, that he understands *the details of his attorney's possible conflict of interest and the possible perils of such a conflict*, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections."

Id at 1049; citing, U.S. v. Akinseye, 802 F.2d 740, 745 (Md. 1986)

The trial judge's questioning of appellant here was limited to whether he wanted Mr. Diggs to continue representing him. R. 2961, ll. 16-23. However, the law requires that the record reflect a defendant's *full understanding* of any negative consequences arising from the conflict. U.S. v. Swartz, 975 F.2d at 1049.

Appellant told the judge that his decision to keep counsel Diggs, even though there were pending allegations of ineffective assistance of counsel against him, was because he felt that any other attorney besides Diggs may not believe in his defense – which had failed to first time during the Ling trial. R. 2963, ll. 4-10.

Because both the right to counsel and the right to counsel free from conflicts and "devoted to the interests of his client" are derived from the Sixth Amendment, the standard for determining whether a conflict of interest is effectively waived should be at least as thorough as an effective waiver for a right to counsel. See Von Moltke v. Gillies, 332 U.S. at 725; United States v. Wheat, 813 F.2d. 8, ll. 22-25. This Court respectfully should grant rehearing and fully explore the lack of a meaningful waiver of conflict free counsel given the enormous risks that appellant faced in waiving a conflict with Diggs representing him again on failed insanity defense which was the subject of a pending PCR in another county.

Juror #480 was a death prone juror

This Court should also grant rehearing because it failed to address the fact that Juror #480 likely conveyed to the other jurors her knowledge of appellant's prior conviction wherein he "murdered his girlfriend, and left the daughter for dead." Shearouse's Adv. Sh. # 9 at p. 92 (February 27, 2013). The juror also knew appellant had been sentenced to death. R. 644, l. 7 – 646, l. 13. A jury aware of appellant's prior murder conviction, and death sentence, where he was on trial for murder, and asserting an insanity defense, could not reasonably be expected to be impartial. This Court should respectfully address this issue, and the trial judge's failure to instruct Juror #480 not to discuss her knowledge of the prior murder with the other jurors.

In West v. State of Mississippi, 463 S.E.2d 1048, 1052-1053 (1985) the state supreme court held that it was reversible error for the solicitor to bring up during the guilt phase of the defendant's trial evidence of other murders which were not related to the murder for which the defendant was on trial. If the solicitor in the present case brought up evidence of appellant's prior crimes and death sentence during the guilt phase of this trial, it would have been grounds for a mistrial. *There is respectfully no difference in seating a juror who knows this information from the outset.* To believe

the juror in this case did not convey this information to the other jurors *where she was not instructed otherwise* is simply to ignore human nature.

Juror # 480's knowledge of appellant's character evidence and prior bad acts along with his sentence of death was compounded by her willingness to sentence a defendant to death in every instance of an aggravating circumstance being presented. This Court wrote that "Juror #480's initial statements demonstrate a troubling likelihood that her view on the issue would have substantially impaired her performance as a juror. However, we find that the trial court sufficiently rehabilitated her." Shearouse's Adv. Sh. # 9 at p. 94 (February 27, 2013).

If a juror is merely allowed to state, while she is being rehabilitated by the trial court, that she will follow the law as instructed then death prone jurors such as Juror #480 are going to be allowed to sit in judgment during capital trials in our state. Juror #480's entire *voir dire*, when viewed in context, and not just when parroting the "correct answers" while she is being rehabilitated by the trial court, respectfully, shows a juror who is intent on imposing the death penalty on a murderer. See Morgan v. Illinois, 504 U.S. 719 (1992); State v. Bennett, 328 S.C. 251, 493 S.E.2d. 845 (1997).

In Bennett, this Court remanded the case for resentencing when a juror said he would have to go with the majority. Critically, this Court noted language in Morgan that general questions of fairness and impartiality were insufficient to detect unqualified jurors. The trial court's attempt to rehabilitate Juror # 480's statement about imposing death were insufficient to cure the juror's unequivocal response that she would impose death if an aggravating circumstance was found.

Here, the juror said she knew appellant had been sentenced to death. R. 635, ll. 14-20. She was predisposed to vote for the death penalty as opposed to life imprisonment if the state presented evidence of an aggravating circumstance. She said she would do so in every case. R. 639, l. 8 –

640, l. 15. Again, after she said this, the trial court was able to get the juror to say she could "follow the law." R. 640, l. 18 – 643, l. 3.

Defense counsel argued that the juror was not qualified because of her prior knowledge of appellant, his death sentence, and her position on imposing the death penalty. R. 644, l. 7 – 646, l. 13. During jury selection, defense counsel struck all of the similarly situated jurors with the exception of Juror # 480 *because he had used all ten of his strikes by that time.* R. 1296, l. 18 – 1315, l. 11. Before Juror # 480, was seated defense counsel noted on the record that he had exhausted his strikes. R. 1313, ll. 16-21.

Due process under the Fourteenth Amendment and the Sixth Amendment to the United States Constitution demands that a defendant be given a fair trial by a panel of impartial, indifferent jurors. Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968); Ross v. Oklahoma, 487 U.S. 81 (1988). Juror #480 was not a qualified juror. She was a death prone juror who would infect the remainder of the jury with her knowledge that appellant had committed a prior murder, and had already been sentenced to death. Respectfully, knowledge that appellant had already been sentenced to death can certainly have the consequence of lessening the sense of responsibility for the present decision. People v. Davis, 452 N.E.2d 525 (Ill. 1983) correctly made that point.

Jurors sixty-five and older being a distinctive group

This Court noted that in Duren v. Missouri, 439 U.S. 357, (1979), the United States Supreme Court found that granting women, upon request, an automatic exemption from jury service violated a defendant's right to a jury chosen from a cross-section of the community. The court found that women as a group were **a distinctive group** in the community.

To find a violation of the Sixth Amendment requirement that a person charged with a crime must be able to draw from a fair cross- section of the community, and a defendant also had to show that "the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community." Finally, a defendant had to show that "this underrepresentation is due to systematic exclusion of the group in the jury selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

A "distinctive" group has been defined as one that: (1) shows a quality or attribute that defines or limits membership in the group; (2) possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) shares a community of interest that may not be represented in other segments of the population. Shearouse's Adv. Sh. # 9 at p. 99 (February 27, 2013).

This Court found that jurors sixty-five and older – unlike women – are not a "distinctive" group." Appellant continues to respectfully note that citizens sixty-five or older do make up a distinctive group in the community. The most compelling fact is that clearly a community made up of entirely of citizens under the age of sixty-five would be significantly different than a community comprised of all citizens. People sixty-five or older frequently share the same generational values and experiences. They have been alive through the same major world and national events and cultural changes. They are often more involved in their community and bring invaluable insight and wisdom to the jury simply based on their maturity. In addition, older citizens are often more rational and sensible as a result of their age. Therefore, such exemption dilutes the quality of community judgment represented by the jury in criminal trials. See Taylor v. Louisiana, 419 U.S. 531, 535 (1975).

This is a cross-section of the community challenge, not an equal protection challenge and appellant submits that jurors sixty-five and older are a distinctive group. Further, the representation of citizens sixty-five or older in the venire from which the jury was selected in this case was not fair and reasonable in relation to the number of such persons in the community. This Court can take judicial notice that, according to the U.S. Census Bureau, the population of citizens sixty-five or older in Horry County in 2009, the year the trial took place, **was 18.0 percent.**[1] This is a significant portion of the county's population. However, ***only one of the qualified jurors was sixty-five or older***, almost completely eliminating the representation of 18.0 percent of the community's population in the venire from which the jury was ultimately selected.

This elimination of such a significant portion of the county's population is both unfair and unreasonable. It is untenable to advocate, as defense counsel argued, that in this day and age with the improvements in the fields of health and medical care, that all citizens age sixty-five and older can be automatically exempt, over the telephone, because of the fact that are simply sixty-five years old or older.

Again, this argument is analogous to Taylor v. Louisiana, 419 U.S. at 534 where the Court held that: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties."

Just as a change in societal views of the role of women and their occupations made the exclusion of women from jury service unreasonable in the 1970s, the improvement of medical care and the overall health of our nation's seniors has made the exclusion of citizen's sixty-five

[1] U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov/qfd/states/45/45051.html (Last visited July 26, 2011)

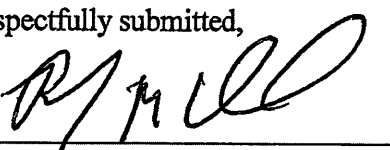
or older unreasonable today. A significant amount of such citizens are wholly qualified to serve on a jury.

This Court should grant rehearing and re-examine its view that jurors sixty-five and older, like women in the 1975 case of Taylor v. Louisana, are a distinctive whose systematic exclusion from jury service violates a defendant's right to a cross-section of the venire, and that group's judgment, and its wisdom of age.

As appellant noted in his brief, State v. Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002) involved a similar challenge but on an equal protection basis. As the North Carolina Supreme Court previously noted, "The adverse effects of growing old do not strike all equally or at the same time, and it is only sensible to allow trial judges to consider the individual when a prospective juror seeks to be excused because of his or her age." Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002).

Appellant showed in his brief that he can detail the statistical requirement that excluding jurors sixty-five and older violates his right to a cross-section of the jury, and appellant respectfully requests that this Court reconsider and grant rehearing on its holding that jurors sixty-five and older are not a "distinctive" group.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 14th day of March, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

Appellate Case No. 2010-154746

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of March, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of March, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

ORDER

The petition for rehearing filed in the above entitled matter is denied.

s/Jean H. Toal C.J.

s/Costa M. Pleicones J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

Columbia, South Carolina

April 3, 2013

cc:
Robert M. Pachak, Esquire
J. Anthony Mabry, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
John Gregory Hembree, Esquire

COPY

FORM 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2014 CP 26 035
Stephen C. Stanko, #6022 Full name and prison number (if any) of Applicant.	)	
v.	)	**APPLICATION FOR**
State of South Carolina	)	**POST-CONVICTION RELIEF**

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Death Row, Lieber Correctional Institution, P.O. Box 205, Ridgeville, S.C. 29472

2. Name and location of Court which imposed sentence Horry County Court of General Sessions, Judge Steven H. John presiding.

3. Name(s) of co-defendant(s) (if any) n/a

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2005-GS-26-2927

   (b) Murder, armed robbery

   (c) _____

JAN 8 2014

FILED
HORRY COUNTY
2014 JAN -6 AM 10:46
MELANIE HUGGINS-WARD
CLERK OF COURT

5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

3890

(a) November 19, 2009

(b) Death sentence; twenty (20) years for armed robbery.

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. United States Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Sentence and conviction affirmed.

ii. Certiorari denied

iii. _____

(c) the date of each such result:

i. February 27, 2013, rehearing denied April 3, 2013

ii. October 7, 2013

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013).

ii. Stanko v. South Carolina, 134 S.Ct. 247 (2013).

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of trial and/or appellate counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Defense counsel was ineffective, in derogation of the Sixth Amendment and Fourteenth Amendment, for failing to present available evidence and argument showing actual juror prejudice as a result of widespread pre-trial publicity.

(b) Defense counsel was ineffective, in derogation of the Sixth Amendment and Fourteenth Amendment, for failing to present statistical evidence showing the percentage of persons sixty-five (65) years or older in the Horry County venire was not a reasonable representation of the community, and that this alleged underrepresentation was due to systematic exclusion in the jury selection process.

(c) Defense counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments, for failing to present available mitigating evidence during the sentencing trial.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of trial and/or appellate counsel.

(b) The ground was not presented on direct appeal, because ineffective assistance can only be reviewed on collateral appeal.

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. William I. Diggs, 1700 Oak St., Suite D, Myrtle Beach, S.C.

ii. Brana J. Williams, 889 Inlet Square Dr., Murrells Inlet, S.C.

iii. Robert M. Dudek, 1330 Lady St., Suite 401, Columbia, S.C

iv. Robert M. Pachak, 1330 Lady St., Suite 401, Columbia, S.C.

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Trial

iii. Appeal

iv. Appeal

19. State clearly the relief you seek in filing this application:

New trial.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
County of Horry)

VERIFICATION

I, Stephen Christopher Stanko, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 3rd day of January, 2014.

Notary Public (L.S.)

My Commission Expires: 12/3/2023

FILED
HORRY COUNTY
2014 JAN -6 AM 10:47
MELANIE HUGGINS-WARD
CLERK OF COURT

Revised 3/2003

3896

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Stephen Christopher Stanko, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this 3rd day of January, 2014.

Notary Public

My Commission Expires: 12/3/2023

FILED
HORRY COUNTY
2014 JAN -6 AM 10:47
MELANIE HUGGINS-WARD
CLERK OF COURT

Revised 3/2003

3897

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-035
	)	
vs.	)	
	)	**FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Horry County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Not applicable.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2006-GS-26-2927 – murder; armed robbery.

5. The date upon which sentence was imposed and the terms of the sentence: November 19, 2009 – death sentence for murder; twenty (20) years for armed robbery.

6. A finding of guilty was made: after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8. The Courts to which applicant appealed:
   (a) The Supreme Court of South Carolina.
   (b) The Supreme Court of the United States.

   The result in each Court to which applicant appealed:
   (a) Sentence and conviction affirmed.
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) February 27, 2013, rehearing denied April 3, 2013.
   (b) October 7, 2013.

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CLERK OF COURT

Citations of any written opinion or orders entered pursuant to such results:
(a) *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).
(b) *Stanko v. South Carolina*, 134 S. Ct. 247 (2013).

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant was denied the right to conflict-free assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20.**

11(a) **Supporting Facts:** Applicant did not receive conflict-free assistance of counsel because his trial counsel, Mr. William Diggs, had a conflict of interest, which the trial court failed to adequately address under *Holloway v. Arkansas*, 435 U.S. 475 (1978). Mr. Diggs previously represented Applicant on a capital murder charge in Georgetown County, which resulted in a death sentence. The Georgetown County case involved a separate, but related, incident to the incident underlying Applicant's Horry County charges. Prior to the beginning of Applicant's Horry County capital trial, Applicant filed a PCR application, alleging Mr. Diggs' ineffective assistance of counsel during the Georgetown proceedings. This created a conflict of interest for Mr. Diggs. *See Odum v. State*, 641 S.E.2d 279, 281 (Ga. Ct. App. 2007); *Owens v. State*, 792 So.2d 650, 655 (Fla Ct. App. 2001); *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. App. 1999) *Adams v. State*, 380 So.2d 421, 422 (Fla. 1980); *People v. Fields*, 410 N.E.2d 1178, 1179 (Ill. App. Ct. 1980); *People v. Norris*, 361 N.E.2d 105, 110 (Ill. App. Ct. 1977). Over the State's objection to Mr. Diggs' continued representation of Applicant, the trial court improperly allowed Mr. Diggs to continue his representation of Applicant without adequately informing Applicant of the risks of proceeding with Mr. Diggs' representation or the specific nature of the conflict. *See Wheat v. United States*, 486 U.S. 153, 160-61 (1988); *Holloway*, 435 U.S. 475; *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the pre-trial phase of his capital trial.**

11(b) **Supporting Facts:** Trial counsel's performance during the pre-trial phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel agreed to postpone raising the change of venue motion until after voir dire was completed and the jury was impaneled, despite the fact that prior to voir dire a defendant can present evidence that negative pretrial publicity raises a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected, *see Skilling*

v. United States, 561 U.S. 358 (2010); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, 530 (1982); and

(2) Counsel 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 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. *See Skilling v. United States*, 561 U.S. 358 (2010); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

10(c) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the guilt-or-innocence phase of his capital trial.**

11(c) **Supporting Facts:** Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to adequately impeach the State's expert, Dr. Pamela Crawford, with all available information to impeach her credibility and undermine her testimony; and

(2) Counsel failed to protect Applicant's right to conflict-free counsel by failing to adequately advise Applicant and the trial court of all relevant issues regarding the conflict of interest created by Applicant's then-pending PCR application alleging counsel was ineffective in a prior, related proceeding. *See Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).

10(d) **Applicant was denied due process of law and a fundamentally fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution during the guilt-or-innocence phase of his capital trial.**

11(d) **Supporting Facts:** The State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared Applicant'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 Applicant's PET scan. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

10(e) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**

11(e) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel unreasonably informed the jury that Applicant's family did not like him and specifically pointed out the fact that none of Applicant's family were in attendance at the trial;

(2) Counsel elicited expert testimony that Applicant is a psychopath who could not help killing the victim and other testimony tending to dehumanize Applicant in the eyes of the jury, instead of evidence that tended to lessen Applicant's culpability and humanize Applicant in the eyes of the jury, *see* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11, commentary (2003); and

(3) Counsel failed to investigate and present all available mitigating evidence of applicant's life history and background, including testimony from an expert or other appropriate witnesses about how applicant's history and background affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003).

10(f) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.**

11(f) **Supporting Facts:** Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Applicant's prior murder conviction over trial counsel's consistent objections; U.S. Const. amends. V, VIII; Rule 403, SCRE.

(2) Appellate counsel failed to adequately raise and brief all legal grounds for challenging the conflict of interest created by trial counsel's representation of Applicant while a PCR application alleging that trial counsel was ineffective in a prior, related proceeding remained pending. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.

(b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.

(c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).

(d) Applicant has not filed any motions, petitions, or applicants in this or any other Court.

13. Not applicable.

14. Applicant has not raised any ground set forth in (10) in this or any other court.

15. Not Applicable.

16. These grounds rely on additional facts outside the record which was before the previous courts.

17. Applicant was previously represented by counsel.

18. Applicant was represented at trial by William I. Diggs, 1700 Oak St., Suite D, Myrtle Beach, SC and Brana J. Williams, 1500 Hwy 17 North, Suite 102, Surfside Beach, SC.

On direct appeal applicant was represented by Robert M. Dudek and Robert M. Pachak, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, SC 29201.

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

BY: _____
ATTORNEY FOR APPLICANT

June 16, 2014

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)	
)	
Applicant,)	Case No. 2014-CP-26-035
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

The undersigned certifies that a copy of the Applicant's First Amended Application for Post-Conviction Relief was mailed today by first class United States mail, postage prepaid, this 16th day of June, 2014, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

14 JUN 17 PM 1:18
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-035
	)	
vs.	)	
	)	**FINAL AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Horry County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Not applicable.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2006-GS-26-2927 – murder; armed robbery.

5. The date upon which sentence was imposed and the terms of the sentence: November 19, 2009 – death sentence for murder; twenty (20) years for armed robbery.

6. A finding of guilty was made: after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8. The Courts to which applicant appealed:
   (a) The Supreme Court of South Carolina.
   (b) The Supreme Court of the United States.

   The result in each Court to which applicant appealed:
   (a) Sentence and conviction affirmed.
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) February 27, 2013, rehearing denied April 3, 2013.
   (b) October 7, 2013.

FILED
2014 OCT -1 PM 1:11

Citations of any written opinion or orders entered pursuant to such results:

(a) *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013).

(b) *Stanko v. South Carolina*, 134 S. Ct. 247 (2013).

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant was denied the right to conflict-free assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20.**

11(a) **Supporting Facts:** Applicant did not receive conflict-free assistance of counsel because his trial counsel, Mr. William Diggs, had a conflict of interest, which the trial court failed to adequately address under *Holloway v. Arkansas*, 435 U.S. 475 (1978). Mr. Diggs previously represented Applicant on a capital murder charge in Georgetown County, which resulted in a death sentence. The Georgetown County case involved a separate, but related, incident to the incident underlying Applicant's Horry County charges. Prior to the beginning of Applicant's Horry County capital trial, Applicant filed a PCR application, alleging Mr. Diggs' ineffective assistance of counsel during the Georgetown proceedings. This created a conflict of interest for Mr. Diggs. *See Odum v. State*, 641 S.E.2d 279, 281 (Ga. Ct. App. 2007); *Owens v. State*, 792 So.2d 650, 655 (Fla Ct. App. 2001); *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. App. 1999) *Adams v. State*, 380 So.2d 421, 422 (Fla. 1980); *People v. Fields*, 410 N.E.2d 1178, 1179 (Ill. App. Ct. 1980); *People v. Norris*, 361 N.E.2d 105, 110 (Ill. App. Ct. 1977). Over the State's objection to Mr. Diggs' continued representation of Applicant, the trial court improperly allowed Mr. Diggs to continue his representation of Applicant without adequately informing Applicant of the risks of proceeding with Mr. Diggs' representation or the specific nature of the conflict. *See Wheat v. United States*, 486 U.S. 153, 160-61 (1988); *Holloway*, 435 U.S. 475; *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the pre-trial phase of his capital trial.**

11(b) **Supporting Facts:** Trial counsel's performance during the pre-trial phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel agreed to postpone raising the change of venue motion until after voir dire was completed and the jury was impaneled, despite the fact that prior to voir dire a defendant can present evidence that negative pretrial publicity raises a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected, *see Skilling*

v. United States, 561 U.S. 358 (2010); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, 530 (1982); and

(2) Counsel 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 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. *See Skilling v. United States*, 561 U.S. 358 (2010); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

(3) Counsel failed to move for the trial court to find that the South Carolina death penalty statute, S.C. Code § 16-3-20, is unconstitutional, and thus bar the State from seeking a death sentence against Applicant, because the statute does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

(4) Counsel failed to ask potential jurors *voir dire* questions aimed at determining whether the potential jurors had any biases resulting from knowledge of, or relationships with, the Ling victims from Applicant's Georgetown charges. *Irvin v. Dowd*, 366 U.S. 717 (1961).

10(c) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the guilt-or-innocence phase of his capital trial.**

11(c) **Supporting Facts:** Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to adequately impeach the State's expert, Dr. Pamela Crawford, with all available information to impeach her credibility and undermine her testimony; and

(2) Counsel failed to protect Applicant's right to conflict-free counsel by failing to adequately advise Applicant and the trial court of all relevant issues regarding the conflict of interest created by Applicant's then-pending PCR application alleging counsel was ineffective in a prior, related proceeding. *See Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).

10(d) **Applicant was denied due process of law and a fundamentally fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution during the guilt-or-innocence phase of his capital trial.**

11(d) **Supporting Facts:** The State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared Applicant'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 Applicant's PET scan. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

10(e) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**

11(e) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel unreasonably informed the jury that Applicant's family did not like him and specifically pointed out the fact that none of Applicant's family were in attendance at the trial;

(2) Counsel elicited expert testimony that Applicant is a psychopath who could not help killing the victim and other testimony tending to dehumanize Applicant in the eyes of the jury, instead of evidence that tended to lessen Applicant's culpability and humanize Applicant in the eyes of the jury, *see* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11, commentary (2003); and

(3) Counsel failed to investigate and present all available mitigating evidence of applicant's life history and background, including testimony from an appropriate social history expert and/or other appropriate witnesses about how applicant's history and background affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

(4) Counsel failed to investigate and present all available mitigating evidence of applicant's mental health, including testimony from an appropriate mental health expert and/or other appropriate witnesses about how applicant's mental health/illness affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

10(f) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.**

11(f) **Supporting Facts:** Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Applicant's prior murder

conviction over trial counsel's consistent objections; U.S. Const. amends. V, VIII; Rule 403, SCRE.

(2) Appellate counsel failed to adequately raise and brief all legal grounds for challenging the conflict of interest created by trial counsel's representation of Applicant while a PCR application alleging that trial counsel was ineffective in a prior, related proceeding remained pending. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

10(g) **Applicant was denied an impartial jury—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 14-7-1020.**

11(g) **Supporting Facts:** Juror James Barry, who sat on the jury for the guilt-or-innocence and penalty phases of Applicant's trial, was married, at the time of trial, to a woman who treated the teenage daughter of the victim of the murder that resulted in Applicant's Georgetown County death sentence after the teenage daughter was sexually assaulted by Applicant. The sexual assault of the daughter and the murder of her mother were entered as aggravation during the penalty phase of Applicant's trial in Horry County. *Irvin v. Dowd*, 366 U.S. 717 (1961).

10(h) **Applicant's death sentence violates the Eighth Amendment to the United States Constitution because 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.**

11(h) **Supporting Facts:** 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. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
(b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
(c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).
(d) Applicant has not filed any motions, petitions, or applicants in this or any other Court.

13. Not applicable.

14. Applicant has not raised any ground set forth in (10) in this or any other court.

15. Not Applicable.

16. These grounds rely on additional facts outside the record which was before the previous courts.

17. Applicant was previously represented by counsel.

18. Applicant was represented at trial by William I. Diggs, 1700 Oak St., Suite D, Myrtle Beach, SC and Brana J. Williams, 1500 Hwy 17 North, Suite 102, Surfside Beach, SC.

On direct appeal applicant was represented by Robert M. Dudek and Robert M. Pachak, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, SC 29201.

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
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900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
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Columbia, South Carolina 29201
(803) 765-1044

BY: _____
ATTORNEY FOR APPLICANT

September 30, 2014

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-035
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of the Applicant's First Amended Application for Post-Conviction Relief was mailed today by first class United States mail, postage prepaid, this 30th day of September, 2014, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Lindsey S. Vann

3910

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
Stephen C. Stanko, #6022)
Plaintiff,)
vs.)
State of South Carolina)
Defendant.)

IN THE COURT OF COMMON PLEAS
15th JUDICIAL CIRCUIT
CASE NO.: 2014-CP-26-035

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Emily Paavola, Bar No.	Anthony Mabry, Bar No 11973
Address: 900 Elmwood Ave, Ste. 101, Columbia SC 29201	Address: P.O. Box 11549 Columbia, SC 29211
Phone (803) 765-1044 Fax	Phone (803) 734-6305 Fax (803) 734-4035
E-mail: Emily@defendingmyoath.org Other:	E-mail: amabry@scag.gov Other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ Oct. 30, 2014
Signature of Attorney for ☐ Plaintiff/☒ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $ _____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____
Date: _____, 20___

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____, 20___

☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

3911

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-035
	)	
vs.	)	
	)	**RETURN TO FINAL AMENDED APPLICATION FOR POST-CONVICTION RELIEF AND MOTION TO DISMISS**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, the State of South Carolina, by and through the Attorney General, hereby makes a Return to the Final Amended PCR Application of applicant Stephen C. Stanko, who has been convicted of one (1) count of murder, one (1) count of armed robbery, and sentenced to death. Respondent denies the allegations of the Final Amended PCR Application and requires strict proof thereof. Further, Respondent asserts several of applicant's grounds asserted herein are claims of trial court error or direct appeal claims that are not cognizable in post-conviction relief and must be dismissed with prejudice. Further, Respondent asserts there is no merit to any of the allegations alleged in the Final Amended Application for Post-Conviction Relief, and they should be denied. With regard to the grounds alleging ineffective assistance of counsel, applicant cannot prove deficient performance or resulting prejudice under Strickland v. Washington, 466 U.S. 668 (1984), and its progeny.

PROCEDURAL HISTORY

On April 8, 2005, applicant Stephen C. Stanko ("Stanko") murdered Charles Henry Turner in Conway and stole his keys and pick-up truck. Stanko was arrested on a fugitive from justice warrant in Augusta, Georgia on April 12, 2005 and returned to South Carolina. Stanko was

subsequently indicted by the Horry County grand jury in a two (2) count indictment for the murder and armed robbery of Turner. (Ind. No. 2005-GS-26-2927). (R. 3507, 2482, 1670-77).

The State sought the death penalty for Turner's murder. William Diggs and Brana J. Williams, Esquires, were appointed to represent Stanko. The Honorable Steven H. John, Circuit Court Judge was appointed as presiding judge over this capital case. (R. 2909, 3508, 3533).

Stanko proceeded to trial on November 14, 2009. At the conclusion of the guilt phase, the jury found Stanko guilty of murder and armed robbery. (R. 2482). At the conclusion of the penalty phase, the jury unanimously found two (2) aggravating circumstances were proven beyond a reasonable doubt: (1) the murder was committed during the commission of an armed robbery; (2) the murder was committed for the purpose of monetary gain. The jury also unanimously recommended a sentence of death. (R. 2896). Judge John, following the jury's recommendation, sentenced Stanko to death for Turner's murder and thirty (30) years for armed robbery. (R. 2905-06).

Stanko appealed his convictions and death sentence to the South Carolina Supreme Court raising six (6) issues:

I. Whether the trial court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where Appellant presented an insanity defense.

II. Whether the trial court erred in accepting Appellant's waiver of his trial counsel's conflict of interest where that counsel was subject to a pending accusation of ineffective assistance of counsel for his representation of Appellant in a prior capital murder case.

III. Whether the trial court erred in refusing to disqualify a juror who acknowledged she knew that Appellant received the death penalty for a prior capital murder, and stated unequivocally that she would vote to impose death in every instance where the State proved an aggravating circumstance beyond a reasonable doubt.

IV. Whether the trial court abused its discretion by refusing to grant a change of venue.

V. Whether the trial court erred by allowing all jurors over sixty-five to opt out of jury jury service.

VI. Whether the trial court erred by ruling that Appellant's execution did not violate the Eighth Amendment to the United States Constitution.

The State through Assistant Attorney General J. Anthony Mabry, filed its Final Brief of Respondent on July 23, 2012. On October 4, 2012, the South Carolina Supreme Court heard oral arguments in the case. On February 27, 2013, the South Carolina Supreme Court affirmed Stanko's convictions and death sentence. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). Stanko filed for rehearing, which was denied on April 3, 2013. Stanko sought certiorari in the United States Supreme Court, which was denied.

FACTS

On April 8, 2005, around 4:00 a.m., applicant Stephen Stanko ("Stanko") drove from Murrell's Inlet, S.C. to Conway, S.C. to the residence of Henry Turner, a friend. Stanko was driving a red Ford Mustang convertible, which belonged to his girlfriend. Prior to driving to Turner's residence, Stanko had called Turner and informed him that his, Stanko's, father had died. Turner, who was seventy-four (74) years old, told Stanko to come over to his residence, and he would console him. When Stanko arrived at Turner's residence, he parked the red Mustang in front of Turner's home. (R. 1472-78, 1495-1502, 1857-61, 1872-74, 1880, 2706, 2710-11).

Stanko and Turner sat in the living room of Turner's home discussing Stanko's loss, i.e. the death of his father. During the conversation, Turner called his girlfriend in Charlotte, N.C. and informed her Stanko was there at the house and he, Turner, was trying to help Stanko deal with his father's death. Stanko and Turner talked most of the remaining night. (R. 1857-61, 1868, 2706, 2710-11).

That same morning, after daylight, Turner drove his gray Mazda pick-up truck to a nearby

McDonald's restaurant and got breakfast. He returned to his residence shortly thereafter. A neighbor spoke with Turner in the yard and noticed Stanko's Mustang was parked at Turner's residence.[1] (R. 1503-11, 1517-31. 1587-88).

After returning to the residence with breakfast, Turner was shaving with an electric razor in front of his bathroom mirror. Unknown to Turner, Stanko's father had not died. Unknown to Turner, Stanko had murdered his girlfriend Laura Ling in Georgetown County, raped her daughter, cut the daughter's throat, and left her for dead. Stanko had also stolen Lings' car, the red Mustang, and driven to Ling's bank and withdrawn several hundred dollars in cash before coming to Turner's residence[2] (R. 1479-94, 1472-78, 1587-88, 1590, 319-20, 1593-94, 1830-51, 1857-62, 1880, 2315).

Either while Mr. Turner was at McDonald's getting breakfast, or while Turner was shaving, Stanko retrieved a .357 revolver loaded with .38 caliber bullets. While Turner was shaving, Stanko approached Turner from behind, and while placing a pillow over the gun to silence the weapon, shot Turner in the back. Turner turned around and walked a few steps to the doorway of the bathroom. Stanko struck Turner in the head with his hand or possibly the gun. Turner dropped to his knees. Stanko then shot Turner again, this time in the chest. Turner then collapsed on the floor dead. (R. 1499-1572, 1575-97, 1598-1603, 1730-45, 1746-50, 1751-57, 1830-46, 1862-63,1876-77, 1884).

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[1]The neighbor had seen Stanko driving the red Mustang before and assumed it belonged to Stanko. The car actually belonged to Stanko's girlfriend Laura Ling.

[2]Stanko was previously convicted of Ling's murder, the attempted murder of her daughter, the kidnapping of Ling, the kidnapping of the daughter, and the sexual assault of the daughter. Stanko was also sentenced to death by a Georgetown County, S.C. jury for the murder of Laura Ling. His convictions and death sentence were affirmed by the South Carolina Supreme Court, State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008), and his Petition for Writ of Certiorari to the U.S. Supreme Court from those convictions and death sentence was denied.

Stanko then removed items from Turner's pockets including the keys to his truck. Stanko then stole Turner's gray truck, leaving Ling's red Mustang convertible at Turner's residence. Stanko then fled the coastal area of South Carolina in Turner's truck. (R.1532-48, 1590, 1592, 1604-77,1508-09,1529-31, 1830-46, 1865-67, 2239-41).

Police were called to Turner's residence that same evening when Turner's son became worried about his father when he saw news reports that Stanko was wanted for Laura Ling's murder. When police arrived at Turner's residence, they found Ling's Mustang still parked in front of Turner's home. Inside the residence, police found Turner's body face down on the floor with Turner's electric shaver next to his body. Police also found the pillow Stanko had used in an attempt to muffle the first shot fired into Turner's back and two (2) fired shell casings on the dresser.[3] Also found was a business card of Stanko. (R. 1532-48, 1549-57, 1559-72, 1575-97, 1598-1603).

Stanko appeared that same evening in the Congaree Vista area of Columbia, S.C. Stanko was seen partying at various restaurants or night clubs representing himself to be a successful businessman. Stanko was carrying a large amount of cash. Stanko bought drinks for most of the people he came into contact with that night. Witnesses noticed Stanko had an injury to his hand that was bandaged. Stanko told various stories regarding how he injured the hand. Stanko told one individual he hurt the hand while changing a tire on his vehicle. Stanko told another individual he had fallen while jogging in Charleston, S.C. earlier in the week. (R. 1604-33).

Stanko appeared the following Monday in Augusta, Georgia where *The Masters* golf tournament was taking place. At this time, Stanko was again seen at a bar, and struck up a

[3]The gun Stanko used to murder Turner was a revolver. (R. 1755-56).

romantic relationship with another young lady, Dana Putnam. Stanko at this time represented himself to be the owner of several "Hooters" restaurants in the southeastern United States. Stanko's new girlfriend also noticed he had an injury to his hand. She also testified Stanko was spending a lot of cash. She also testified the entire time she was with Stanko he was driving a Mazda pick-up truck. Stanko told her the truck belonged to his mechanic, and his Jaguar was being repaired. After several days of being in Stanko's company, Ms. Putnam saw Stanko's picture in a local newspaper indicating he was wanted for the coastal South Carolina murders. She notified police. (R. 1634-88).

A United States Marshall's task force located Stanko at a strip mall in Augusta, Georgia where Stanko was arrested. He waived extradition to South Carolina. (R. 1670-77).

At the time of his arrest, Stanko was still in possession of Turner's Mazda pick-up truck. Found inside the truck were items linked directly to Stanko, including his business card, and a receipt for flowers he had bought his new girlfriend in Augusta. Also found in the truck was a .357 revolver fully loaded with .38 caliber ammunition. Police also found in the truck the key fob to a Ford Mustang automobile, and a notebook with Laura Ling's name on it. (R. 1670-77, 1707-24, 1867-68, 1886).

At Henry Turner's autopsy, the pathologist removed two fired .38 caliber bullets from Turner's body. A forensic firearms examiner later concluded the two .38 caliber bullets taken from Turner's body were fired by the .357 revolver recovered from Turner's truck, which was in Stanko's possession. (R. 1730-57, 1867-68).

At trial, Stanko called a series of experts who opined that Stanko was insane and had, based on brain scans, a malformed frontal lobe of the brain. (R. 1811-89, 1913-2009, 2012-2220, 2229-50, 2254-57). The State called several experts who established Stanko was not insane and

that the frontal lobe of Stanko's brain was not malformed. A State's expert also testified Stanko did not suffer from any mental illness and had anti-social personality disorder with narcisstic traits. (R. 2278-2319, 2320-46, 2346-2410). At the conclusion of the guilt phase, the jury was given four (4) different verdict forms for each crime charged: (1) Not guilty; (2) Not guilty by reason of insanity; (3) Guilty but mentally ill; and (4) Guilty. (R. 2413-27, 2475-76). The jury found Stanko guilty of murder and guilty of armed robbery, rejecting the insanity defense and a verdict of guilty but mentally ill. (R. 2481-85).

The Penalty Phase

In the penalty phase, the State established Stanko's bad character and future dangerousness. Stanko was on community supervision (parole) at the time he murdered Turner. Stanko had previously been convicted in Charleston, S.C. of kidnapping, obtaining goods by false pretenses, and multiple counts of breach of trust. Stanko served eight (8) and a half (½) years in prison for these offenses. After being released from prison, and while on community supervision, Stanko was representing himself to be an attorney, paralegal, or attorney's investigator and had defrauded several individuals of large amounts of money through his fraudulent cons and schemes. (R. 2504-94).

In the penalty phase, the jury also heard the facts and circumstances surrounding Stanko's murder of Laura Ling, and the kidnapping, rape, and attempted murder of Ling's minor daughter. Stanko bound Laura Ling and strangled her to death. (R. 2603-16, 2631-76, 2681-96). Stanko had also beaten, bound, and brutally raped her fifteen (15) year old daughter. After murdering Laura and raping her daughter, Stanko cut the daughter's throat and left her believing she was dead. Stanko then stole Ling's Ford Mustang, drove to Ling's bank, and withdrew the cash from the ATM machine. The following morning, Stanko called Ling's employer, the Socastee Library, and

informed them that Ling would not be coming to work because she was ill from food poisoning. (R. 2594-2601). At the time Stanko made this call, the Socastee Library staff already knew police had discovered someone dead in the Ling home; however, Stanko was not aware Ling's body and that of her living daughter had been discovered in the early morning hours after he left the Ling residence. Ling's daughter had survived the brutal assault and called 911 using a cell-phone. Police were already looking for Stanko for the Ling murder when he made the call to the Socastee Library and when he murdered Henry Turner and stole his truck. (R. 2603-16).

Ineffective Assistance of Counsel

In a PCR action, 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). In order to establish ineffective assistance of counsel, Stanko must prove: (1) deficient performance; and, (2) resulting prejudice. Id., *citing* Strickland v. Washington, 466 U.S. 668 (1984). This requires Stanko prove the representation he received fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Id.; Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 700 (2006). Stanko must show counsels' actions were unreasonable under prevailing professional norms. Strickland, 466 U.S. at 690. This is a difficult burden to satisfy, as there is a strong presumption counsel provided effective assistance and made all significant decisions in the exercise of reasonable professional judgment. Id., at 690. It is made more difficult still by the latitude courts must give attorneys when evaluating strategies they used to try their cases. Accordingly, where counsel articulates an objectively reasonable strategic reason for employing a certain strategy, it will not be deemed ineffective assistance, if the decision was objectively reasonable under the circumstances. Id.; Council v. State, 380 S.C. 159, 670 S.E.2d 356

(2008)(Counsel's strategy is reviewed under "an objective standard of reasonableness.").[4]

Satisfying the second prong of the Strickland test is equally challenging. Stanko must prove he was prejudiced by counsel's ineffective assistance. In a guilt phase, Stanko must prove but for counsel's alleged deficient performance, the result of the proceeding would have been different. Strickland. In a penalty proceeding, prejudice occurs if "there is a reasonable probability that the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695; Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. Id. The United States Supreme Court made clear in Wong v. Belmontes, 130 S.Ct. 383 (2009), the burden is not on the State to show the lack of prejudice but on the applicant to show prejudice. Id. This requires Stanko establish that had counsel acted competently, there is a reasonable probability the jury would have returned with a different sentence. Id., *quoting* Wiggins v. Smith 539 U.S. 510, 535-36 (2003). More recently, the United States Supreme Court has clarified this showing "requires a substantial, not just a conceivable, likelihood of a different result." Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011). *See also* Sears v. Upton, 130 S.Ct. 3259 (2010).

In order for Stanko to prevail on a claim of ineffective assistance of counsel, he must satisfy both prongs of the Strickland analysis. "Failure to make the required showing of either

[4] When reviewing ineffective assistance claims, courts must "eliminate the distorting effects of hindsight" attempt "to reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." Strickland., 466 at 689. In fact, "[t]here are countless ways to provide effective assistance in any given case," and the fact that counsel's strategy was ultimately unsuccessful does not render counsel's assistance constitutionally ineffective. Id., at 689. Thus, in order to establish the quality of his representation was so poor as to be ineffective, Owens must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on has having produced a just result." Strickland, 466 U.S. at 696.

deficient performance or sufficient prejudice defeats the ineffective assistance claim." Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (2009).

PCR GROUNDS

10(a) **Applicant was denied the right to conflict-free assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20.**

11(a) **Supporting Facts:** Applicant did not receive conflict-free assistance of counsel because his trial counsel, Mr. William Diggs, had a conflict of interest, which the trial court failed to adequately address under *Holloway v. Arkansas*, 435 U.S. 475 (1978). Mr. Diggs previously represented Applicant on a capital murder charge in Georgetown County, which resulted in a death sentence. The Georgetown County case involved a separate, but related, incident to the incident underlying Applicant's Horry County charges. Prior to the beginning of Applicant's Horry County capital trial, Applicant filed a PCR application, alleging Mr. Diggs' ineffective assistance of counsel during the Georgetown proceedings. This created a conflict of interest for Mr. Diggs. *See Odum v. State*, 641 S.E.2d 279, 281 (Ga. Ct. App. 2007); *Owens v. State*, 792 So.2d 650, 655 (Fla Ct. App. 2001); *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. App. 1999) *Adams v. State*, 380 So.2d 421, 422 (Fla. 1980); *People v. Fields*, 410 N.E.2d 1178, 1179 (Ill. App. Ct. 1980); *People v. Norris*, 361 N.E.2d 105, 110 (Ill. App. Ct. 1977). Over the State's objection to Mr. Diggs' continued representation of Applicant, the trial court improperly allowed Mr. Diggs to continue his representation of Applicant without adequately informing Applicant of the risks of proceeding with Mr. Diggs' representation or the specific nature of the conflict. *See Wheat v. United States*, 486 U.S. 153, 160-61 (1988); *Holloway*, 435 U.S. 475; *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

Respondent denies the allegations of this ground and requires strict proof thereof.

Further, this ground is raising a claim of trial court error or a direct appeal claim, and not one of ineffective assistance of counsel. **As a result, this claim is not cognizable in post-conviction relief.** S.C. Code Ann. Section 17-27-20(b) (2003); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). ("Allegations of trial court

error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). This ground must be dismissed with prejudice. Id.

Further, there is no merit to this ground as the South Carolina Supreme Court addressed this issue and found it was not preserved, and the South Carolina Supreme Court found Stanko himself knowingly, intelligently, and voluntarily waived and abandoned any possible conflict of interest. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). The South Carolina Supreme Court's decision in this case is fully supported by the record, including numerous hearings before the circuit courts. (Record on Appeal). Further, this PCR Court cannot overturn the South Carolina Supreme Court's decision in this case. And, that decision is the law of the case. Furthermore, Stanko is barred from raising this claim by the principles of *res judicata*, judicial estoppel, and collateral estoppel.

Further, the Record shows not only that this issue was not preserved and was waived and abandoned by Stanko, but also that there is no merit to this ground. (See Record on Appeal, and Final Brief of Respondent, Issue II.). This ground must be denied and dismissed with prejudice.[5]

10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the pre-trial phase of his capital trial.**

[5] To the extent applicant is attempting to raise a claim of ineffective assistance of counsel under this ground, which it does not appear he is raising, Respondent denies those allegations and requires strict proof thereof. Further, there is no merit to that allegation, if raised, for the reasons stated above. Further, Stanko will not be able to show deficient performance or prejudice under Strickland.

11(b) **Supporting Facts:** Trial counsel's performance during the pre-trial phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel agreed to postpone raising the change of venue motion until after voir dire was completed and the jury was impaneled, despite the fact that prior to voir dire a defendant can present evidence that negative pretrial publicity raises a presumption of juror prejudice and demonstrates that an impartial jury cannot be selected, *see Skilling v. United States*, 561 U.S. 358 (2010); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, 530 (1982); and

(2) Counsel 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 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. *See Skilling v. United States*, 561 U.S. 358 (2010); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

(3) Counsel failed to move for the trial court to find that the South Carolina death penalty statute, S.C. Code Section 16-3-20 is unconstitutional, and thus bar the State from seeking a death sentence against Applicant, because the statute does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment. *Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

(4) Counsel failed to ask potential jurors *voir dire* questions aimed at determining whether the potential jurors had any biases resulting from knowledge of, or relationships with, the Ling victims from Applicant's Georgetown charges. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Respondent denies the allegations of this ground, including subparts (1) through (4), and requires strict proof thereof.

Further, there is no merit to this ground. Stanko will not be able to prove deficient performance or resulting prejudice. Strickland; Belmontes. The record will show counsel's performance was not deficient in this regard, and Stanko was not prejudiced in this regard.

Further, Stanko was tried by a fair and impartial jury. (Record on Appeal). State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013).

"When a trial judge grants or denies a motion for a change of venue after adequate *voir dire* of prospective jurors, the decision will not be overturned absent extraordinary circumstances." State v. Woods, 382 S.C. 153, 157, 676 S.E.2d 128 (2009); State v. Evins, 373 S.C. 404, 645 S.E.2d 904, *cert. denied*, 128 S.Ct. 662 (2007). "The moving party has the burden of demonstrating actual juror prejudice." Woods, 373 S.C. at 157; State v.Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

"When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where 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." Evins, 373 S.C. at 412; State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). Therefore, the mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Id.

Deference is to be given to a trial judge's discretion in qualifying or disqualifying a juror, because a trial judge is in a position to assess the demeanor of the juror, a factor of critical importance in assessing the attitude and qualifications of any potential juror. Utecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218 (2007); State v. Mercer, 381 S.C. 149, 672 S.EW.2d 556 (2009).

While there was certainly publicity surrounding these crimes, as in any capital case, the jurors were each questioned individually regarding what they had heard about the case. Each juror who was qualified and selected to serve in this case, if they had heard, read, or seen anything about

the case, testified under oath that they could set aside what they knew or had heard and decide the case based solely on the evidence they heard in the courtroom. **(R. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916).** Stanko has presented no reason to question the sworn testimony of these jurors. (See R. 274-86, See also Tr. pp. 70-71, 21).

Additionally, Stanko has pointed to no juror, of those qualified and not selected as petit jurors, who testified they could not set aside what they had read or heard about the case or any preformed opinion and decide the case solely on the facts and evidence presented in the courtroom. (See IBOA, p. 41, n. 9).

The South Carolina Supreme Court has clearly held that the safest guarantee of a fair and impartial jury is *voir dire*. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007). Evins was a capital murder case that involved extensive pre-trial publicity including the fact that Evins had previously been convicted of sexual assaults and had been charged with another brutal murder in addition to the murder for which he was on trial. Even though some of the jurors in Evins had read about the other crimes, this Court held that the trial judge did not err in refusing to change venue, finding the court=s instructions and the jurors' answers under oath sufficient to insure a fair and impartial jury. Id. Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath that they would disregard anything they had read, heard, or seen about the case, and decide the case solely on the evidence presented at trial, Stanko cannot show deficient performance or prejudice. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(when jurors

have been exposed to pretrial publicity, a denial of a change of venue is not error where 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. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing trial court's grant of a change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, the better practice is to try and seat a jury prior to ruling on a change of venue motion); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, **not pre voir dire public opinion surveys**); *See also* State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(change of venue not required where jurors are found to be able to lay aside exposure and base verdict on evidence at trial); State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998)(relevant inquiry is whether jurors have such fixed opinions that they cannot judge evidence impartially, and credibility of juror responses is for trial court). Given the jurors' responses under oath that they would decide the case based solely on the evidence introduced at trial, and this state's legal precedential standard for a change of venue, Judge John did not err in denying the motion for a change venue. State v. Kelsey, 331 S.C. 50, 68, 502 S.E.2d 63, 72 (1998)(finding no error by denying change of venue when nine of twelve seated jurors had heard some coverage of the case but told judge they could set aside what they heard and decide case on evidence presented); *see* State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)(no abuse of discretion to deny venue change when eleven seated jurors and two alternates acknowledged exposure to media coverage but said they could be impartial and decide case on evidence presented). *See also* State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins.").

The issue is not whether the jurors had heard something about the case or whether there was publicity about the crimes prior to trial. Evins; Tucker; Manning. The critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial. Evins, 373 S.C. at 412, 645 S.E.2d. at 908. *See also* State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(no error committed where trial judge qualified two jurors to serve, who admitted to reading a newspaper article revealing defendant's prior death sentence, where each juror when questioned, stated they could put aside their prior knowledge, and follow the law); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)(nine jurors who knew that defendant had been convicted in a separate capital case and received the death penalty, were properly qualified). *See also* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(trial judge did not err qualifying seven jurors that knew something about the case, including some who knew of the defendant's prior conviction and death sentence for the same murder, where each juror stated that they would set aside such knowledge and base their verdict on evidence presented).

These decisions are consistent with prior holdings of the United States Supreme Court that a juror's exposure to information about a defendant's prior convictions or to news accounts about the crime with which he is charged does not presumptively deprive the defendant of due process. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1619 (1961). The relevant question is not whether the community remembers the case, but whether the potential jurors have fixed opinions about the case, such that they cannot impartially judge the guilt or innocence of the defendant. Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899 (1991); Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885 (1984); DeLee v. Knight, 266 S.C. 103, 221 S.E.2d 844 (1975). Therefore, when jurors

have been exposed to pretrial publicity, it is not error to deny a motion to disqualify a juror, where jurors are found to have the ability to lay aside any impressions or opinions they may have, and render a verdict based upon the evidence presented at trial. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); DeLee v. Knight, 266 S.C. 103, 221 S.E.2d 844 (1975); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990); State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct. App. 1985).

Additionally, Stanko has failed to demonstrate prejudice. Stanko was tried by a fair and impartial jury. **(R. 1407-1412, 1418-1423, Nov. 13 Tr. pp. 133-138, 144-149). State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013).**

Further, the South Carolina Supreme Court found Stanko was tried by a fair and impartial jury *and* the trial court did not err in denying the motion for a change of venue. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). That determination by the South Carolina Supreme Court is the law of the case, and Stanko is bound by that decision and is barred from re-litigating that issue by the principles of *res judicata* and/or collateral estoppel. Stanko cannot show deficient performance or prejudice with regard to any change of venue motion. Strickland.

A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985) *overruled on other grounds* Torrence, *supra*; State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity or knowledge. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Stanko has shown none.

The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the evidence. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2009) *citing* State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert denied* 498 U.S. 881 (1990); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Green; State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987).

The record shows that of Stanko's petit jury panel only (2) jurors had heard or read about Stanko's prior crimes in Georgetown County and heard or read something about the Horry County case. Both testified they had not formed an opinion about the case, and could set aside whatever they had read, heard, or knew and decide the case based solely on the evidence presented in the courtroom. **(R. 81-97, 624-646, Nov. 9-12 Tr. pp. 624-646).** The remainder of the ten (10) petit jury panel members, and the four (4) alternates, either knew nothing about the case or only had heard the name of the defendant. **(See R. 1418-1421, Nov. 13 Tr. pp. 144-147).**

Each juror who was seated on the petit jury panel, if they knew anything about the case, testified they would set aside anything that they had heard, seen, or knew outside the courtroom and decide the case and issues therein based only on the evidence introduced at trial. **(R. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719, Nov. 9-12 Tr. pp. 81-97, 98-113, 165-177, 246-259, 259-272, 274-286, 399-412, 414-429, 434-447, 624-646, 684-697, 704-719).** The alternates testified similarly. **(R. 730-742, 746-757, 826-840, 904-916, Nov. 9-12 Tr. pp. 730-742, 746-757, 826-840, 904-916).** Stanko has

not shown any of the jurors in this case violated their oath or sworn testimony to disregard anything they heard or saw in the press or knew about the case and decide the case solely on the evidence produced in the courtroom.

Furthermore, the fact that Stanko committed the Georgetown murder and attempted murder could not have prejudiced the jury's ultimate determination of sentence. The jury was fully aware Stanko had murdered his girlfriend Laura Ling, and kidnapped, raped her daughter, and tried to murder her through the testimony elicited during the Horry County trial. **(R. 2603-2696, Tr. pp. 2193-2286).** The jury was also aware Stanko had stolen Ling's car and gone to her bank and withdrawn money from her bank account before going to Turner's residence. **(R. 1473-1531, 1533-1547, 1549-1557, 1559-1571, 1575-1602, 1634-1668, 1670-1676, 1857, 2594-2606, 2608-2616, 2631-2675, 2677-2696, Tr. pp. 199-257, 259-273, 275-283, 285-297, 301-328, 360-394, 396-402, 1449, 2184-2196, 2198-2206, 2221-2265, 2267-2286).** These facts were properly before the jury, therefore Stanko cannot show prejudice in the penalty phase. Evins, 373 S.C. at 414.

Accordingly, Stanko's complaint regarding prejudice is necessarily limited to the guilt phase. Id., at 414. Given the overwhelming evidence presented during that phase of his trial, Stanko cannot show prejudice. The guilt phase jury knew Stanko had taken Ling's car, driven to her bank and withdrawn money, and then driven all the way to Conway from Murrell's Inlet. The jury also knew Stanko had deceived the victim into admitting him into his home, waited until the victim was distracted before attempting to murder him, approached the victim surreptitiously from behind and shot the victim in the back using a pillow as a silencer, shot the victim again in the chest while he was on his knees, removed items from the victim's pocket after he rendered him helpless,

stole the victim's truck leaving Ling's red Mustang behind, and fled the coastal area of South Carolina. Considering this evidence, along with Stanko's actions after the crimes, along with the State's medical expert testimony that Stanko was not insane and did not have any brain abnormality, Stanko cannot show he suffered any prejudice. Id., at 414.

Inasmuch as counsel made a change of venue motion, and the trial court was able to select an unbiased jury pursuant to the South Carolina Supreme Court's mandate in Manning; Evins, and Woods, there was no error in failing to grant a change of venue. **(R. 1418-1421, Nov. 13 Tr. p. 144, ln. 15 - p. 149, ln. 14).** State v. Stanko. *See* Woods, 382 S.C. at 158. *Accord* State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007)(grant or denial of change of venue after adequate *voir dire* of prospective jurors will not be overturned except in extra-ordinary circumstances). As a result, counsel could not have been ineffective or Stanko prejudiced as alleged above under this ground or any of its subparts. *See* Fulks v. United States, 875 F.Supp.2d 535, 599-604 (2010); *affirmed* 683 F.3d 512 (4th Cir. 2012). This ground has no merit and must be denied and dismissed.

With regard to ground 10(b)11(b)(3) above, there is no merit to this ground. Counsel could not have been ineffective for failing "*to move for the trial court to find that the South Carolina death penalty statute, S.C. Code Section 16-3-20, is unconstitutional, and thus bar the State from seeking a death sentence against applicant Stanko, because the ststute does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment[.],*" because the statute is not unconstitutional pursuant to Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) because the statute does genuinely narrow the class of offenders eligible for the death scntence as required by the Eighth Amendment. S.C. Code Ann. Section 16-3-20, *et. seq*; Kansas v. Marsh, 548 U.S. 163, 126 S.Ct. 2516 (2006); Brown v.

Sanders, 546 U.S. 212 (2006); Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847 (2005); Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183 (2005); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002); Smith v. Texas, 543 U.S. 37, 125 400 (2004); Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1997), *overruled on other grounds* Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002); Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283 (1995); Tuilaepa v. California, 512 U.S. 967, 512 U.S. 967 (1994); Arave v. Creech, 507 U.S. 463, 113 S.Ct. 2112 (1993); Sochor v. Florida, 504 U.S 527, 536, 112 S.Ct. 2114 (1992); Stringer v. Black; 503 U.S. 222, 112 S.Ct. 1130 (1992); Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092 (1990); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313 (1990)(per curiam); Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078 (1990); Penry v. Lynaugh, 492 U.S. 302, 109 Ct. Ct. 2934 (1989); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Sumner v. Goodman, 483 U.S. 66, 107 S.Ct. 2716 (1987); Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983); Godfrey v. Georgia, 446 U.S. 420, 1000 S.Ct. 1759 (1980); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1197 (1977); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976)(plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The trial court would have overruled any such objection or challenge.

As a result, this Ground has absolutely no merit and must be denied and dismissed with prejudice.

10(c) **Applicant was denied the right to effective assistance of counsel—guaranteed**

by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the guilt-or-innocence phase of his capital trial.

11(c) **Supporting Facts:** Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to adequately impeach the State's expert, Dr. Pamela Crawford, with all available information to impeach her credibility and undermine her testimony; and

(2) Counsel failed to protect Applicant's right to conflict-free counsel by failing to adequately advise Applicant and the trial court of all relevant issues regarding the conflict of interest created by Applicant's then-pending PCR application alleging counsel was ineffective in a prior, related proceeding. *See Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).

Respondent denies the allegations of this ground, including subparts, and requires strict proof thereof.

Further, there is no merit to this ground. Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996)("In hindsight, there are few, if any cross-examinations that could not be improved upon. If that were the statndard of constitutional effeictiveness, few would be the coun sel whose performance would pass muster."). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every concevable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). As the trial record shows, counsel adequately cross-examined Dr. Crawford and his cross examination was not deficient, further Stanko cannot show prejudice on this record. (See Record on Appeal). Strickland; Belmontes.

Further, there is no merit to the 2nd allegation of this ground either. Trial counsel adequately advised applicant and the court of all relvant issues regarding any alleged conflict of interest, and Stanko knowingly, intelligently, and voluntarily waived any alleged conflict of interest several times on the record before the trial court, and the South Carolina Supreme Court found Stanko knowingly, voluntarily and intelligently waived any possible conflict of interest. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). **(See also Brief of Respondent, Issue II.).** Further, that decision is the law of the case. Further, the circuit court also adequately advised applicant of all relvant issues regarding any alleged conflict of interest. And, Stanko, knowingly, intelligently, and voluntarily waived any possible alleged conflict of interest several times on the record before the trial court, and the South Carolina Supreme Court found Stanko knowingly, voluntarily, and intelligently waived any possible conflict of interest. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). **(See also Brief of Respondent, Issue II.).** Further, Stanko is bound by the South Carolina Supreme Court's ruling on this issue and is barred from re-litigating the issue of his waiver of any possible conflict by the principles of *res judicata*, judicial estoppel, and/or collateral estoppel. As a result, Stanko cannot show deficient performance or prejudice with regard to this ground. Strickland. This ground must be denied and dismissed.

10(d) **Applicant was denied due process of law and a fundamentally fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution during the guilt-or-innocence phase of his capital trial.**

11(d) **Supporting Facts:** The State presented false, misleading, inaccurate, and unreliable expert testimony through Dr. Kenneth Spicer who compared Applicant'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 Applicant's PET scan. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

Respondent denies the allegations of this ground and requires strict proof thereof.

Further, this is a direct appeal claim that could have been raised on direct appeal and was not. As a result, this claim is not cognizable on post-conviction relief and must be dismissed with prejudice. S.C. Code Ann. Section 17-27-20(b) (2003); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). ("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981), Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). This ground must be dismissed with prejudice.

Further, there is no merit to this ground. The State did not present false, misleading, inaccurate, or unreliable expert testimony through Dr. Kenneth Spicer. (See Record on Appeal). As a result, this ground must be dismissed with prejudice.

10(e) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**

11(e) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel unreasonably informed the jury that Applicant's family did not like him and specifically pointed out the fact that none of Applicant's family were in attendance at the trial;

(2) Counsel elicited expert testimony that Applicant is a psychopath who could not help killing the victim and other testimony tending to dehumanize Applicant in the eyes of the jury, instead of evidence that tended to lessen Applicant's culpability and humanize Applicant in the eyes of the jury, *see* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11, commentary (2003); and

(3) Counsel failed to investigate and present all available mitigating evidence of applicant's life history and background, including testimony from an appropriate social history expert or other appropriate witnesses about how applicant's history and background affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

(4) Counsel failed to investigate and present all available mitigating evidence of applicant's mental health, including testimony from an appropriatew mental health expert and/or other appropriate witnesses about how applicant's mental health/illness affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Wiek v. State*, 409 S.C. 214 (2014).

Respondent denies each and every allegation of this ground including parts (1), (2), (3), and (4) and requires strict proof thereof.

Further, there is no merit to any of this ground including subparts. Counsel was not deficient in the sentencing phase, nor can Stanko show any prejudice on this record. Wiggins; Belmontes (See Record on Appeal/Guilt and Penalty Phase). Counsel was not deficient in their mitigation investigation, nor was Stanko prejudiced, but contrary to Stanko's allegation, counsel conducted a reasonable and thorough mitigation investigation and presented a reasonable and proper mitigation case on Stanko's behalf. Wiggins. (See Record on Appeal, both Guilt and Penalty Phase presentation). Further, Respondent is informed and believes counsel made objectively reasonable strategic decisions in regard to what evidence to present and not present and what to argue and not argue on applicant's behalf, and those decisions were objectively reasonable

under the circumstances and not subject to a claim of ineffective assistance of counsel. Strickland; Council.

Further, Stanko cannot show prejudice under the appropriate standard. Strickland; Belmontes; Pinholster; Sears v. Upton. Stanko cannot show that but for counsel's alleged deficient performance there is a reasonable probability the jury would have returned with a different sentence. Id. Stanko must show there is a substantial, not just a conceivable likelihood of a different result. Pinholster.

The evidence supporting a sentence of death was overwhelming. Stanko surrepticiously gained entrance into the victim's residence by falsely informing the victim that his, Stanko's, father had died, when in fact Stanko's father had not died. Stanko waited until the victim was helpless and distracted in front of the bathroom mirror to approach the elderly victim from behind and shoot the victim one (1) time in the back using a pillow as a silencer. When the victim turned around, Stanko struck the victim knocking him to his knees, and then shot the victim in the chest again killing him. Stanko then stole the victim's car keys and truck and fled Horry County. Stanko left behind at the victim's residence the car of his first murder victim, Laura Ling.

Stanko murdered another human being, Laura Ling, the night before the murder of the victim in this case. Stanko bound Laura Ling, beat her unconsious, and strangled her to death. Stanko also bound her teenage daughter and raped her. Stanko then attempted to murder the teenage daughter of his first murder victim by cutting her throat. Stanko left the teenage daughter believing she was dead or would die shorlty thereafter and locked the door to Ling's residence as he left. Stanko then drove Ling's car to her bank and withdrew money from her bank account.

Stanko then called the victim in this case, Henry Turner, informing him falsely that his father had died. Stanko then drove from Georgetown County all the way to Turner's residence in Conway, S.C. The following morning, Stanko called Ling's employer, the Socastee County Library and falsely informed them Ling would not be coming to work that day because she was suffering from food poisoning.

Stanko then fled the coastal area of South Carolina in Turner's truck. His actions in the days following his flight from Georgetown and Horry County's support the death sentence imposed by the jury in this case. (See Record on Appeal).

Stanko committed the murder of Turner, the murder of Ling, and the rape and attempted murder of her daughter while he was on community supervision for a prior kidnapping offense. Stanko had also previously been convicted of several counts of breach of trust. Stanko served approximately 8 ½ years in prison immediately before these crimes, had not been rehabilitated, and was engaging in similar confidence schemes while under community supervision when he committed these criminal acts.

As a result, Stanko cannot establish but for counsel's alleged deficient performance, there is a reasonable probability the jury would have returned with a different sentence. Belmontes; Sears; Strickland; Pinholster.

As a result, this ground must be dismissed with prejudice.

10(f) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.

11(f) **Supporting Facts:** Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Appellate counsel failed to raise the issue that the trial court erred in admitting significant amounts of prejudicial evidence relating to Applicant's prior murder conviction over trial counsel's consistent objections; U.S. Const. amends. V, VIII; Rule 403, SCRE.

(2) Appellate counsel failed to adequately raise and brief all legal grounds for challenging the conflict of interest created by trial counsel's representation of Applicant while a PCR application alleging that trial counsel was ineffective in a prior, related proceeding remained pending. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986).

Respondent denies the allegations of this ground, including subparts (1) and (2) and requires strict proof thereof.

Further, appellate counsel's performance was neither deficient nor can Stanko prove prejudice on this record. Smith v. Robbins, 528 U.S. 259, 285 (2000); Richardson v. Branker, 668 F.3d 128, (4th Cir 2011); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000)(en banc); Jones v. Barnes, 463 U.S. 745, 751 (1983); Smith v. Stewart, 140 F3d 1267 (9th Cir. 1988); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); (See Record on Appeal, Brief of Appellant, State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013)).

Further, the evidence admitted in the guilt phase was admissible in the guilt phase. And, the evidence admitted in the penalty phase was admissible in the penalty phase under the case law of the United States Supreme Court and the South Carolina Supreme Court on among other issues, the circumstances of the crime, applicant's character, and his future dangerousness, which are relevant sentencing considerations. *See* Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093

(1992); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418 (1983); Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 3418 (1983); Barefoot v. Estelle, 463 U.S. 880, 1107, 103 S.Ct. 3383, 3396 (1983); Jurek v. Texas, 328 U.S. 262, 276 (1976); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976); Delso v. Lashley, 507 U.S. 272, 113 S.Ct. 1222 (1993); State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006); State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998); Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990); State v. Howard and Weldon, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Middleton, 295 S.C. 318, 368 S.E.2d 457, *cert. denied*, 488 U.S. 872 (1988); State v. Mathews, 296 S.C. 379, 373 S.E.2d 587 (1988); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987); State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (1985); State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984); State v. Woomer, 278 S.C. 468, 399 S.E.2d 317 (1982); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). *See also* State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998)(generally in evidentiary law character refers to an individual's propensity). There was no deficient performance or prejudice under this allegation. *See* Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance claims based on failure to object are tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial not to object).

Further, appellate counsel appropriately raised the alleged conflict issue on appeal, and Stanko cannot show deficient performance or prejudice from any alleged ineffective assistance of appellate counsel. Smith v. Barnes. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). Further, the Supreme Court found the issue was not preserved for appeal because of the positions taken by Stanko below before the Circuit Court. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). Appellate counsel could not be deficient in failing to more thoroughly raise an issue that was not preserved for appellate review. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991)(appellate counsel is not ineffective for failing to raise an issue that was not preserved below). Further, the South Carolina Supreme Court found Stanko personally voluntarily, knowingly, and intelligently waived any possible conflict of interest. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). Appellate counsel could not be deficient in failing to more thoroughly raise an issue that was found to have been waived and abandoned by Stanko below. Id. Nor can Stanko demonstrate prejudice for the same reason. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). Furthermore, the South Carolina Supreme Court's decision on the lack of preservation of this issue and on Stanko's waiver of any possible conflict is the law of the case, and Stanko cannot re-litigate this issue or is barred from re-litigating this issue under the principles of *res judicata*, judicial estoppel, and/or collateral estoppel. As a result Stanko cannot show prejudice under this ground, and this ground must be denied and dismissed with prejudice. Strickland.

10(g) Applicant was denied an impartial jury—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitutions, and S.C. Code Section 14-7-1020.

11(g) Supporting Facts: Juror James Barry, who sat on the jury for the guilt-or-innocence and penalty phases of Applicant's trial, was married, at the time of trial, to a woman who treated the teenage daughter of the victim of the murder that resulted in Applicant's Georgetown County death sentence after the teenage daughter was sexually assaulted by Applicant. The sexual assault

of the daughter and the murder of her mother were entered as aggravation during the penalty phase of Applicant's trial in Horry County. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Respondent denies the allegations of this Ground and requires strict proof thereof.

Furthermore, this is a claim of trial court error or a direct appeal claim that is not cognizable in post-conviction relief (PCR). S.C. Code Ann. Section 17-27-20(b) (2003); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). ("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981), Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). As a result, this ground must be dismissed with prejudice.

Furthermore, even if it were assumed for argument's sake [*arguendo*] that Stanko's supporting facts above are true, Stanko has failed to show the juror was aware of this fact or that if he knew of this fact that it affected the juror's deliberations, verdict, or sentence recommendation such that it would entitle Stanko to a new trial or sentencing proceeding. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845 (1984); United States v. Fulks, 454 F.3d 410 (4th Cir. 2006); Jones v. Cooper, 311 F.3d 306, 314 (4th Cir. 2002); United States v. Fulks, 2004 WL 5042206 (D.S.C. 2004)(*not reported in F.Supp.2d.*). (R. 274-86, See also Tr. pp. 70-71, 21).

10(h) Applicant's death sentence violates the Eighth Amendment to the United States Constitution because the South Carolina death penalty statute, S.C. Code Section 16-3-20, does not genuinely narrow the class of offenders eligible for a death sentence.

11(h) Supporting Facts: The South Carolina death penalty statute, S.C. Code Section 16-3-20, does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Respondent denies the allegations of this ground and requires strict proof thereof.

Furthermore, this is a claim that could have been raised to the trial court and is a direct appeal claim that is not cognizable in post-conviction relief (PCR). S.C. Code Ann. Section 17-27-20(b) (2003); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted)("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981), Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). This ground must be dismissed with prejudice.

Furthermore, there is no merit to this ground whatsoever. The South Carolina death penalty statute does genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment and United States Supreme Court precedent. S.C. Code Ann. Section 16-3-20, *et. seq*; Kansas v. Marsh, 548 U.S. 163, 126 S.Ct. 2516 (2006); Brown v. Sanders, 546 U.S. 212 (2006); Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847 (2005); Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183 (2005); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct.

2242 (2002); Smith v. Texas, 543 U.S. 37, 125 400 (2004); Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1997), *overruled on other grounds* Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002); Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283 (1995); Tuilaepa v. California, 512 U.S. 967, 512 U.S. 967 (1994); Arave v. Creech, 507 U.S. 463, 113 S.Ct. 2112 (1993); Sochor v. Florida, 504 U.S 527, 536, 112 S.Ct. 2114 (1992); Stringer v. Black; 503 U.S. 222, 112 S.Ct. 1130 (1992); Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092 (1990); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313 (1990)(per curiam); Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078 (1990); Penry v. Lynaugh, 492 U.S. 302, 109 Ct. Ct. 2934 (1989); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Sumner v. Goodman, 483 U.S. 66, 107 S.Ct. 2716 (1987); Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983); Godfrey v. Georgia, 446 U.S. 420, 1000 S.Ct. 1759 (1980); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1197 (1977); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976)(plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). As a result, this Ground must be denied and dismissed with prejudice.

CONCLUSION

Respondent denies each and every allegation of the Final Amended Application for Post-Conviction Relief filed by applicant Stephen C. Stanko and requires strict proof thereof. Further, applicant's claims of trial court error or direct appeal claims are not cognizable on post-conviction relief and must be dismissed with prejudice. Further, Stanko cannot show error or

prejudice with regard to these grounds. Further, with regard to applicant's grounds of ineffective assistance of counsel, Stanko cannot prove deficient performance or prejudice under any of the grounds alleged. Strickland. Therefore, Respondent moves this Court to dismiss each of the grounds alleging trial court error or direct appeal claims that are not cognizable on post-conviction relief and requests this Court convene an evidentiary hearing into each claim alleged in this application and not dismissed by this Court, including those alleging ineffective assistance of counsel.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

By: _____
Anthony Mabry
ATTORNEYS FOR RESPONDENT
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

October 30, 2014

STATE OF SOUTH CAROLINA) **)** **COUNTY OF HORRY COUNTY)** **)** **)** **Stephen C. Stanko, 6022,)** **)** **Applicant,)** **v.)** **)** **State of South Carolina,)** **)** **Respondent.)** **)**	**IN THE COURT OF COMMON PLEAS** **C/A No.: 2014-CP-26-0035** **(Capital PCR Action)** **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of Respondent's ***Return to Final Amended Application for Post-Conviction Relief and Motion to Dismiss***, was served on Counsel for the Applicant by depositing same in the United States mail, postage prepaid, addressed as follows:

Emily Paavola, Esquire
Lindsey Vann, Esquire
Death Penalty and Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC. 29201

This 30th day of October, 2014.

Anthony Mabry
Assistant Attorney General

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)) Applicant,)) vs.)) State of South Carolina,)) Respondent.)	Case No. 2014-CP-26-035

14 NOV 25 PM 11

RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FINAL AMENDED APPLICATION

Undersigned counsel respectfully submit the following response in opposition to Respondent's Motion to Dismiss Applicant's Final Amended PCR Application ("Motion to Dismiss"). Respondent seeks dismissal of each of Applicant's claims for post-conviction relief ("PCR") raised in his Final Amended PCR Application, asserting there is no merit to any of the allegations. This Court, however, cannot dismiss Applicant's PCR Application without holding a hearing on the merits of his Application.

This Court has already determined a majority of the claims raised in the Final Amended PCR Application cannot be dismissed prior to holding a hearing on the merits of the application. On September 25, 2014, this Court denied Respondent's Motion to Dismiss Applicant's First Amended Application. Most of the claims on which the Court denied dismissal were not changed in any way between Applicant's First Amended PCR Application and Final Amended PCR Application. Specifically, the Court denied dismissal on Claim 11(a), Claim 11(b)(1) & (2), Claim 11(c), Claim 11(d), 11(e)(1) & (2), and 11(f), which were not changed between the filing of the First Amended Application and the Final Amended Application. Because the claims are identical to those previously considered by this Court, there is no support for dismissing these claims from

the Final Amended Application prior to holding an evidentiary hearing on the claims. Likewise, this Court cannot dismiss the remainder of the claims raised in Applicant's Final Amended PCR Application.

Legal Standard

The PCR Act sets forth specific procedures for capital case PCR applications. *See* S.C. Code § 17-27-160. When a defendant has been sentenced to death and submits a PCR application, the respondent must file a return. S.C. Code § 17-27-160(B). Upon receipt of the respondent's return, "the judge *shall* convene a status conference to schedule a hearing on the merits of the application for post-conviction relief." S.C. Code § 17-27-160(C) (emphasis added). The PCR Act thus requires this Court to hold a hearing on the merits of Applicant's PCR claims and does not provide a legal basis for summarily dismissing Applicant's PCR Application as suggested by Respondent.

Further, no PCR application, involving capital or non-capital sentences, can be disposed of on the pleadings and summarily dismissed "if there exists a material issue of fact." S.C. Code § 17-27-70(b). In considering a motion to dismiss a PCR application, a court must assume facts presented by the applicant are true and view those facts in the light most favorable him. *Al-Shabazz v. State*, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (1999). The Court must deny a motion to dismiss "if facts alleged and inferences reasonably deducible therefrom would entitle [the applicant] to any relief on any theory of the case." *Id.* Summary dismissal without a hearing is appropriate only when: (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts; and, (2) the applicant is not entitled to relief. *Id.* (citing S.C. Code § 17-27-70(b) and (c)). Applicant's PCR Application alleged facts which, if true, entitle Applicant to relief. To the

extent that there is any question about those facts, the appropriate step is for this Court to hold an evidentiary hearing at which those facts may be fully developed.

The Supreme Court of the United States also has well-established rules prohibiting this Court from summarily dismissing Applicant's well-pleaded federal claims. It has long been settled that a state court cannot dismiss a well-pleaded federal claim without giving the applicant an opportunity for fact development in support of the claim. *See Coleman v. Alabama*, 377 U.S. 129 (1964); *McNeal v. Culver*, 365 U.S. 109 (1961); *Herman v. Claudy*, 350 U.S. 116 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1952). A well-pleaded federal claim is one whose allegations are "plainly and reasonably made," *Angel v. Bullington*, 330 U.S. 183, 188 (1947); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), and are "not patently frivolous or false on a consideration of the whole record." *Herman*, 350 U.S. at 119.

Moreover, a state court is not free to summarily dismiss a well-pleaded federal claim merely because the respondent's answer denies the allegations. *Herman*, 350 U.S. at 123; *see also Palmer* 342 U.S. at 137. A court is obligated to facilitate fact development when an applicant has shown "reason to believe" such development could lead to proof of a constitutional violation. *Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.").

This Court, therefore, cannot summarily dismiss Applicant's claims because the allegations set forth in his Application, if proven, entitle him to relief. Respondent incorrectly implies otherwise by asserting that the Court can determine on the face of the PCR Application that Applicant is not entitled to relief on his PCR claims. Respondent itself belies the request for

summary dismissal by denying each ground in the PCR Application and requiring strict proof thereof. *See* Motion to Dismiss 1, 10, 12, 22, 24, 25, 28, 32, 33. Applicant can only provide strict proof of each claim through the development of facts in preparation for and at a hearing on the merits of his claims. A brief discussion of each claim follows, demonstrating that summary dismissal is not warranted on any of the claims raised in Applicant's PCR Application.

> 10(b) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the pre-trial phase of his capital trial.**
>
> 11(b) **Supporting Facts:** Trial counsel's performance during the pre-trial phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:
>
> (3) Counsel failed to move for the trial court to find that the South Carolina death penalty statute, S.C. Code § 16-3-20, is unconstitutional, and thus bar the State from seeking a death sentence against Applicant, because the statute does not genuinely narrow the class of offenders eligible for a death sentence as required by the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).
>
> (4) Counsel failed to ask potential jurors *voir dire* questions aimed at determining whether the potential jurors had any biases resulting from knowledge of, or relationships with, the Ling victims from Applicant's Georgetown charges. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Respondent argues the Court should dismiss claim 11(b)(3) because the South Carolina death penalty statute is constitutional. This argument ignores the fact that if the South Carolina death penalty statute fails to adequately narrow the class of offenders eligible for a death sentence, the statute allows for arbitrary imposition of the death penalty and is unconstitutional under the Eighth Amendment, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Evidence of the statute's failure to adequately narrow the class of offenders was available to trial counsel prior to the commencement of Applicant's capital trial. Accordingly, if Applicant can prove the statute fails to narrow the class of offenders eligible for a death sentence, Applicant is entitled to relief. Claim 11(b)(3) is, therefore, a well-pleaded federal claim and this

Court must allow Applicant an opportunity for factual development and deny dismissal. *See Coleman*, 377 U.S. 129.

Respondent makes no argument that claim 11(b)(4) should be dismissed; therefore, the Court should not dismiss the claim prior to holding a hearing on the merits of the claim.

> 10(e) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**
>
> 11(e) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:
>
> (3) Counsel failed to investigate and present all available mitigating evidence of applicant's life history and background, including testimony from an appropriate social history expert and/or other appropriate witnesses about how applicant's history and background affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).
>
> (4) Counsel failed to investigate and present all available mitigating evidence of applicant's mental health, including testimony from an appropriate mental health expert and/or other appropriate witnesses about how applicant's mental health/illness affected his behavior, mental state, and functioning over the course of his life. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weik v. State*, 409 S.C. 214 (2014).

Respondent contends that the Court should dismiss Applicant's ineffective assistance of counsel claims relating to sentencing because counsel conducted a reasonable and thorough mitigation investigation and Respondent was informed and believes counsel made objectively reasonable strategic decisions with regard to what evidence to present and not present at sentencing. These claims cannot be summarily dismissed because the only support for dismissal is that Respondent denies the facts asserted in the PCR Application. Dismissal of these claims is, therefore, inappropriate because a court is not free to summarily dismiss a well-pleaded federal claim merely because the respondent's answer denies the allegations. *Herman*, 350 U.S. at 123.

Further, Respondent's arguments in favor of dismissal rely on evidence outside of the record and the PCR Application by stating that Respondent was informed by trial counsel that counsel made strategic decisions. This Court may not dismiss Applicant's claims merely on Respondent's word that all of trial counsel's actions and inactions were the result of reasoned strategic decisions. Applicant must also be able to develop and present evidence outside of the record in support of his ineffective assistance of counsel allegations and to demonstrate that counsel's "strategic" decisions, to the extent that is even the case, were not objectively reasonable.

Finally, Respondent's argument that Applicant cannot show prejudice because the evidence supporting a death sentence was overwhelming, ignores the fact that the trial court instructed the jury "you may sentence the Defendant to life imprisonment for any reason or no reason at all or simply as an act of mercy." App. 2888. Thus, had trial counsel adequately presented mitigating evidence to the jury, "there is a reasonable probability that at least one juror would have struck a different balance" and voted for a life sentence. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Additionally, a state court determining whether an applicant was prejudiced by trial counsel's failure to present mitigating evidence must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [PCR] proceeding." *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000). Accordingly, despite evidence supporting a death sentence, this Court cannot decide whether Applicant was prejudiced by trial counsel's deficiencies without considering the mitigation evidence that should have been presented at trial. The Court, therefore, should not dismiss Applicant's claims for relief based on ineffective assistance of counsel at sentencing. *See Harris*, 394 U.S. at 300; *Al-Shabazz*, 338 S.C. at 364, 527 S.E.2d at 747.

10(g) **Applicant was denied an impartial jury—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 14-7-1020.**

11(g) **Supporting Facts:** Juror James Barry, who sat on the jury for the guilt-or-innocence and penalty phases of Applicant's trial, was married, at the time of trial, to a woman who treated the teenage daughter of the victim of the murder that resulted in Applicant's Georgetown County death sentence after the teenage daughter was sexually assaulted by Applicant. The sexual assault of the daughter and the murder of her mother were entered as aggravation during the penalty phase of Applicant's trial in Horry County. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Respondent asserts the Court should dismiss Applicant's juror bias claim because the claim could have been raised during direct appeal and because Applicant has failed to show the juror's knowledge affected Applicant's sentencing. Respondent's assertions do not warrant dismissal. As an initial matter, this claim could not have been raised on direct appeal because it relies on evidence outside of the record. *See* Rule 210 SCACR (generally confining appellate review to the facts appearing within the record on appeal). Juror Berry's knowledge of the victim's treatment for sexual assault can only be demonstrated with evidence outside the record on appeal through presentation of evidence at a hearing on the merits of the claim. Further, the only way to demonstrate the effect of Juror Berry's knowledge on the sentencing determination at Applicant's trial is to present evidence at a hearing on the merits of the claim. *See United States v. Fulks*, 454 F.3d 410, 431 (4th Cir. 2006) (relying on a juror's post-trial hearing testimony to determine whether the murder of her husband affected her qualification to serve as a juror). This Court, therefore, should not dismiss Applicant's juror bias claim and should allow for the development and presentment of facts in support of his allegations at a hearing on the merits of the claim. *See Harris*, 394 U.S. at 300; *Al-Shabazz*, 338 S.C. at 364, 527 S.E.2d at 747.

10(h) **Applicant's death sentence violates the Eighth Amendment to the United States Constitution because 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.**

11(h) **Supporting Facts:** 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. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Respondent argues the Court should dismiss claim 11(h) because it could have been raised on direct appeal and because the South Carolina death penalty statute is constitutional. Respondent's assertions do not warrant dismissal. As an initial matter, this claim could not have been raised on direct appeal because it was not preserved for appellate review due to trial counsel's failure to move for a finding that the death penalty statute was unconstitutional and counsel's failure to present any evidence in support of such a claim. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, in order to prove the statute does not genuinely narrow the class of offenders eligible for a death sentence, Applicant must present evidence outside of the record regarding other homicide cases to show the class of defendants charged with homicide is not genuinely narrowed by the statute to determine which defendants are eligible for a death sentence.

Respondent's second argument—that the South Carolina death penalty statute has been found constitutional—ignores the fact that if the South Carolina death penalty statute fails to adequately narrow the class of offenders eligible for a death sentence, the statute allows for arbitrary imposition of the death penalty and is unconstitutional under the Eighth Amendment, *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Accordingly, if Applicant can prove the statute fails to narrow the class of offenders eligible for a death sentence, Applicant is entitled to relief. Claim 11(h) is, therefore, a well-pleaded federal claim and this Court must allow Applicant an opportunity for factual development and deny dismissal. *See Coleman*, 377 U.S. 129.

CONCLUSION

Under the PCR Act, this Court does not have a legal basis for summarily dismissing Applicant's PCR Application. *See* S.C. Code § 17-27-160(C). Further, it is not clear from the face of the PCR Application that there is no need for a hearing to develop facts in support of Applicant's claims. *See Al-Shabazz*, 338 S.C. at 364, 527 S.E.2d at 747. Therefore, for the reasons stated above, this Court should not dismiss Applicant's claims for post-conviction relief and should allow Applicant to continue developing the factual support for his claims for presentation at a hearing on the merits of his claims.

November 24, 2014

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
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STATE OF SOUTH CAROLINA)	
)	
COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)	
)	
Applicant,)	Case No. 2014-CP-26-035
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

14 NOV 25 PM 1:11
CLERK OF COURT - HARD

The undersigned certifies that a copy of the Applicant's Return in Opposition to Respondent's Motion to Dismiss Final Amended Application was mailed today by first class United States mail, postage prepaid, this 24th day of November, 2014, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

December 11, 2014
Via Email and U.S. Mail Delivery

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psnowden@horrycounty.org

RE: *Stanko v. State* (Case No. 2014-CP-26-035)

Dear Ladies and Gentlemen:

Please find enclosed a copy of the Form 4 Order dated 12/11/2014 denying Respondent's Motion to Dismiss Final Amended Application in this case without a trial on the merits. By copy of this letter and enclosure, I am forwarding the original to the clerk of court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)
pc: Melanie Huggins-Ward, Clerk of Court

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-26-035

Stephen C. Stanko, #6022
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Respondent's Motion to Dismiss Final Amended Application without a merits hearing is DENIED.

(This motion is decided without oral arguments.)

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H Culbertson

Benjamin H. Culbertson, Circuit Court Judge | 2148 **Judge Code** | Dec. 11, 2014 **Date**

3958

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola
Lindsey S. Vann

ATTORNEY(S) FOR THE PLAINTIFF(S)

Anthony Mabry
Jimmy A. Richardson

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	Case No. 2014-CP-26-035
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE HUGGINS-WARD
CLERK OF COURT

APPLICANT'S MOTION FOR CONTINUANCE

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves for a continuance of the PCR merits hearing because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation.

This Court scheduled a hearing on the merits of Stanko's post-conviction relief claims to begin on March 2, 2015. The Court also set a deadline for the completion of discovery for January 31, 2015. Despite undersigned counsel's diligent work since being appointed, counsel will be unable to prepare for a hearing by March 2, 2015 because the Court has denied all funding requests for expert services. Without expert assistance, Stanko cannot effectively prepare for a hearing on his claims. Stanko, therefore, respectfully requests this Court continue the hearing in this case for nine months from the date the Court rules on Stanko's October 14, 2014 *Ex parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, and to adjust the deadline for

completing discovery accordingly.[1] Stanko further requests a hearing with oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order.

The legal and factual bases for this motion are set forth below.

I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be

[1] Counsel request a nine month continuance because the experts they consulted indicate six to nine months is the minimum amount of time it will take to prepare for a hearing on Stanko's claims.

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B). During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[3] Specifically, the First Funding Motion requested the Court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Stanko

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[3] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[4] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[5] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel

[4] The facts in support of Stanko's requests are set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[5] This motion was likewise filed *ex parte* as permitted by South Carolina law.

could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's

social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Stanko argued the Court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Stanko could not present the Court with the conclusions the experts will reach. Stanko argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

The capital case funding statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior to the court's authorization of funds*. The Court's interpretation of the "reasonably necessary" requirement impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport. The Court has, thus, not ruled on Stanko's Second Motion to Reconsider and, as of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 2, 2015.

II. LEGAL BASIS FOR GRANTING A CONTINUANCE.

The South Carolina post-conviction relief statute explicitly authorizes this Court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). The statute does not set a limit for the amount of time the Court can continue the hearing. The statute requires only that the Court find good cause for the continuance granted.

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

III. ARGUMENT

Undersigned counsel have done everything in their power to attempt to prepare for Stanko's post-conviction relief hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the Court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Stanko. S.C. Code § 16-3-26(C)(1). The Court has done so based on an improper reading of the capital case funding statute, finding that the necessity of expert assistance can only be determined after the expert services have been completed and result in a favorable outcome for the applicant.[6] Given the necessity of the assistance of the experts to effectively develop and present Stanko's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Stanko's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[7] and asked the Court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by this Court. Counsel then presented the Court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media

[6] Due to the Court's denial of funding requests based on this standard, it would be futile for Stanko to request the services of any other experts that might assist in preparing and presenting his claims for relief.

[7] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case. *See* Andrews Aff. ¶¶ 3, 5, *attached*; Knight Aff. ¶ 3, *attached*.

expert. In spite of the demonstrated necessity of expert services, the Court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court over two months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the Court's scheduling order, the Court has now canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than two months.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until this Court authorizes funding for their services. *See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by this Court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by this Court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim). Even if the Court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Stanko because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and this Court has thus far denied Stanko the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Stanko's claims for relief. Accordingly, Stanko has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court continue the post-conviction relief hearing for nine months from the date it rules on the Second Motion to Reconsider and adjust the discovery deadline accordingly.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request this Court find good cause shown and continue the post-conviction relief hearing, currently scheduled for March 2, 2015, for nine months from the date it rules on Stanko's Second Motion to Reconsider and to adjust the discovery deadline accordingly. Counsel further requests this Court schedule a hearing for oral argument on this Motion for a Continuance as soon as practicable.

January 6, 2015

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Arlene Bowers Andrews, PhD, who appeared personally before me, affirms and states the following:

1. I, Arlene Andrews, am a Licensed Social Worker, have a PhD in psychology, and am a retired professor of social work.

2. I have been retained to evaluate and present a social history in approximately fifteen (15) capital cases at the trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on June 25, 2014 about evaluating and presenting Mr. Stanko's social history in his Horry County post-conviction relief proceedings.

4. I would typically not begin working on a capital case without a funding order from the Court authorizing payment for my services. However, I have worked with Ms. Paavola before, and she explained to me that Mr. Stanko's case was scheduled for hearing within a relatively short period of time and she was concerned about waiting to get started while the motion for funding remained pending. Therefore, I began working on Mr. Stanko's case prior to receiving an order from the Court authorizing funding for my services. I cannot, however, continue my social history evaluation or present my findings to the Court without an order authorizing payment for my services.

5. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client.

6. Since being contacted by Mr. Stanko's attorneys, I have reviewed the trial record to determine what social history evaluation had already been completed; I have reviewed social history records already collected by counsel and the mitigation investigator; I met and interviewed Mr. Stanko; and, I interviewed Mr. Stanko's brother.

7. Based on my preliminary evaluation, it is clear to me that a grossly inadequate social history was presented during Mr. Stanko's trial. My initial work has begun to reveal a compelling and mitigating social history story. Based on this initial review and my experience in other capital cases, I believe it is possible that an adequate investigation in Mr. Stanko's case could reveal mitigating evidence of physical abuse, sexual abuse, parental neglect and abandonment, and/or mental illness.

8. A significant amount of work remains to complete and present my social history evaluation. I must: (1) interview Mr. Stanko several more times; (2) interview Mr.

Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; (5) conduct any additional work that may develop as the investigation progresses; and (6) prepare my opinion for presentation to the Court. This is work that cannot be completed without authorization of funds from the Court.

9. The work that remains will take approximately six (6) to nine (9) months to complete once the Court authorizes funding. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. My social history evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation. Additionally, I am currently preparing for a hearing on a case in Aiken County, which will not allow me to continue my work on Mr. Stanko's case until February 15, 2015.

10. I believe Mr. Stanko's social history is likely to provide powerful mitigating evidence, but without the authorization of funds from the Court and a continuance of the hearing, I cannot complete the social history evaluation or aid counsel in their presentation of Mr. Stanko's social history at a hearing.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Arlene Bowers Andrews
ARLENE BOWERS ANDREWS

Sworn to and subscribed before me
This 14th day of January, 2015

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina, and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation, the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

SUSAN KNIGHT

Sworn to and subscribed before me
This 6th day of JANUARY, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires
May 9, 2017

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,)	
)	
Applicant,)	Case No. 2014-CP-26-03
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE ROGERS-WARD
CLERK OF COURT

The undersigned certifies that a copy of the Applicant's Motion for Continuance was mailed today by first class United States mail, postage prepaid, this 6th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY)	FIFTEENTH JUDICIAL CIRCUIT
)	
Stephen C. Stanko, #6022,)	Case No. 2014-CP-26-035
)	
Applicant,)	**MOTION TO UNSEAL EX PARTE FUNDING REQUESTS AND ORDERS REGARDING THE SAME**
)	
vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This is a capital post-conviction relief action in which the Applicant has moved for a continuance of the March 2, 2015 trial date based on this Court's alleged denial of all *ex parte* funding requests. Respondent, through the undersigned attorneys, moves this Court to issue an Order unsealing any and all *ex parte* funding requests and Orders regarding the same so that Respondent may adequately and properly respond to Applicant's continuance motion whether in writing or at a scheduled hearing on said motion. Respondent has no knowledge of these *ex parte* matters except for the limited information set forth in Applicant's Motion for Continuance. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests.

There is no statutory or a constitutional right to be heard on funding requests *ex parte*[1] and *in camera*[2] in this setting. Respondent acknowledges, however, the right of the Court to

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1 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

2 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law

determine that matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct. Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Respondent would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding funding in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 (1996).

The references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160. That provision addresses the appointment, qualification, and compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[3] There is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected

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Dictionary at 684 (5th ed. 1983)).

3 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position. This is, of course, contrary to the standard references of the funding as two distinct concerns.

in S.C. Code § 16-3-26(C)(1).[4] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[5]

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicants seek to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence....*" A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but

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4 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal trial.

5 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings,* and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27-40-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing Applicant is not directly raising issues related to guilt or sentence.[6] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.").[7]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *State v. Cribb*, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also State v. Phillips*, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); *State v. Sweat*, 386 S.C.

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6 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Stanko is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

7 Reliance on *Wade v. State*, 348 S.C. 255, 559 S.E.2d 843 (2002), to argue the case is quasi-criminal, (see Motion, p.10), is misplaced. Though the Supreme Court of South Carolina has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996) (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a "defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services."). If that is so, then *Thames v. State* is applicable and controlling. In *Thames*, the Supreme Court of South Carolina instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in preparation for the criminal trial. *Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. Consequently, Applicant has failed to show a statutory right to *ex parte* proceedings.[8]

2. There is no constitutional right to *ex parte* proceedings in capital post-conviction relief proceedings. As a first point, there is no constitutional right to post-conviction relief proceedings. *See, e.g., United States v. MacCollom*, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see Griffin v. Illinois, 351

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8 Respondent has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). See also July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed Counsel ("Because § 17-3-50 (C) does not provide for *ex parte* proceedings to determine attorney's fees, hearings on requests for additional fees should be held in open court.").

U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Applicant is the party bringing the suit in this instance.[9] He bears the burden of proof. *See, e.g. Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicant argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply is not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *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."). *Cf. Fisher v. Baker*, 203 U.S. 174, 181 (1906) ("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883) ("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the

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9 It is Applicant who is obligated to make the allegations to allow Respondent the opportunity to prepare a defense. Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Respondent has prepared both a return and a return to the final application. Respondent has no notice of any specific new claim.

constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also In re Care and Treatment of Canupp*, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake* does not speak to collateral proceedings in the least. *See, e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("*Ake v. Oklahoma* ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (*Sanborn v. Commonwealth*, 975 S.W.2d 905, 909-910 (Ky. 1998) ("Ake v. Oklahoma, ... is not a post-conviction case.") (*overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)); *McGahee v. State*, 885 So.2d 191, 229

(Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, *Ake* is not dispositive. [10]

Whether funding for any particular expert is necessary, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Respondent submits for all the foregoing reasons, Applicant has no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[11]

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[12]

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10 It should not be lost that the purpose of *Ake* was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. *Ake*, 470 U.S. at 77. *Ake* does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." *Caldwell v. Mississippi*, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in *Ake* to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

11 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (emphasis added). *See also United States v. Caro*, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

12 For example, see *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593

Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Respondent to investigate and present a defense. *See* S.C. Code § 17-27-40. There is no right to keep known potential issues from Respondent and essentially shorten, (or in some cases eradicate), the opportunity for Respondent to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[13] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is

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(1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." *Id.* To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* The Supreme Court of South Carolina in *Ex parte Lexington County* based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

13 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...") (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[14] In short, Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in *Ex parte Lexington County* are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in certain discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

See also Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[15] The party communicating in

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14 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. See also Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

15 Ex *parte* funding requests are neither provided for nor mandated. The better course, and

the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision."). Notably, in Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was

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the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord State v. Jeff*, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, **in camera**, either on the face of the allegations of the motion or upon taking evidence at an **ex parte** hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue **ex parte**. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting State v. Touchet*, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See United States v. Caro*, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also Sallie v. Humphrey*, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); *Barnett v. Roper*, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

provided to the PCR judge.[16] Applicant's case is not a new trial. Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking this Court for the ability to start completely fresh or simply "expert shop" most likely is unreasonable. *See Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert.").[17] For example, a request for a mental health expert in this case should be examined in light of investigation and testing already made. Applicant presented at trial well-credentialed psychiatrists, psychologists, and radiologists or neuro radiologists, who examined Applicant contemporaneous to the proceedings and reviewed multiple records and scans. It would be difficult to fault trial counsel for relying on such experts.

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16 Applicant's assumption, if made, that Respondent would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the trial judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action.* Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

17 Even capital defendants at trial are not entitled to unlimited funding. *See, for example, Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

See Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). At any rate, these are the types of facts that the PCR court should have before deciding on funding requests.

For all the above argued reasons, Applicant has failed to show a need for *ex parte* or *in camera* proceedings or that these requests and the Order regarding the same remain sealed.

Furthermore, Applicant has waived any confidentiality by the filing of this Motion for a Continuance, with Applicant's assertion of the history of the funding requests and this Court's actions regarding the same, along with supporting Affidavits without a request that they be under seal. Applicant has made his requests and the Court's reasons for denial of the same, if true, relevant and discoverable.

WHEREFORE, Respondent submits, for all the foregoing reasons, this Court should issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond the Motion for a Continuance, argue the same at the hearing on this Motion, make a proper record for the appellate court, and prepare for trial.

RESPONDENT SO MOVES.

Respectfully submitted,

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January 9, 2014.
Columbia, South Carolina.

*counsel of record

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
)	Case No. 2014-CP-26-035
Stephen C. Stanko, #6022,)	
)	
Applicant,)	**(Proof of Service)**
)	
vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

I, J. Anthony Mabry, certify that I have served Respondent's Motion to Unseal Ex Parte Funding Requests and Orders Regarding the Same on Applicant by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
900 Elmwood Avenue, Suite 101
Columbia SC 29201

This 9th day of January, 2015.

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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF HORRY Stephen C. Stanko, #6022, Applicant, vs. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Case No. 2014-CP-26-035 **RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO UNSEAL *EX PARTE* FUNDING REQUESTS AND ORDERS REGARDING THE SAME**

FILED COUNTY
2015 JAN 16 PM 2:34
MELANIE HIGGINS-WARD
CLERK OF COURT

Undersigned counsel respectfully submit the following response in opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). Respondent asks this Court to issue an order unsealing all *ex parte* funding requests and orders so that Respondent may respond to Applicant's motion for continuance. However, Respondent is not entitled to review the *ex parte* requests and orders, nor has Respondent presented any legitimate need for the documents to be unsealed. This Court should deny Respondent's motion for the reasons that follow.

I. Applicant is Entitled to *Ex Parte* Proceedings

Contrary to Respondent's assertion, Applicant is entitled to *ex parte* proceedings for the consideration of his funding requests as a matter of state statute and federal constitutional principles.

a. S.C. Code § 17-27-160 Expressly Authorizes *Ex Parte* Proceedings

The plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in

Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1).[1] "When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning." *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). "The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction." *Id.* To the undersigned counsel's knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), is not applicable to this issue. The language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner's request for payment of psychiatrist fees after she had already been examined by two

[1] If § 17-27-160 incorporated only § 16-3-26(B) as Respondent argues, there would be no need for the explicit exclusion of § 17-27-160(I) because it would not have been otherwise incorporated by § 17-27-160. The exclusion of subsection (I) thus indicates that the entirety of § 16-3-26 is incorporated into § 17-27-160.

psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at 683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because *Thames* was decided before the statute which controls capital post-conviction proceedings was enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

b. *Ex Parte* Proceedings are Required by Due Process and Equal Protection

Due Process and Equal Protection require that Applicant's funding requests and this Court's orders regarding those requests remain sealed. The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky v. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Id. at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Judicial pronouncements by the Supreme Courts of the United States and of South Carolina make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, Applicant has much more than an abstract need or desire for his funding proceedings to remain *ex parte* and sealed. The South Carolina statutes give him a clear claim thereto. Applicant maintains that the proper procedure is that set forth in § 16-3-26(C)(1). That section, on its face, requires *ex parte* proceedings when applicants seeks "investigative, expert, or other services." Because South Carolina chose to accord the right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection" on the other hand, emphasizes disparity in treatment by

> a State between classes of individuals whose situations are arguably indistinguishable.

Ross, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."[2] *Ake*, 470 U.S. at 77 (citations omitted). This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992), likewise has access to privileged information only because of Applicant's indigency.[3] As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

Ex Parte Lexington County, 314 S.C. at 228, 442 S.E.2d at 594. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997).

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[2] Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumes the *ex parte* nature of this showing.

[3] If Applicant were not indigent, he would have the resources to obtain investigative and expert funding without presenting any information about his case to the Court. Thus, the only reason Respondent is able to seek to unseal the information contained in the *ex parte* filings in this case is because Applicant is indigent and was required to present information to the Court in order for it to determine whether the services are reasonably necessary.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa*, 385 U.S. 192 (1966) (finding refusal to provide the transcript of a state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (finding prevention of the right to appeal the denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the Supreme Court of the United States has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Here, allowing the State access to information about Applicant's funding requests or granting the State a voice in the funding decision would violate Due Process as Respondent clearly has an interest in prohibiting Applicant access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because Applicant will not be similarly accorded the opportunity to review the State's use of funding for expert and investigative services or the reasons for the State's decision to expend such funds. Moreover, allowing the State information about Applicant's funding requests would violate equal protection because non-indigent PCR applicants would not be similarly required to provide such information to the State.

c. The State is Not Entitled to Information Within the Funding Requests and Orders Under the Rules of Discovery

Respondent argues there is no danger of Applicant having to "telegraph to the prosecution the defendants' strategy" because he is required to provide Respondent with the information contained in the funding documents under the discovery rules. This assertion is inaccurate. By Respondent's own admission, the rules of discovery provide access to documents and things that

would go either to a claim or defense and the names of witnesses and experts who have knowledge of a claim or defense – not to strategic information about what expert or investigative services Applicant is considering before it is even known whether these services will bear fruit. Further, in order to apply for funding for investigative and expert services, Applicant may have disclosed to the Court information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit Applicant to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

II. Respondent Has No Legitimate Basis for Unsealing *Ex Parte* Funding Requests and Orders

Also contrary to Respondent's assertion that it must review the funding requests and orders to adequately respond to Applicant's Motion for Continuance, Respondent has no legitimate basis for unsealing the funding documents. The issue presented by Applicant's motion for a continuance is not whether or not Applicant is entitled to the funding requested. Rather, the issue is whether Applicant is entitled to a continuance given the fact that the Court has not ruled on Applicant's Second *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service ("Second Motion to Reconsider") filed on October 14, 2014. Applicant filed the Second Motion to Reconsider nearly five months before the scheduled hearing date in an attempt to obtain expert funding in time to adequately prepare for the hearing. As of the filing of this return, the Court has not ruled on Applicant's Second Motion to Reconsider and approximately six weeks remain for Applicant to prepare for the hearing. Even if the Court ruled on the Second Motion to Reconsider, Applicant would not have time to adequately prepare his post-conviction claims for a hearing. Applicant, therefore, requests a continuance.

The only reason Respondent would need to review the *ex parte* funding requests and orders would be to weigh in on whether or not Respondent believes Applicant is entitled to the funding requested. As discussed above, Respondent is not entitled to weigh in on the funding decision as a matter of state statute, Due Process, and Equal Protection. Respondent accordingly fails to demonstrate a legitimate basis for the unsealing of the *ex parte* funding motions and orders before this Court.

CONCLUSION

For the reasons stated above, this Court should deny Respondent's Motion to Unseal and maintain the *ex parte* nature of the funding procedures adopted by the legislature in S.C. Code § 17-3-160(C)(1).

January 14, 2015

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-035
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of the Applicant's Return in Opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same was mailed today by first class United States mail, postage prepaid, this 14th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

FILED
HORRY COUNTY
2015 JAN 16 PM 2:35
MELANIE HUGGINS-WARD
CLERK OF COURT

4000

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Capital PCR Case Number: 2013-CP-26-00035

STEPHEN C. STANKO, SK 6022 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION
(Expedited Consideration Requested)

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Counsel for Petitioner

I. INTRODUCTION

Petitioner, Stephen C. Stanko, an indigent death-sentenced inmate, respectfully petitions this Court to exercise its supervisory authority and order the post-conviction relief ("PCR") court to authorize expert funding as provided for by statute and grant a continuance to allow undersigned counsel an opportunity to prepare for a merits hearing on Petitioner's PCR Application. This petition invokes the Court's supervisory authority in capital PCR cases. S.C. Code § 17-27-160; *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This petition also invokes counsel's duty to provide information to this Court pursuant to *In re Stays of Execution in Capital Cases*.

Petitioner's PCR action was assigned by this Court to the Honorable Benjamin H. Culbertson in the Horry County Court of Common Pleas ("the PCR court"). Prior to filing this Petition, Petitioner filed (before the PCR court) multiple motions to reconsider funding denials, arguing Judge Culbertson's denials were based on a misinterpretation of the applicable statutory funding standard, and a motion for a continuance of the PCR hearing, which is currently scheduled for March 2, 2015. *See* Section II, *infra*. Respondent has taken no position on these motions, except for making a request that the funding motions and orders denying funding be unsealed.

Currently, undersigned counsel find themselves unable to prepare for the scheduled PCR hearing because the PCR Court (1) has denied funding for all expert assistance, despite counsel's demonstration that such assistance is reasonably necessary to the representation of Mr. Stanko; (2) has not ruled on counsel's motion to reconsider the funding denials; and (3) has not ruled on counsel's motion for a continuance. Petitioner, through undersigned counsel, therefore asks this Court to order the PCR court to rule on Petitioner's currently pending motions, to apply the appropriate standard for considering funding requests, and to grant a continuance to allow

undersigned counsel an opportunity to prepare for a hearing on Petitioner's pending PCR application. Petitioner respectfully requests this Court consider this Petition and rule prior to March 2, 2015 when an evidentiary hearing is currently scheduled to begin.

II. PROCEDURAL BACKGROUND

Petitioner was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, this Court affirmed the conviction and sentence. *Id.* Petitioner subsequently moved for a stay of execution in order to pursue post-conviction relief. This Court issued a stay of execution and assigned the post-conviction relief proceedings to Judge Culberson. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013), *attached* as Exhibit A. Judge Culbertson appointed undersigned counsel to represent Petitioner on February 4, 2014. *See* Exhibit B.

On February 21, 2014, the PCR court entered a Scheduling Order, scheduling a merits hearing for December of 2014, and subsequently amended the Scheduling Order, sua sponte, to tentatively schedule a merits hearing for February of 2015. On September 25, 2014, the PCR court set a date certain for the merits hearing, scheduling the trial in this PCR proceeding to commence on March 2, 2015, and ordering the discovery be completed by January 31, 2015.[2]

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[1] Petitioner was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Petitioner was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Petitioner in connection with his Georgetown County proceedings.

[2] The PCR court's scheduling orders are attached as Exhibit C.

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation.[3] On April 1, 2014, counsel filed Applicant's First *Ex Parte* Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B).[4] During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[5] Specifically, the First Funding Motion requested the PCR court authorize

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[3] The PCR court initially denied undersigned counsel's *Ex Parte* Motion to Authorize Attorney Fee Rates. Counsel was therefore forced to file a motion for reconsideration, asking the PCR court to authorize attorney rates and hours, which was not ultimately resolved until March 27, 2014.

[4] Respondent has moved to unseal the *ex parte* pleadings and orders and Petitioner has opposed that request. If this Court deems it necessary to review the *ex parte* pleadings and orders referenced in this Petition, Petitioner will be happy to provide them under seal.

[5] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Petitioner provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[6] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, the PCR Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[7] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to

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First Funding Motion 6-7 (Apr. 1, 2014).

[6] The facts in support of Petitioner's requests were set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[7] This motion was likewise filed *ex parte* as permitted by South Carolina law.

reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the PCR court denied all funding requested for a forensic psychologist. The court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the PCR court with additional facts supporting the need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the PCR court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Petitioner filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Petitioner argued the PCR court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot

be determined because Stanko could not present the Court with the conclusions the experts will reach. Petitioner argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the PCR court order Petitioner transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the PCR court sent counsel an email canceling the *ex parte* hearing, informing Petitioner the court would decide the Second Motion to Reconsider without oral arguments, and ordering Petitioner to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Petitioner's Motion for Order of Transport.

On January 6, 2015, Petitioner filed a brief in support of his Second Motion to Reconsider. On the same day, based on the PCR court's denial of expert funding and failure to rule on Petitioner's Second Motion to Reconsider, Petitioner filed a Motion for Continuance and asked for a hearing on the continuance motion in the PCR court. *See* Exhibit D. In response, Respondent filed a Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). *See* Exhibit E. Petitioner filed a Return in Opposition to Respondent's Motion to Unseal on January 14, 2015. *See* Exhibit E. As of the filing of this Petition, the Circuit Court has not ruled on the Second Motion to Reconsider, the Motion for Continuance, or the State's Motion to Unseal. Petitioner, therefore, has no funding for expert assistance in preparation for a hearing on the merits of his PCR application, currently scheduled to begin on March 2, 2015.

III. LEGAL BASIS FOR GRANTING EXPERT FUNDING AND CONTINUANCE

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The South Carolina PCR statute explicitly authorizes a court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). Generally, a hearing on a capital PCR application "must be scheduled within one hundred eighty days from the date of the status conference" held after the filing of the State's return. *Id.* However, the statute

authorizes the PCR court to grant a continuance of the hearing beyond 180 days after the status conference where "good cause is shown." *Id.*

IV. ARGUMENT

Funding Standard

Undersigned counsel are in an impossible (and unprecedented) bind. The PCR court has denied requests for funding for necessary expert assistance on the basis that Petitioner cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[8] Instead, courts have required counsel for PCR applicants to simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7, Bloom Aff. ¶ 7.

[8] In addition to other affidavits supporting Petitioner's specific funding requests, with the Second Motion to Reconsider, Petitioner submitted three affidavits from experienced counsel, which are attached to this Petition. The affidavits are attached as Exhibit F.

The standard set forth in the PCR court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[9] Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Norris Aff. ¶ 8.

The PCR court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *See Williams*, 618 F.2d at 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft

[9] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis. Additionally, some experts, such as forensic psychologists, cannot ethically provide services under the PCR court's standard which effectively creates a contingent fee arrangement.

1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506.

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 859 (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit

psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

Undersigned counsel presented facts demonstrating that expert services in this case are reasonably necessary to the PCR court. Nevertheless, the PCR court has consistently misinterpreted the standard for authorizing expert funding set forth in S.C. Code § 16-3-26(C)(1). Undersigned counsel are, therefore, unable to effectively prepare for Petitioner's impending PCR hearing. Because funding for reasonably necessary expert assistance is mandated by state and federal law, judicial economy demands that this Court exercise its supervisory authority in capital PCR cases and order the PCR court to rule on Petitioner's Second Motion to Reconsider applying the proper standard for authorization of expert funding. Without such an order from this Court, the procedures provided by the PCR court are likely to be so defective as to require further proceedings upon appeal and remand of Petitioner's case. Counsel, therefore, request this Court to correct the PCR court's misunderstanding of the statutory standard and order the court to rule on the Second Motion to Reconsider accordingly.

Continuance

Undersigned counsel have done everything in their power to attempt to prepare for Petitioner's PCR hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the PCR court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Petitioner. S.C. Code § 16-3-26(C)(1). As described in detail above, the

PCR court has done so based on an improper reading of the capital case funding statute. Given the necessity of the assistance of the experts to effectively develop and present Petitioner's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Petitioner's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[10] and asked the PCR court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by the PCR court. Counsel then presented the court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media expert. In spite of the demonstrated necessity of expert services, the PCR court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court nearly four months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the PCR court's scheduling order, the court canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than one month.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until the PCR court authorizes funding for their services.

[10] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case.

See Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by the PCR court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by the PCR court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim).[11] Even if the PCR court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Petitioner because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and the PCR court has thus far denied Petitioner the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Petitioner's claims for relief. Accordingly, Petitioner has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court order the PCR court to continue the PCR hearing for nine months from the date it rules on the Second Motion to Reconsider. Without such

[11] Both Dr. Andrews and Dr. Knight's affidavits were attached to Petitioner's Motion for Continuance, which is attached to this Petition as Exhibit D.

a continuance, counsel will be unable to effectively prepare for Petitioner's PCR hearing, which will likely require further proceedings upon appeal of the PCR court's ultimate determination. *See Martinez*, 132 S. Ct. 1309 (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded).

V. CONCLUSION

To allow undersigned counsel to effectively prepare for a hearing on the merits of Petitioner's PCR application and to avoid remand for further proceedings upon appeal of the PCR court's ultimate decision, this Court should order the PCR court to rule on Petitioner's Second Motion to Reconsider, applying the proper standard for authorization of expert funding, and order the PCR court to continue Petitioner's PCR hearing until counsel have an opportunity to prepare for the hearing with the assistance of reasonably necessary experts.

February 3, 2015

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

Counsel for Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Capital PCR Case Number: 2013-CP-26-00035

STEPHEN C. STANKO, SK 6022 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Petition for Court Oversight of Capital PCR Action was serve by first class United States mail, postage prepaid, this 3rd day of February, 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Lindsey S. Vann

Exhibit A

The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

RECEIVED
NOV - 7

ORDER

Appellant was convicted of armed robbery and murder. He was sentenced to twenty years in prison for armed robbery and to death by lethal injection for murder. This Court affirmed his convictions and sentence. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). The United States Supreme Court denied appellant's petition for a writ of certiorari. *Stanko v. South Carolina*, 2013 WL 3465786 (U.S.S.C. Oct. 7, 2013).

Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*.

The Honorable Benjamin H. Culbertson is hereby assigned to the PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits.

The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases*, *supra*, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

C.J.

FOR THE COURT

Columbia, South Carolina

November 7, 2013

cc:
Robert M. Pachak
John W. McIntosh
J. Anthony Mabry
Alan McCrory Wilson
Robert Michael Dudek
Donald J. Zelenka
John Gregory Hembree
Melanie Huggins-Ward
The Honorable Benjamin H. Culbertson

Exhibit B

STATE OF SOUTH CAROLINA **COUNTY OF HORRY** **Stephen C. Stanko, #6022** **Plaintiff(s),** **-vs-** **State of South Carolina,** **Defendant(s).**	))))))))	**IN THE COURT OF** (*Select one.*) ☑ **COMMON PLEAS** ☐ **FAMILY COURT** **15th JUDICIAL CIRCUIT** **CASE NO.: 2014-CP-26-035** **APPOINTMENT OF COUNSEL OR GAL** (*Select one.*) ☑ **ORDER** ☐ **AMENDED ORDER**

TYPE OF CASE/PROCEEDING: (*Check one.*)

☑ Post-Conviction Relief (PCR)/habeas case	☐ Adoption	☐ Juvenile
☐ SVP case	☐ Custody and/or Visitation	☐ Abuse and Neglect
☐ Minor Name Change	☐ Other:	

It appears that **Stephen C. Stanko**, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (*Select only one.*)

☑ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other: .

FILED
2014 FEB 11 PM 2:55
HORRY COUNTY
CLERK OF COURT

Therefore, it is ordered that **Emily C. Paavola**, hereby is appointed as (*Select one.*)

☐ counsel ☑ lead counsel (*if capital PCR case*) ☐ guardian ad litem

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☑ (*If Death Penalty PCR Case*) It is further ordered that **Lindsey Vann**, Esquire, is hereby appointed as second counsel in this capital PCR case.

(See attached affidavits of qualifications and consents to appointment of counsel.)

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 4th DAY OF **February**, **2014**.

Benjamin H. Culbertson

☑ Circuit Judge ☐ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

4022

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2014-CP-26-035
Stephen C. Stanko, #6022,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SCHEDULING ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013 and Code of Laws of South Carolina 1976 §17-27-160(C), a status conference was convened in this case on 2/21/2014 at 9:30 a.m. in the chambers of the undersigned judge at the Horry County Judicial Center in Conway, South Carolina. Attorneys Emily C. Paavola and Lindsey S. Vann appeared on behalf of the petitioner and Assistant Attorney General Anthony Mabry appeared on behalf of the respondent.

Pursuant to the said status conference, the following schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than **5/1/2014**. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by **5/31/2014**.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by **10/1/2014**.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by **11/1/2014**. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by **11/1/2014**.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before **12/1/2014**. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 7/1/2014 through 12/31/2014. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

February 21, 2014
Conway, SC

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
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Email: bculbertsonj@sccourts.org

April 29, 2014
Via Email and U.S. Mail Delivery

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Lindsey Vann, Esquire
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Conway, SC 29528

Email: richj@horrycounty.org
psnowden@horrycounty.org

RE: *Stanko v. State* (Case No. 2014-CP-26-035)

Dear Ladies and Gentlemen:

Please find enclosed a copy of the Amended Scheduling Order dated 4/29/2014 in this case. By copy of this letter and enclosure, I am forwarding the original Scheduling Order to the clerk of court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)
pc: Melanie Huggins-Ward, Clerk of Court

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2014-CP-26-035
Stephen C. Stanko, #6022,	)	
	)	
Petitioner,	)	
	)	
vs.	)	AMENDED SCHEDULING ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case was assigned to the undersigned. As presiding judge, the undersigned issued a Scheduling Order in this case dated February 21, 2014. The court now deems, *sua sponte*, that the Scheduling Order dated February 21, 2014, does not provide adequate time for the parties to prepare for trial and, therefore, should be amended .

NOW, THEREFORE, the following amended schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than **6/16/2014**. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by **7/16/2014**.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by **10/1/2014**.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by **12/15/2014**. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by **12/15/2014**.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before **2/28/2015**. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 1/1/2015 through 6/30/2015. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

9. This court's Order For Date Certain Trial dated April 2, 2014, is hereby rescinded and rendered null and void.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

April 29, 2014
Georgetown, SC

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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401 Cleland St. (zip code 29440)
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September 25, 2014

Via Email and U.S. Mail Delivery

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Lindsey S. Vann, Esquire
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psnowden@horrycounty.org

RE: *Stephen C. Stanko, #6022 v. State of South Carolina*
Case Number: 2014-CP-26-035

Dear Ladies and Gentlemen:

Please find enclosed a copy of the *Order For Date Certain Trial And Second Amended Scheduling Order* in the above referenced case. As you can see from the order, the trial of this case is set to commence on 3/2/2015 and the deadline for completing discovery is extended until 1/31/2015. All other mandates of the prior scheduling order remain in effect.

Under copy of this letter, I am forwarding the original order to the Clerk of Court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosures (a/s)
pc: Hon. Larry B. Hyman, Administrative Judge for Common Pleas, 15th Judicial Circuit
Hon. Steven H. John, Circuit Court Judge
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

Stephen C. Stanko, #6022
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2014-CP-26-035
Stephen C. Stanko, #6022,	)	
	)	
Petitioner,	)	
	)	
vs.	)	ORDER FOR DATE CERTAIN TRIAL AND
	)	SECOND AMENDED SCHEDULING ORDER
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case for post-conviction relief is assigned to the undersigned.

NOW, THEREFORE, as the presiding judge in this case, it is hereby

ORDERED, that the trial of this case is set to commence at **9:30 a.m.** on **March 2, 2015**, in the **Horry County Judicial Complex** in **Conway, SC**; it is further

ORDERED, that the parties shall complete discovery by **1/31/2015**; it is further

ORDERED, that the Amended Scheduling Order in this case dated 4/29/2014 is amended to reflect the scheduling changes set forth hereinabove; it is further

ORDERED, that all other mandates of the Amended Scheduling Order in this case dated 4/29/2014 not affected by this order shall remain the order of this court.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

September 25, 2014
Georgetown, SC

Exhibit D

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	Case No. 2014-CP-26-035
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE HUGGINS-WARD
CLERK OF COURT

APPLICANT'S MOTION FOR CONTINUANCE

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves for a continuance of the PCR merits hearing because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation.

This Court scheduled a hearing on the merits of Stanko's post-conviction relief claims to begin on March 2, 2015. The Court also set a deadline for the completion of discovery for January 31, 2015. Despite undersigned counsel's diligent work since being appointed, counsel will be unable to prepare for a hearing by March 2, 2015 because the Court has denied all funding requests for expert services. Without expert assistance, Stanko cannot effectively prepare for a hearing on his claims. Stanko, therefore, respectfully requests this Court continue the hearing in this case for nine months from the date the Court rules on Stanko's October 14, 2014 *Ex parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, and to adjust the deadline for

completing discovery accordingly.[1] Stanko further requests a hearing with oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order.

The legal and factual bases for this motion are set forth below.

I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be

---

[1] Counsel request a nine month continuance because the experts they consulted indicate six to nine months is the minimum amount of time it will take to prepare for a hearing on Stanko's claims.

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B). During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[3] Specifically, the First Funding Motion requested the Court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Stanko

---

[3] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[4] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[5] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel

[4] The facts in support of Stanko's requests are set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[5] This motion was likewise filed *ex parte* as permitted by South Carolina law.

could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's

social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Stanko argued the Court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Stanko could not present the Court with the conclusions the experts will reach. Stanko argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

The capital case funding statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior to the court's authorization of funds*. The Court's interpretation of the "reasonably necessary" requirement impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport. The Court has, thus, not ruled on Stanko's Second Motion to Reconsider and, as of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 2, 2015.

II. LEGAL BASIS FOR GRANTING A CONTINUANCE.

The South Carolina post-conviction relief statute explicitly authorizes this Court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). The statute does not set a limit for the amount of time the Court can continue the hearing. The statute requires only that the Court find good cause for the continuance granted.

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

III. ARGUMENT

Undersigned counsel have done everything in their power to attempt to prepare for Stanko's post-conviction relief hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the Court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Stanko. S.C. Code § 16-3-26(C)(1). The Court has done so based on an improper reading of the capital case funding statute, finding that the necessity of expert assistance can only be determined after the expert services have been completed and result in a favorable outcome for the applicant.[6] Given the necessity of the assistance of the experts to effectively develop and present Stanko's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Stanko's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[7] and asked the Court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by this Court. Counsel then presented the Court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media

[6] Due to the Court's denial of funding requests based on this standard, it would be futile for Stanko to request the services of any other experts that might assist in preparing and presenting his claims for relief.

[7] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case. *See* Andrews Aff. ¶¶ 3, 5, *attached*; Knight Aff. ¶ 3, *attached.*

expert. In spite of the demonstrated necessity of expert services, the Court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court over two months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the Court's scheduling order, the Court has now canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than two months.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until this Court authorizes funding for their services. *See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by this Court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by this Court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim). Even if the Court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Stanko because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and this Court has thus far denied Stanko the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Stanko's claims for relief. Accordingly, Stanko has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court continue the post-conviction relief hearing for nine months from the date it rules on the Second Motion to Reconsider and adjust the discovery deadline accordingly.

CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request this Court find good cause shown and continue the post-conviction relief hearing, currently scheduled for March 2, 2015, for nine months from the date it rules on Stanko's Second Motion to Reconsider and to adjust the discovery deadline accordingly. Counsel further requests this Court schedule a hearing for oral argument on this Motion for a Continuance as soon as practicable.

January 6, 2015

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Arlene Bowers Andrews, PhD, who appeared personally before me, affirms and states the following:

1. I, Arlene Andrews, am a Licensed Social Worker, have a PhD in psychology, and am a retired professor of social work.

2. I have been retained to evaluate and present a social history in approximately fifteen (15) capital cases at the trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on June 25, 2014 about evaluating and presenting Mr. Stanko's social history in his Horry County post-conviction relief proceedings.

4. I would typically not begin working on a capital case without a funding order from the Court authorizing payment for my services. However, I have worked with Ms. Paavola before, and she explained to me that Mr. Stanko's case was scheduled for hearing within a relatively short period of time and she was concerned about waiting to get started while the motion for funding remained pending. Therefore, I began working on Mr. Stanko's case prior to receiving an order from the Court authorizing funding for my services. I cannot, however, continue my social history evaluation or present my findings to the Court without an order authorizing payment for my services.

5. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client.

6. Since being contacted by Mr. Stanko's attorneys, I have reviewed the trial record to determine what social history evaluation had already been completed; I have reviewed social history records already collected by counsel and the mitigation investigator; I met and interviewed Mr. Stanko; and, I interviewed Mr. Stanko's brother.

7. Based on my preliminary evaluation, it is clear to me that a grossly inadequate social history was presented during Mr. Stanko's trial. My initial work has begun to reveal a compelling and mitigating social history story. Based on this initial review and my experience in other capital cases, I believe it is possible that an adequate investigation in Mr. Stanko's case could reveal mitigating evidence of physical abuse, sexual abuse, parental neglect and abandonment, and/or mental illness.

8. A significant amount of work remains to complete and present my social history evaluation. I must: (1) interview Mr. Stanko several more times; (2) interview Mr.

Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; (5) conduct any additional work that may develop as the investigation progresses; and (6) prepare my opinion for presentation to the Court. This is work that cannot be completed without authorization of funds from the Court.

9. The work that remains will take approximately six (6) to nine (9) months to complete once the Court authorizes funding. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. My social history evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation. Additionally, I am currently preparing for a hearing on a case in Aiken County, which will not allow me to continue my work on Mr. Stanko's case until February 15, 2015.

10. I believe Mr. Stanko's social history is likely to provide powerful mitigating evidence, but without the authorization of funds from the Court and a continuance of the hearing, I cannot complete the social history evaluation or aid counsel in their presentation of Mr. Stanko's social history at a hearing.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Arlene Bowers Andrews
ARLENE BOWERS ANDREWS

Sworn to and subscribed before me
This 14th day of January, 2015

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina, and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation, the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

SUSAN KNIGHT

Sworn to and subscribed before me
This 6TH day of JANUARY, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires
May 9, 2017

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Stephen C. Stanko, #6022,	)	
	)	
Applicant,	)	Case No. 2014-CP-26-03
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE [illegible]-WARD
CLERK OF COURT

The undersigned certifies that a copy of the Applicant's Motion for Continuance was mailed today by first class United States mail, postage prepaid, this 6th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

Exhibit E